

Title IX New Regulations for Addressing Sexual Harassment in K-12 Schools

Torrington Public Schools Administrators

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Some Statistics on Sexual Harassment in Schools

According to the National Women's Law Center:

About 1 in 2 students in grades 7-12 are sexually harassed in any given school year.

More than 1 in 5 girls ages 14-18 have been kissed or touched without their consent.

More than 60% of college students experience sexual harassment, and 1 in 4 women, 1 in 4 transgender or gender-nonconforming students, and 1 in 15 men are sexually assaulted during college.

<https://nwlc.org/resources/let-her-learn-toolkit-sexual-harassment/>

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 subjected to discrimination under any education program or activity receiving Federal financial assistance.”

Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.* [“Title IX”].

Who is Protected by Title IX?

- Students
- Staff
- US citizens and non-US citizens
- Men and Women
- Pregnant students
- While it is still not clear if it protects transgender students or students based on sexual orientation, is clear that it protects students from harassment for exhibiting or failing to exhibit stereotypical sex-based characteristics
- Does not matter if the alleged harasser is the same or different sex than the alleged victim

- The US DOE Office of Civil Rights' April 4, 2011 Dear Colleague Letter provided guidance on handling sexual harassment in schools
 - Was heavily weighted in favor of the alleged victim
 - Was combined with OCR issuing a list of colleges and universities being investigated for failing to address and remediate sexual assault claims
 - Led to significantly more discipline of students for allegedly engaging in sexually harassing behavior on college campuses
 - Resulted in approximately 500 law suits brought by alleged harassers against colleges across the country claiming improper sexual harassment investigations

- In May, the Office of Civil Rights published new regulations regarding sexual harassment under Title IX
- These regulations went into effect on August 14, 2020
 - Giving school districts exactly 89 days to implement them during a pandemic
- They appear to be designed for colleges and are often a poor fit for K-12 schools
- They require sweeping changes to numerous things including
 - The definition of sexual harassment under Title IX,
 - How schools must address sexual harassment under Title IX,
 - How complaints under Title IX must be investigated, and
 - Many other aspects of addressing sexual harassment in schools

Various New Roles

- **Title IX Coordinator**
 - Employee who will coordinate the district's efforts to comply with its responsibilities under Title IX
- **Investigator**
 - If possible, should not be the Title IX Coordinator
- **Decision-maker**
 - Must not be the Title IX Coordinator or the Investigator
- **Appeal Decision-maker**
 - Must not be the Title IX Coordinator, Investigator or Decision-maker

Definition of Sexual Harassment Under the Title IX Regulations

- Conduct on the basis of sex that satisfies one of the following:
 - An employee of the district conditioning the provision of an aid, benefit, or service on the individual's participation in unwelcome sexual conduct (*quid pro quo harassment*);
 - 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 district's education program or activity*** (*hostile educational environment*); or
 - sexual assault, dating violence, domestic violence and/or stalking.
- Per the Regulations, Title IX only applies to conduct that occurs in a program or activity over which the district exerts substantial control over both the respondent and the context.
- Does not apply if the conduct occurred against a person outside the U.S.

NOTE – just because OCR will not treat conduct as a Title IX violation, it does not mean the conduct does not violate some other section of the district's policies

- Things to look at:
 - How frequently did the conduct occur
 - Was the conduct physically threatening
 - What the conduct humiliating
 - The age and relationship between the alleged harasser and victim
 - What was the effect on the alleged victim's emotional state
 - Did it unreasonable interfere with an individual's ability to engage in a school activity
 - Did it unreasonably interfere with a student's educational performance or an employee's work performance
 - Was the conduct directed at more than one person
 - Was the conduct protected First Amendment speech

Title IX Overlap with Other State and Federal Statutes

- C.G.S. § 10-222d – Anti-bullying in schools
- C.G.S. § 10-15c – Discrimination in public schools
- C.G.S. § 46a-58 - General anti-discrimination statute
- Title VII of the Civil Rights Act – Anti-discrimination in employment
- Connecticut Fair Employment Practices Act – Anti-discrimination in employment

