

Title IX Virtual Summer Training

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Title IX

Background to new regulations

Hypothetical

Parents assert their son, Student X, was a happy kindergarten student for the first half of the year, when he began to act hostile and afraid of school. One day, Student X confesses that while he was in gym class, the teacher left the children unattended to get some equipment and another student, Student Y, pulled down his pants and licked his genitals.

The school promptly learns about this and has a video of the incident. The parents, however only learn about this assault through Student X. After the incident, Student X was called into the office and made to watch the video with the boy who assaulted him. Student Y is disciplined. The parents further learn that Student Y has been sexually harassing Student X for two (2) months. It is later discovered that the classroom teacher reported concerns about this behavior to the school principal. What could the school have done differently here?



How Big of a Problem is Sexual Harassment and Assault in K-12?



Introduction to Title IX

- **Title IX of the Education Amendments of 1972 (Title IX) is a federal civil rights law that prohibits discrimination on the basis of sex in federally funded education programs and activities.**
 - It has been more than 45 years since enactment of Title IX.
 - Title IX states in part:
 - *“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....”*

The Long Road to the New Regulations

- **September 7, 2017:** Department of Education Secretary Betsy DeVos announces review and comment process
- **September 22, 2017:** OCR issued:
 - Dear Colleague Letter (2017 DCL) withdrawing 2011 DCL and 2014 Q&A
 - Q&A on Campus Sexual Misconduct (2017 Q&A)
- **November 16, 2018:** Proposed Regulations Posted
 - Officially published in Federal Register later in November, 2018
 - Fact Sheet and Summary also posted
- **May 6, 2020:** Final Regulations Posted
 - Officially published in Federal Register later in May 2020
- **August 14, 2020:** Final Regulations Effective

The New Definition of Sexual Harassment

- Pursuant to the new rules, schools are required to use a **narrower definition** of sexual harassment.
- Prohibited Conduct
 - Prohibited “sexual harassment” means conduct on the basis of sex that satisfies one or more of the following:
 - An employee conditioning the provision of an aid, benefit, or service on an individual’s participation in unwelcome sexual conduct (i.e., quid pro quo)
 - Unwelcome conduct determined by a reasonable person to be **so severe, pervasive, and objectively offensive that it effectively denies a person equal access to an education program or activity** (i.e., hostile environment);
or
 - Sexual assault (as defined by Clery Act), or “dating violence,” “domestic violence,” and “stalking” (as defined by Violence Against Women Act (VAWA)).

Definition of “Program or Activity”

For K-12 purposes, the definition of “program or activity” has been expanded to include **“locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurs”** (e.g. campus, field trips, athletic events, conferences, etc.).

