

# What Every Campus Administrator Should Know about the New Title IX Regulations

*(and what Spring Branch ISD intends to do about them)*

September 3, 2020 – Principals

September 15, 2020 – Assistant Principals

Spring Branch ISD



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# Title IX

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving federal financial assistance.”



# Secretary DeVos Takes Historic Action to Strengthen Title IX Protections for All Students

New regulation defines sexual harassment, requires supportive measures for survivors, restores due process on campus

## New Campus Sexual-Harassment Rule Aims to Boost Rights for Accused

Trump administration's regulation allows for cross-examination and live hearings, and provides some new support for accusers

### ACLU sues Betsy DeVos over new campus sexual assault rules

The suit says Title IX changes will make it "more difficult for victims of sexual harassment or sexual assault to continue their educations."

### Georgetown Students, Administration Raise Concerns About Title IX Changes

May 12, 2020 by [Jaime Moore-Carrillo](#) and [Moira Ritter](#) — [Leave a Comment](#)

Published on Friday, May 15, 2020 by Common Dreams

## DeVos Sued Over New Title IX Rules That Make It 'Easier for Schools to Sweep Sexual Violence Under the Rug'

THE HILL

### Biden says he'll reverse DeVos rule bolstering protections for those accused of campus sexual assault

BY JONATHAN EASLEY - 05/06/20 09:07 PM EDT

2,101 COMMENTS



## *Why is it important for campus administrators to know about the changes to Title IX?*

- Greater reporting duties for all employees
- Greater emphasis on interim (now “supportive”) measures, to both parties over a longer period of time
- Longer and more complicated investigations
- Prohibition on punitive measures against students until Title IX process is complete

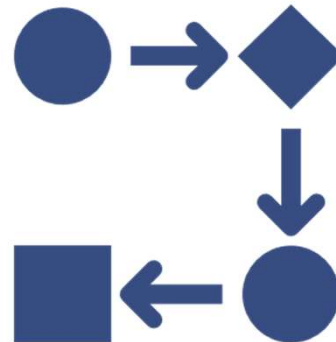
# Overview of New Regulations

- Effective August 14, 2020
- Defines sexual harassment and scope of Title IX protections
- Adopts deliberate indifference to actual knowledge of sexual harassment standard
- Adds that knowledge of any school district employee can trigger a duty to respond
- Discusses formal/informal complaints



# Overview of New Regulations

- Discusses the procedures schools must have to respond to reports
  - ❖ Supportive measures
  - ❖ Process for emergency removal, if applicable
- Discusses grievance procedures schools must have for due process
  - ❖ Investigation
  - ❖ Determination process
  - ❖ Appeals process



# Overview of New Regulations

- Further defines role of Title IX Coordinator
- Provides role for investigator, decisionmaker, facilitator, and person reviewing any appeal
- Identifies policies school districts must implement
- Discusses written notices schools must provide
- Provides training schools must provide to personnel involved in the Title IX complaint process
- Includes specific anti-retaliation provisions with a complaint process for any retaliation

# Many District Staff Members Will Be Involved



Title IX Coordinator



Investigator



Decision-maker



Appeal Officer



Informal Resolution Facilitator



Hearing Advisors (if live hearings are utilized)

# The SBISD Title IX Team!

- **Title IX Coordinator:** Karen Heeth
- **Investigators:**
  - (when the accused is an employee): Gary Henry, Tanisa Hoyer, Stacie Gibson
  - (when the accused is a student): Trish Thomas, Sofia Petrou
- **Decision-makers:** Bryan Williams, Jennifer Parker, Karen Liska
- **Appellate decision-maker:** Kristin Craft
- **Informal Facilitators:** Lawanda Coffee, Cheryl Etlinger



# The Informal Stage

# What Triggers A Need to Respond?

A school must respond when it has:

- ✓ actual knowledge
- ✓ of sexual harassment
- ✓ that occurred within the school's educational program or activity
- ✓ against a person in the United States



*A school must respond when it has **actual knowledge** of sexual harassment that occurred within the school's educational program or activity against a person in the United States*

**Actual knowledge** means notice of sexual harassment or allegations of sexual harassment by **any employee** of an elementary and secondary school.

“In elementary and secondary schools telling **any** school employee always puts the school on notice.”