- Current definition of bullying in Connecticut (until June 30, 2021)
 - **Repeated** use by one or more students of a
 - Written, oral or electronic communication
 - Directed at or referring to another student attending school in the same school district, OR
 - A physical act or gesture by one or more students **repeatedly** directed at another student attending school in the same school district that
 - Causes physical or emotional harm to the student or damage to the student's property
 - Places such student in reasonable fear of harm to self or of damage to property
 - Creates a hostile environment at school for the student
 - Infringes on the rights of such student at school OR
 - Substantially disrupts the education process or orderly operation of a school

CT Anti-Bullying Statute

“Bullying” shall include a written, oral or electronic communication, or a physical act or gesture **based on actual or perceived differentiating characteristics** such as:

- Race
- Color
- Religion
- Ancestry
- National origin
- Gender
- Sexual orientation
- Gender identity or expression
- Socioeconomic status
- Academic status
- Physical appearance
- Mental disability
- Physical disability
- Developmental disability
- Sensory disability
- Association with a group or individual with one or more of these characteristics

- “Cyberbullying” means:
 - Any act of bullying through the internet, interactive and digital technologies, cellular mobile telephone or other mobile electronic devices or any electronic communications
- “Teen dating violence” means:
 - Any act of physical, emotional or sexual abuse, including stalking, harassing and threatening, that occurs between two students who are currently in or who have recently been in a dating relationship
- “Hostile environment” means:
 - A situation in which bullying among students is sufficiently severe OR pervasive to alter the conditions of the school climate
 - NOTE – this is different that the term “hostile environment” under Title IX

Future CT Anti-Bullying Statute

- Effective July 1, 2021 the definition of bullying is set to change:
- An act that is direct or indirect and severe, persistent OR pervasive, which
 - A. Causes physical or emotional harm to an individual
 - B. Places an individual in reasonable fear of physical or emotional harm, or
 - C. Infringes on the rights or opportunities of an individual at school.

- C.G.S. § 10-15c – Discrimination In Public Schools Prohibited
- Requires an equal opportunity for all students to participate in the activities, programs and courses of study without discrimination on account of:
 - Race
 - Color
 - Sex
 - Gender identity or expression
 - Religion
 - National origin
 - Sexual orientation

- The Connecticut Commission on Human Rights and Opportunities has taken the approach that it is able to investigate and regulate discrimination that occurred in schools through C.G.S. § 46a-58. This statute prohibits the deprivation of any right guarantees by the laws of the state or the United States on account of
 - Religion
 - National origin
 - Alienage
 - Color
 - Race
 - Sex
 - Gender identity or expression
 - Sexual orientation
 - Blindness, mental disability
 - Physical disability
 - Veteran Status

Title VII of the Civil Rights Act

- Title VII prohibits discrimination in employment on the basis of
- Makes it unlawful for an employer to refuse to hire or discharge, or otherwise discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment because of the individual's
 - Race
 - Color
 - Religion
 - Sex
 - National origin

Title VII of the Civil Rights Act

- Other federal laws also protect employees from discrimination based on:
 - Disability
 - Age (over 40)
 - Veteran's status
 - Genetic Information
- Title VII – to be actionable, the conduct must be severe, pervasive OR objectively offensive
 - No requirement that it deny access to education
 - Is a much broader category of conduct

Connecticut Fair Employment Practices Act prohibits discrimination (including harassment) on the basis of:

race,
color,
religion,
age,
sex,
marital status,
family status
sexual orientation,
pregnancy

national origin, ancestry,
present or past history of
mental disability,
intellectual disability, learning
disability,
physical disability,
gender identity or expression
retaliation,
veteran status.

Two Separate Situations

- The District has knowledge of sexual harassment but there has not been a request for a formal investigation
 - The District **must** take steps to eliminate sexual harassment and provide support to the victim whenever it has actual knowledge of sexual harassment
 - The District **cannot** issue discipline to the alleged harasser under Title IX
 - Other statutes such as bullying might apply that would allow discipline

- A formal complaint of sexual harassment is filed under Title IX
 - The District may discipline the alleged harasser if the alleged harasser is determined to be responsible for sexual harassment after the completion of the grievance process

When Can A District Be Liable?