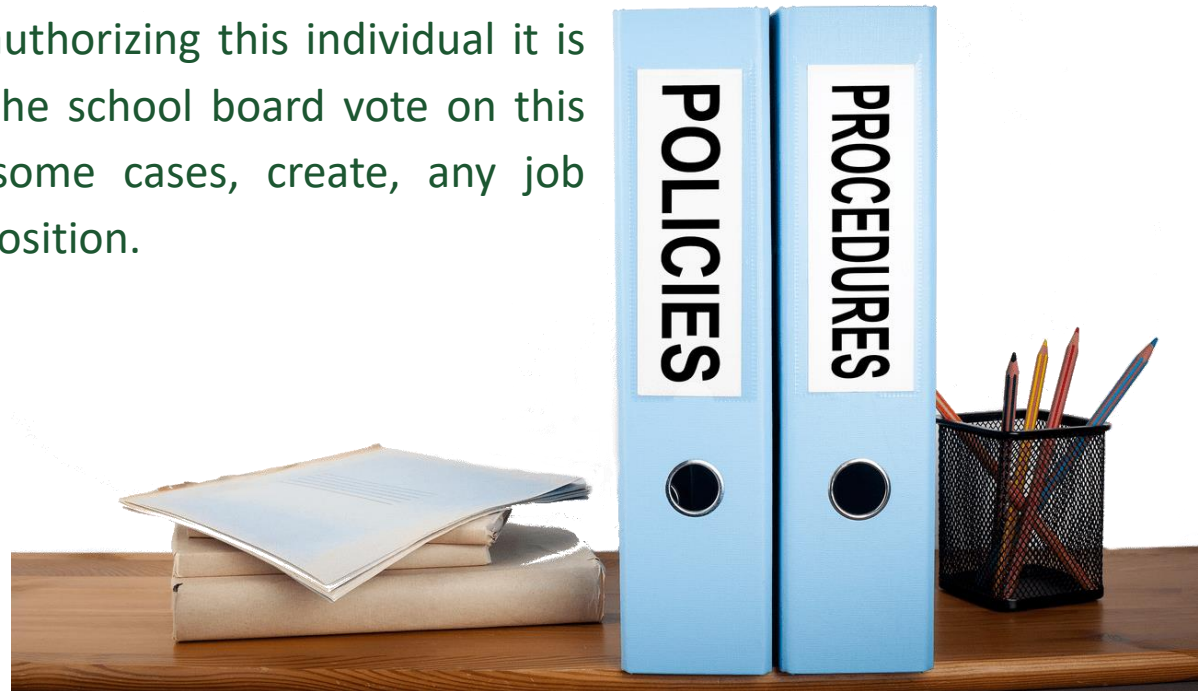


Designate Qualified Personnel

Please respond to the following survey.
Your answers are anonymous.

Title IX regulations have always required recipients to designate an employee to coordinate the recipient's efforts to implement the law.

The final rule requires that recipients not only **designate but also “authorize”** this individual to coordinate the recipient's compliance efforts. In terms of authorizing this individual it is recommended that the school board vote on this and update or, in some cases, create, any job description for that position.



When a Response is Required: Actual Knowledge

Under the new regulations, schools are required to respond when they have “**actual knowledge**” (defined as notice to the Title IX Coordinator or an official who has authority to institute corrective measures of sexual harassment on behalf of the school) of a complaint of sexual harassment (any report to any elementary/secondary school employee).

Hypothetical

*A sixth grade teacher, who was also the girls' softball coach, was accused of and later admitted to having sexual relations with a then sixteen year old former student. The parents allege that the district had actual notice that the teacher posed a substantial danger to students, based on the fact that several school employees were told (over a period of time) about inappropriate behavior by the teacher directed towards other students. **Based on the following facts, if you were the judge hearing this case, would you find that the district had actual knowledge that the teacher was harassing the student, or that he posed a substantial danger to students?***

BREAK

Investigative Requirements

- Schools are required to start an investigation with the accused having a criminal-like presumption of innocence.
- The new regulations codify additional investigative requirements. For example, after a student reports an assault or a harassment covered by Title IX, the school must tell the students involved and their parents **in writing** about the allegations and the evidence that is gathered.
- An accused student must be given at least **10 days** to respond to the complaint.



New Procedural Requirements

- The new regulations also specify the school has the burden of proof. Schools are **required to select one of two standards of evidence**, the preponderance of the evidence standard or the clear and convincing evidence standard—and to apply the selected standard **evenly** to proceedings for all students and employees, including faculty. This is a new and higher standard than what schools used previously
 - **Note: Preponderance of the evidence requires that evidence be “more likely than not” to prove the matter at hand (i.e. 51%)...Under the clear and convincing standard, the evidence must be substantially greater than a 50% likelihood of being true.**

New Scope of Responsibility

- The new regulations specify the school's responsibilities and when schools **must** dismiss formal complaints. After receiving a formal complaint, districts must conduct a formal investigation or, in limited circumstances, offer an informal resolution process.
- Schools **must dismiss** a formal complaint if:
 - 1) the conduct would not constitute sexual harassment, under the new definition, or
 - 2) if the conduct did not occur in a school's function or
 - 3) in the United States. If the school dismisses the formal complaint, it may still take action under its code of conduct (such areas may include bullying, intimidation, and harassment, generally).