- OCR Webinar on New Title IX Regulations (emphasis in original)



*A school must respond when it has actual knowledge of **sexual harassment** that occurred within the school's educational program or activity against a person in the United States*

### 1) **Quid Pro Quo**

- ❖ A **school employee** conditioning an educational benefit or service on an individual's participation in unwelcome sexual conduct

### 2) **Hostile environment**

- ❖ Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school's educational program or activity

### 3) Sexual assault, dating violence, domestic violence, or stalking as defined under the Clery Act and the Violence Against Women Act

*A school must respond when it has actual knowledge of sexual harassment that occurred*  
**within the school's educational program or activity**  
*against a person in the United States*

- The sexual harassment must occur **within the school's program or activity** (on or off campus)
  - ❖ This “includes locations, events, or circumstances over which the recipient exercised **substantial control over both the respondent and the context** in which the sexual harassment occurs.”
- The harassment must have been perpetrated against a person **in the United States**



# School District's Response



- Must respond in a manner that is **not “deliberately indifferent”**
  - ❖ The school cannot act in a manner that is clearly unreasonable in light of the known circumstances
  - ❖ The response must be prompt

# School District's Response

- Once the school knows about the sexual harassment, the Title IX Coordinator must contact the complainant (victim) to provide information regarding:
  - ❖ Supportive measures
  - ❖ Right to file a complaint
  - ❖ How to file a formal complaint
- A Title IX Coordinator must engage in such outreach even if no formal complaint has been filed by anyone

# Supportive Measures

- During the grievance process, the school must ensure supportive measures are offered to both the Complainant **and** the Respondent
  - ☐ Free, individualized services designed to restore or preserve an individual's equal access to education, to protect the individual's safety, or deter further sexual harassment
  - ☐ Cannot be punitive or disciplinary
- The measures should not unreasonably burden another person
- The measures should be kept confidential
- Title IX Coordinator is responsible for implementing the supportive measures

# Supportive Measures

- Examples:
  - ❖ counseling,
  - ❖ extensions of deadlines or other course-related adjustments,
  - ❖ modifications of work or class schedules,
  - ❖ campus escort services,
  - ❖ mutual restrictions on contact between the parties,
  - ❖ leaves of absence, and
  - ❖ increased security and monitoring of certain areas of the campus.



# Supportive Measures

The courts have held that schools have a duty to evaluate whether their efforts to stop ongoing harassment are ineffective, and potentially increase the severity of the measures they have put in place or take new measures to avoid new liability.

*Patterson v. Hudson Area Schs.*, 551 F.3d 438, 444 (6th Cir. 2009).

*Vance v. Spencer Cty. Pub. Sch. Dist.*, 231 F.3d 253, 262 (6th Cir. 2000).



# Emergency Removal / Administrative Leave

- Emergency removal of student
  - ❖ Must conduct an individualized safety and risk assessment
  - ❖ Student is an imminent threat to the physical health or safety of another student or individual arising from the allegations of sexual harassment
  - ❖ Provide notice and immediate opportunity to challenge the decision
- Administrative leave for employees during investigation is permitted
  - ❖ Follow state law, Board policy, and normal district procedures

# IDEA & Section 504 Implications

- Removal of a student would be a change of placement
- MDR requirements and procedural safeguards will be triggered
- Some supportive measures, such as provision of counseling or changes to class schedules, will also implicate placements and services under IDEA and Section 504
- **Bottom line**: ARD/Section 504 Committees will need to be involved from the beginning and the Title IX staff will need to be trained on identifying and address SPED/504 implications



# Important Terms in the Title IX Grievance Process

- **Complainant:** The alleged victim of the conduct that could constitute sexual harassment
  - The Complainant is always the victim, even if the report was made by a parent/guardian, third party, or signed by the Title IX Coordinator
- **Respondent:** The individual reported to be the perpetrator of the conduct that could constitute sexual harassment
  - Required to call the accused the “Respondent”
- **Formal Complaint:** Written and signed document containing the allegations of sexual harassment



# Impartiality

- All Title IX personnel must avoid:
  - Prejudgment of the facts
  - Conflict of interest
  - Bias



# Formal Complaints

- May be made by a complainant (or parent, or legal guardian) or signed by the Title IX Coordinator
  - ❖ Complainant's wishes as to whether to file a formal complaint should be respected unless the Title IX Coordinator determines that initiating an investigation against the complainant's wishes is not clearly unreasonable
- Complainant must be participating in or attempting to participate in the school's education program or activity
- School must have policy regarding how to file a formal complaint and must publish how to file the formal complaint on the district's website

# Response to Formal Complaints

- Upon receipt of a formal complaint and prior to any interviews, school must provide the parties written notice of:
  - ❖ The school's grievance process;
  - ❖ The allegations of sexual harassment;
  - ❖ The presumption of innocence;
  - ❖ The right to inspect and review evidence;
  - ❖ The right to have an advisor during the process; and
  - ❖ Any provision in the school's code of conduct that prohibits knowingly making false statements or submitting false information during the grievance process.