- A district with actual knowledge of sexual harassment must take steps to address it.
- In elementary and secondary schools “actual knowledge” means that any employee of an elementary or secondary school had knowledge.
 - As written, this covers all employees including custodians, secretaries, food service workers, paraprofessionals, etc.
- Once the district has knowledge, it must act in a way that is not deliberately indifferent to the alleged harassment.
- It is, therefore, important to train all of your staff to recognize potential sexual harassment and how to report it.

If the District knows about alleged sexual harassment, the subject of the harassment must be offered supportive measures.

Supportive measures are:

- Non-disciplinary, non-punitive individualized services offered without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed.
 - Such measures are designed to restore or preserve equal access to the education program or activity without unreasonably burdening the other party,
 - Includes measures designed to protect the safety of all parties or the district's educational environment or to deter sexual harassment.

The Grievance Process

- Some underlying principles for sexual harassment investigations
 - Equitable
 - Impartial
 - Thorough
 - Prompt
- New Terminology to Learn
 - Complainant – the alleged victim
 - Respondent – the alleged harasser
 - Responsible Party – someone found responsible for sexual harassment at the end of the grievance process
- Standard of evidence to be used should be pre-defined in policy and consistent for investigations into staff and students
 - District chooses: “***preponderance of the evidence***” or “***clear and convincing evidence***”

The Grievance Process

- What is a formal complaint?
 - In writing
 - Signed by complainant, a student's parent/guardian or the Title IX Coordinator
 - Alleges sexual harassment
 - Requests an investigation

A report of sexual harassment by anyone else is NOT a formal complaint and cannot lead to discipline under Title IX.

Mandatory Dismissals

- The Title IX Coordinator makes the initial determination as to whether the complaint falls within the confines of Title IX
- The complaint **MUST** be dismissed at the outset if:
 - The conduct as alleged did not occur in the District's education programs or activities
 - The conduct did not occur against a person in the United States

It is suggested that prior to dismissing a complaint under this provision that it be discussed with the District-Wide Title IX Coordinator if there is one, or the Superintendent prior to dismissing the complaint

The Grievance Process

- First steps once a formal complaint is filed
 - Provide the parties with notice of the allegations, including:
 - Identity of parties,
 - Conduct alleged to be sexual harassment, and
 - Date and location of incident.
 - Also need to provide:
 - Notice of the grievance process including any informal resolution processes available,
 - Statement that the respondent is presumed not responsible and that the determination of responsibility will not be made until the end of the process,
 - Ability to have advisor (including an attorney) at all stages, and
 - The section of the code of conduct that prohibits providing false statements and information during the grievance process.

The Grievance Process

- Focus on due process – overview of major investigation steps
 - Each party must have equal opportunity to present witnesses, including fact and expert witnesses, and other evidence,
 - Cannot restrict the ability of either party to discuss the allegation or gather/present relevant evidence,
 - Allow each party to have an advisor of their choosing at each step,
 - The district may establish consistent restrictions on the extent to which the advisor may participate in the proceedings
 - Provide each party the opportunity to inspect and review all evidence, and
 - Prior to the completion of the formal investigation report, send to each party and his/her advisor, the evidence subject to inspection and review.
 - Each party must be given 10 days to provide written responses

The Grievance Process

- The Investigation Report

- This is a formal written report that must fairly summarize relevant evidence
- The investigator must provide both parties and their advisors a copy of the investigation report at least 10 days prior to the determination regarding responsibility so the parties may review and provide a written response
- The report must be provided to both parties simultaneously

The Grievance Process

- The Decision-Making Process

- In K-12 school, an in-person hearing is NOT required prior to determining whether the respondent is responsible for sexual harassment
- The decision-maker still must:
 - Give each party the opportunity to submit relevant questions that the party wants asked for any party or witness,
 - Provide each party with the answers to those questions, and
 - Allow for follow up questions

Note that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rests on the district, not the parties

The Grievance Process

- The Written Decision on Responsibility
- This is a formal written decision that must at a minimum:
 - Identify the allegations,
 - Describe the procedural steps taken to investigate,
 - Make findings of fact,
 - Make conclusions regarding the application of the code of conduct to the facts,
 - Contain a statement of rationale for the result as to each allegation,
 - Identify any disciplinary sanctions to be imposed,
 - Identify whether remedies will be provided to the complainant, and
 - Inform the parties of the appeal procedures.

