

MEMORANDUM

To: Peoria County Schools
From: Jay Greening
Date: September 28, 2020
Re: Changes to Title IX Affecting Schools

Introduction

On November 29, 2018, the Secretary of the Department of Education gave notice of proposed rule changes in the Federal Register. Approximately 18 months later, the Department gave notice of its final rule on May 19, 2020, in the Federal Register.¹ These changes took effect on August 14, 2020 although there are already legal challenges requesting an injunction.² The last regulations from the Education Department took place in 1975, although there have been a series of non-binding guidance documents including guidance released in 1997 and 2001, a now-withdrawn Dear Colleague letter in 2011, a now withdrawn Q & A document in 2014, and a Q & A document in 2017.

In summary, these regulations respond to the need to provide a prompt and just response to individuals who have suffered sexual harassment and provide due process for any alleged perpetrator. These changes create a standard grievance process, define conduct that constitutes sexual harassment, outlines conditions that activate a school's obligation to respond, impose a minimum standard for school response, and establishes procedural due process protections.

Definitions

For the first time, the Education Department has defined sexual harassment under Title IX. 85 Fed. Reg. at 30574. There are three broad categories that the rule divides sexual harassment into. The first is *quid pro quo* type harassment where an employee conditions some aid, benefit or service on the individual's participation in unwelcome sexual conduct. The second type is "unwelcome conduct" determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access" to education or activities. The third category adopts the definition of sexual assault from the Clery Act³ and

¹ [Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 97,30026 \(May 19, 2020\) \(to be codified at 34 C.F.R. pt. 106\).](#)

² [Commw of Pennsylvania, et al., v. DeVos, 2020 WL 3000506](#)

³ A forcible or nonforcible sex offense under the uniform crime reporting system of the FBI

dating violence, domestic violence, and stalking from the Violence Against Women Act.⁴ 85 Fed. Reg. at 30036.

The language “so severe, pervasive, and objectively offensive” to deny an individual equal access to education programs and activities comes from *Davis v. Monroe County Board of Education*.⁵ This became the standard for a private right of action for damages if a school showed deliberate indifference to violations of Title IX. This is different from the standard for workplace harassment that recognizes harassment that is only severe *or* pervasive.⁶ The standard now requiring all three elements may make it more difficult for a complainant to hold a school liable for sex discrimination. 85 Fed. Reg. at 30037.

The regulations also adopt the “actual notice” standard from *Gebser v. Lago Vista Independent School District*.⁷ 85 Fed. Reg. at 30574 and 30038. Under this standard, a school is responsible for a complaint if they have received actual notice of sexual harassment. This includes giving notice to the Title IX Coordinator or any employee of an elementary and secondary school. The “should have known” language from previous Department guidance was removed under the theory that if a school fails to meet its Title IX obligations with respect to any complainant (to investigate actual notice), the Department will hold the school liable under the regulations and doing so will not necessitate speculating about what an investigation “would have” revealed. This is a more restrictive requirement to holding a school liable because constructive notice and vicarious liability are now insufficient to constitute actual knowledge.

The regulations adopt the “deliberate indifference” standard from the Gebser/Davis framework, but adapt and impose mandatory and specific obligations on recipients that are not required under the standard usually. 85 Fed. Reg. at 30043 and 30574. The regulations require the response to be prompt without defining specifically what constitutes “prompt.” However, it does provide that “a recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.” Additionally, a failure of the school appoint a Title IX coordinator, file an assurance of compliance, or adopt and publish a grievance procedure does not in itself constitute sex discrimination by the school, but the Department has the authority to enforce such requirements.

The new regulations also require that the Title IX coordinator to contact the complainant to discuss and offer supportive measures and explains that these supportive measures are available with or without a formal complaint. 85 Fed. Reg. at 30574. These are non-disciplinary and non-punitive individualized services that could include counseling, extensions of deadlines, modifications of work or class schedules, and mutual restrictions on contact between the parties.

⁴ <https://www.law.cornell.edu/uscode/text/34/12291>

⁵ *Davis Next Friend LaShonda D. v. Monroe County Bd. of Educ.*, 526 U.S. 629, 631 (1999)

⁶ *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986)

⁷ *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 118 S. Ct. 1989, 141 L. Ed. 2d 277 (1998)

The responsibility to coordinate and implement these supportive measures falls on the Title IX Coordinator.

The regulations also define the parties as complainant and respondent instead of victim, survivor, or perpetrator. *Id.* The complainant is the individual who alleged to be the victim of the conduct that could constitute sexual harassment, not a third party giving reporting sexual harassment to the school. A formal complaint is defined as a document that is filed by a complainant, who must be participating in or attempting to participate in the education program or activity alleging sexual harassment. A Title IX Coordinator may sign a formal complaint, but they are not the complainant or otherwise a party. A parent may also file a formal complaint on behalf of their child.