# Formal Complaints: Dismissal

- **Mandatory Dismissal**
  - ❖ Complaint does not describe conduct that would constitute sexual harassment, as defined, even if proven
  - ❖ The sexual harassment did not occur in the school's education program or activity
  - ❖ The sexual harassment did not occur against a person in the United States

# Formal Complaints: Dismissal

- **Permissive/Discretionary Dismissal**
  - ❖ Complainant notifies Title IX Coordinator in writing that he/she wishes to withdraw the formal complaint or some allegations in the complaint
  - ❖ The respondent is no longer enrolled or employed
  - ❖ Circumstances exist that prevent the school from gathering sufficient evidence to reach a determination about the allegations

# Formal Complaints: Dismissal

- If the school dismisses the complaint or allegations in the complaint, it must promptly send written notice of the dismissal **and** the reason for the dismissal to all parties
- Any party can appeal the dismissal decision

# Informal Resolution

- An alternative to the formal grievance procedure that schools **may** offer, but not are not required to offer.
- Schools may not offer the parties informal resolution options, such as mediation or restorative justice, unless a formal Title IX complaint is filed.
- Informal resolution is never permitted in employee-student sexual harassment cases.
- Schools cannot require parties to attempt informal resolution and cannot require waiver of a formal adjudication.

# Informal Resolution Facilitator

- Schools that choose to use an informal resolution process should identify an informal resolution facilitator to oversee the process.
- Need not be a school district employee; can be an outside mediator or arbitrator.
- Informal resolution facilitator must be trained on:
  - ❖ The definition of sexual harassment;
  - ❖ The scope of the school's education program/activities;
  - ❖ How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes;
  - ❖ How to serve impartially.

# Informal Resolution Process

- Informal resolution steps are allowed at any time during the formal complaint process if:
  - ❖ The school provides the parties written notice of the allegations and their rights.
  - ❖ Both parties give voluntary, informed, written consent.
  - ❖ Parties have the right to withdraw from the informal process at any time and proceed with the formal grievance process.

# Overview of the Investigative Process

- The school district must investigate all Formal Complaints
- Treat the Complainant and Respondent equitably
- The school district must provide equal opportunity to the parties to present fact and expert witnesses and other inculpatory and exculpatory evidence

# Overview of the Investigative Process

- The Respondent is **presumed not responsible** at the outset of the investigation
- The Investigators must remain impartial and be free of conflicts of interest or bias
- Consistent investigation process for student-on-student and employee-on-student sexual harassment

# Overview of the Investigative Process

- A school cannot restrict the parties' ability to discuss the allegations or gather evidence (i.e. no “gag orders”)
- But confidentiality should be maintained to the greatest extent possible



# Interviews

- School must provide parties **written notice** of the date, time, location, participants, and purpose of all investigative interviews or other meetings **with sufficient time to prepare**

**No more surprise interviews!**



- Must provide parties with equal opportunity to present evidence and identify fact and expert witnesses

# Reviewing the Evidence

- Must provide the parties and advisors an opportunity to inspect and review the evidence
  - Evidence that is directly related to the allegations raised in the Formal Complaint
  - Statements, notes of interviews, and other types of evidence the school plans to use before reaching a determination *and* evidence the school doesn't think it will use
  - Provide the evidence in electronic or hard copy format
- The parties must be given at least **10 days** to review all the evidence and submit written responses about the evidence to the investigator

# Finalizing the Investigation Report

- Investigator must share the final Investigative Report with both parties and their advisors
- Both parties must be given at least **10 days** to review and submit a written response regarding the investigation report to the decisionmaker before any final determination of responsibility



# Hearings v. Written Questions

- Live hearings, with cross-examination, *are not required* at the K-12 level.
- Instead, schools must establish a written question/answer process.