New Supportive Measures Requirement

- The new regulations establish a “first response” protocol on the part of the Title IX coordinators that was not required previously.
- Specifically, if anyone reports sexual harassment through any method, the Title IX coordinator or designee must:
 - 1) promptly contact the complainant to discuss the availability of supportive measures,
 - 2) consider the complainant’s wishes with respect to supportive measures,
 - 3) inform the complainant of availability of supportive measures with or without filing a complaint, and
 - 4) explain to the complainant the process for filing a formal complaint.

Recordkeeping

- Schools will have to keep written records of actions taken in response to sexual misconduct reports for at least **seven (7) years** under the regulations.
- This obligation applies even if the students have graduated.
- These records may include: investigation records, disciplinary sanctions, remedies, appeals, and records of any action taken, including supportive measures.
- **Reminder: This is evidence to defend against later claims of “deliberate indifference” or a policy, practice, or custom of not properly responding to complaints.**



Employment Issues

Although the Department has maintained relatively generic and uncontroversial regulations prohibiting sex discrimination on school campuses for many years, the new regulations break new ground by requiring that all of the procedural requirements referenced above, including those requiring hearings with live cross-examination by advisors in covered sexual harassment cases, apply to reports that employees have harassed other employees or have harassed students.

Hypothetical

Teacher A (female) tells Principal that Teacher B (male) has been “really creepy.” By way of example, Teacher A explains that Teacher B has followed, subscribed, and friend requested Teacher A on all forms of social media. In addition, Teacher B messages Teacher A on each social media platform every morning to wish her a “good morning;” likes to say, “don’t take this the wrong way, but if I wasn’t married I would definitely go on a date with you;” and is always telling Teacher A that her “pants look great, especially from the back.” Principal tells Teacher A that he will personally take care of the issue because he has been properly trained under Title IX.

Principal calls Teacher B in his office and says the following: “Teacher B, there has been a complaint made against you alleging harassment in the workplace. I have already spoken with Superintendent and we agreed that its probably true, seeing as how you’re a guy and she’s a woman and #MeToo. So we are going to have to immediately suspend you without pay and recommend the Board terminate you from your position.”

Are there any issues?