The decision must be provided to both parties simultaneously

The Grievance Process

- The Appeal Process

- Is available to both parties,
- Must be decided by a different decision-maker,
- Can only be based on:
 - Procedural irregularities that affected the outcome of the matter;
 - New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and/or
 - The Title XI Coordinator, investigator(s) or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

The Appeal Process

- The other party must be notified in writing if an appeal is filed,
- Both parties must be given a reasonable, equal opportunity to submit a written statement,
- The decision-maker must issue a written decision describing results of the appeal and the rationale for the result,
- The decision must be given to each party simultaneously.

- The District must:
 - Keep each investigation file for at least 7 years,
 - Including the disciplinary sanctions, if any, and
 - Including remedies and any supportive measures provided.

- Training materials
 - The District must keep copies of all training materials used to train employees on Title IX and post them on the district's website.

- The district MAY dismiss a formal complaint or any allegations therein, if at any time during the investigation:
 - The complainant notifies the Title IX Coordinator in writing that he/she would like to withdraw the formal complaint or allegations therein,
 - The respondent is no longer enrolled in or employed by the district, and/or
 - Specific circumstances prevent the district from gathering evidence sufficient to make a determination.
- Such dismissal does not preclude initiating discipline under another section of the district's code of conduct

- The regulations prohibit any recipient (i.e. school district) or “other person” from
 - Intimidating,
 - Threatening,
 - Coercing, or
 - Discriminating against any individual

for the purpose of interfering with any right or privilege secured by Title IX.

Protected Activity Under Title IX

- Reporting sexual discrimination including harassment
 - On your own behalf or on behalf of someone else
- Filing a discrimination complaint
- Assisting someone in reporting discrimination or filing a complaint
- Participating in any matter in an investigation into sexual harassment
 - e.g. protects witnesses
- Protesting any form of sexual discrimination
 - Although we are discussing harassment today, this would include protesting alleged lack of equality in athletic teams, etc.

Retaliation Defined Under Title IX Regulations

- The regulations prohibit retaliation not just for engaging in a protected activity but:

Because an individual has “refused to participate in any manner in an investigation, proceeding, or hearing under this part.”

Retaliation according to the regulations includes:

“charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purposes of interfering with any right or privilege secured by title IX or this part ...”

Major Changes in the Process

Prior OCR Guidance	New Regulations
<u>Knowledge:</u> The district “knows or reasonably should know” of the conduct	<u>Knowledge:</u> Any employee has actual knowledge of the conduct
<u>Hostile educational environment:</u> “so severe, persistent OR pervasive”	<u>Hostile educational environment:</u> “severe, pervasive AND objectively offensive”
<u>Investigation:</u> is required if the district knows or reasonably should know of harassment	<u>Investigation:</u> is only allowed if a formal written complaint is filed requesting an investigation
<u>Supportive measures:</u> may be offered if knowledge of sexual harassment	<u>Supportive measures:</u> must be offered
<u>Roles:</u> Title IX Coordinator, Investigator and Decision-Maker can be the same person	<u>Roles:</u> Decision-Maker cannot be the Investigator or Title IX Coordinator

So With a New President, Will These Regulations Be Repealed?

- Maybe, but it will most likely be a slow process.
- Would either need to:
 - Go through new rulemaking process to adopt new regulations to replace these, or
 - Revise Title IX or pass new legislation that spells out how to address Title IX sexual harassment
- OCR could also indicate that it would not enforce the new regulations, but a school district would ignore the regulations at its own peril because a student disciplined without following these procedures could bring a legal challenge in court.

Questions???

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