# Hearing on Written Questions

- After completion of the investigation report, and after the report is provided to both parties.
- Each party must have the opportunity to submit written, **relevant** questions for any other party or witness.
- Process must provide opportunity for additional, **limited** follow-up questions from each party.

# Determination

- Decisionmaker may not be Title IX Coordinator or investigator
- Decisionmaker must issue a written determination including:
  - ❖ Identification of the allegations;
  - ❖ Description of procedural steps taken;
  - ❖ Findings of fact;
  - ❖ Conclusion regarding application of code of conduct to fact;
  - ❖ Statement of/rationale for the result of each allegation; and
  - ❖ Procedure for appeal.
- Remedies must be designed to restore or preserve equal access to the school's educational program or activity
- Need not be non-disciplinary or non-punitive and **need not avoid burdening the Respondent.**

# Appeals

- Each party must be provided the opportunity to appeal:
  - (1) a determination regarding responsibility and/or
  - (2) the school's dismissal of a formal complaint
- Bases for appeal:
  - ❖ Mandatory
    - Procedural irregularities that affected the outcome
    - New evidence
    - Conflict of interest
  - ❖ School may choose to offer appeals on additional bases

# Appeals

- Decision-maker on appeal cannot be the same decision-maker from the initial determination, the investigator, or the Title IX Coordinator
- Process:
  - ❖ Both parties provided notice of the appeal and given opportunity to submit written statements
  - ❖ Decision-maker issues a written decision including the result and rationale

# Timeline of Investigation and Determination

Monday	Tuesday	Wednesday	Thursday	Friday
<b>March 1</b>  <b>Formal Complaint Filed</b>	2	3  <b>District provides notice of the allegations of sexual harassment</b> <i>... with sufficient time to prepare a response before any initial interview</i>  <i>advisor of their choice – presumably we have to give them time to find an advisor of their choice?</i>	4	5
8	9	10  <b>Interviews</b>	11  <b>Interviews</b>	12
15  <b>Provide evidence subject to inspection and review</b> -- give parties <i>have at least 10 days to submit a written response</i>	16	17	18	19

**Legend:**

**Green days** are statutory mandatory days

**Yellow days** are “permissive” days, and might be reduced (but not likely)

# Timeline of Investigation and Determination

March 22	23	24	25	26
29	30	31	April 1	2
Receive and consider written comments from parties as to evidence		Issue Investigative Report to both parties – give 10 days for their review and written response		
5	6	7	8	9
<i>decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party</i>				
12	13	14	15	16
		Receive and consider written response from parties as to investigation report		Issue Determination

## Legend:

Green days are statutory mandatory days

Yellow days are “permissive” days, and might be reduced (but not likely)

## What did this investigation presume?

- TIXC could analyze complaint, assemble team, and issue initial notice of interview is in two (2) days
- Parties are given five (5) days to find an advisor (attorney?) and prepare for interviews
- Investigator is able to conduct interviews over two (2) days, synthesize information and evidence, and provide parties access to evidence in 1-2 days
- Investigator is able to receive comments about evidence, synthesize them into report, and issue investigation report in two (2) days
- Right of parties to submit written, relevant questions that a party wants decisionmaker to ask any other party or witness, review answers, and ask additional, limited follow-up questions does not extend the mandatory 10-day period between investigation report and determination (hint: it probably will)
- Decisionmaker is able receive comments about investigation report, as well as first and (limited)second round of written cross examination answers, synthesize that information, and issue written determination report in two (2) days

# Retaliation

- New regulations contain an anti-retaliation provision
- Charges of code of conduct violations that arise out of the same facts or circumstances as a report of sex discrimination or sexual harassment for the purpose of interfering with any right under Title IX constitutes retaliation
- Charges for making a materially false statement is not retaliation if charge is not based solely on outcome of the grievance process
- Complaint process for retaliation



# Recordkeeping



Must retain records for **seven** years.  
Records must include:

- ❖ Final determination;
- ❖ Any audio/visual records or transcripts;
- ❖ Supportive measures taken or reason for no supportive measures;
- ❖ Sanctions imposed;
- ❖ Remedies provided;
- ❖ Appeal and result;
- ❖ Informal resolution and result;
- ❖ All training materials; and
- ❖ The basis for the school's conclusion that any response to an allegation of sexual assault was not deliberately indifferent and that it took measures to restore/preserve equal access.

# Questions? Comments?



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