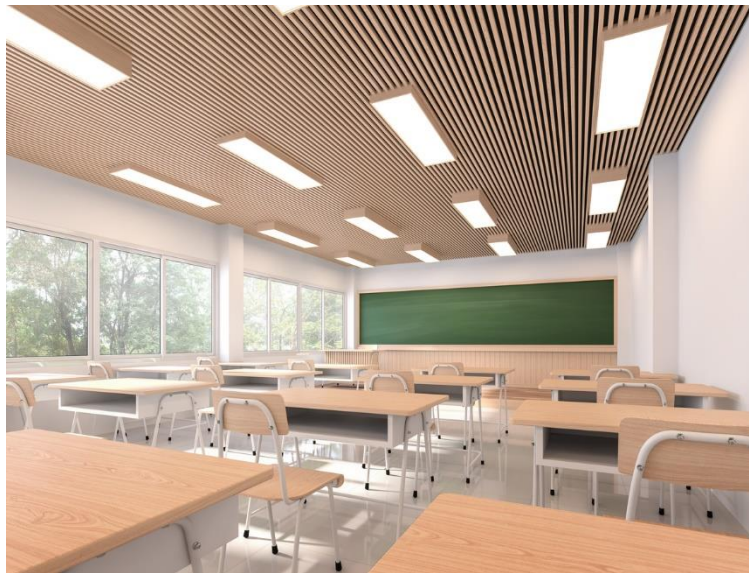
Tips for Employee Investigations



New Training Requirements

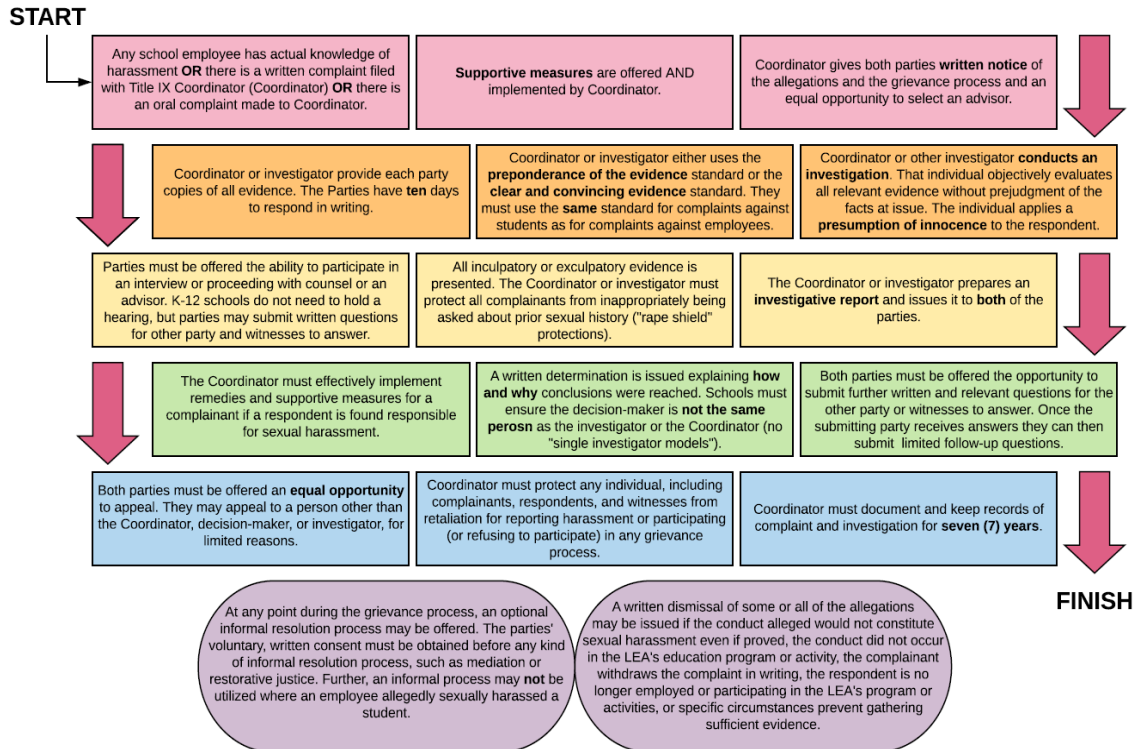
Please respond to the survey.
Your answers are anonymous.

- Before the changes, Title IX already required schools to train certain personnel (Title IX coordinators, investigators, decision-makers, any person who facilitates an information resolution process) on the law.
- The new regulations, however, identify new training topics, including on the regulation's *new* definition of sexual harassment and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.



Next Steps

The New Title IX Investigative Process



Then or Now



Summary of New Major Title IX Regulations vs. Prior Regulations: THEN & NOW

Please circle “THEN” or “NOW” in relation to your guess of whether the statement is a new Title IX regulation or old Title IX regulation.

<p>Schools’ Scope of Responsibility</p>	<p>The focus is on schools’ responsibility to address particular cases of serious sexual misconduct.</p> <p>THEN OR NOW</p>	<p>Schools have broad responsibility to change the culture, to end any harassment, and to address the effects of rape culture on the entire student population.</p> <p>THEN OR NOW</p>
<p>K-12 in Relation to Title IX</p>	<p>Judges and administrators acknowledge important differences between K-12 students and those in postsecondary institutions. Sexual harassment in K-12 schools, however, is not directly addressed.</p> <p>THEN OR NOW</p>	<p>The rules go far beyond the court’s bare-bones framework to explain what constitutes harassment, what schools must do to identify and adjudicate cases of misconduct, and the remedies they must provide to victims of such misconduct. It is the first time the issue of sexual harassment in K-12 schools is addressed directly.</p> <p>THEN OR NOW</p>

Questions?