Furthermore, these regulations only apply to claims that take place inside the United States (85 Fed. Reg. at 30573) and only in locations, events, or **circumstances** in which the recipient exercises substantial control over both the respondent and the context in which the harassment occurs. 85 Fed. Reg. at 30574.

Grievance procedure

The following procedure must be included in a school's Title IX grievance process. The grievance procedure that a school adopts must provide for a **reasonably prompt time frame for the conclusion of the grievance process**, including appeals and informal resolutions. 85 Fed. Reg. at 30574. It should also **describe the range of disciplinary sanctions and remedies** that may possibly result from a finding of responsibility. The new regulations defer to the school to determine the standard of evidence to be used; **either the preponderance of the evidence standard or the clear and convincing standard**, but requires the standard to be identified in the procedure and applied to all types of formal complaints. 85 Fed. Reg. at 30575. Furthermore, the process should include the procedures and bases for appeal, and the range of supportive measures available to the complainant and respondent.

The Title IX Coordinator, investigator, decision-maker, or anyone designated to facilitate an informal resolution process should not have a conflict of interest or bias towards the individual complainant and respondent or complainants and respondents generally. *Id.* Furthermore, **the decision-maker cannot be the same person as the Title IX Coordinator or the investigator(s)**. 85 Fed. Reg. at 30577. All of these parties should also receive **training on the definition of sexual harassment, the scope of the recipients program or activity, how to conduct an investigation and grievance process including hearings, appeals, and informal resolution, and how to serve impartially**. 85 Fed. Reg. at 30575. **The investigators should receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence**. *Id.*

Upon actual notice, the Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures. 85 Fed. Reg. at 30574. **If and when a formal complaint has been received, the school must provide written notice to the parties who are**

known that includes the school's grievance process, the allegations of sexual harassment including sufficient known details with sufficient time to prepare a response before the initial interview. 85 Fed. Reg. at 30576. This notice should also include a statement that the respondent is presumed not responsible for the harassment until a determination made otherwise at the conclusion of the grievance process, that the parties may have an advisor, who may be, but is not required to be an attorney, that they may inspect and review evidence, and that notifies the parties of any provision in the school's code of conduct prohibiting knowingly making false statements or submitting false information during the grievance process. Id. If any further allegations arise in the course of investigation, the school must give notice of any additional allegations.

Upon investigation, the school should ensure that the burden of proof and gathering evidence does not rest on the parties, but on the school. Id. The school must provide an equal opportunity for the parties to present witnesses, inspect and review evidence, not restrict the gathering or presentation of relevant evidence, and provide sufficient notice of the date, time, and location of any hearing, interview or meeting. A school must not restrict the opportunity to have an advisor present at any meeting or proceeding, but may restrict their participation as long as the restrictions are equally applied to both parties.

The school must investigate the allegation of a formal complaint, but if the conduct alleged in the complaint would not constitute sexual harassment, even if proved, or did not occur in the school's program or activity, then the school must dismiss the formal complaint. 85 Fed. Reg. at 30576. This dismissal does not preclude action under another provision of the school's code of conduct. At any time during the investigation or hearing, the complainant may notify the Title IX Coordinator in writing that they would like to withdraw the formal complaint or any allegation. Additionally, if the respondent is no longer a student or employee or circumstances prevent the school from gathering evidence sufficient to reach a determination the complaint may be dismissed. If dismissed, the school must promptly send a written notice of dismissal and the reasoning for it to the parties simultaneously.

If the complaint is not dismissed, the school must then create an investigative report that summarizes relevant evidence at least 10 days prior to the determination regarding responsibility. However, before completing the investigative report, the school must send each party the evidence subject to inspection and review and allow the parties at least 10 days to submit a written response. 85 Fed. Reg. at 30576-77.

Elementary and secondary schools' grievance processes may, but do not need to, include a hearing. 85 Fed. Reg. at 30577. With or without a hearing, the decision-maker must afford each party the opportunity to submit written questions that the party wants asked of any party or witnesses, provide the party with the answers, and allow for limited follow-up questions from each party. If a question is deemed irrelevant, including baseless questions about the

complainants sexual predisposition, the decision-maker must explain the decision to the party asking the question.

A written determination must be issued regarding responsibility and include the allegations, a description of the procedure taken from the formal complaint through the determination, findings of fact that supports the determination, the application of the code of conduct to the facts, and a statement of rationale for the result of each allegation including responsibility, disciplinary sanctions, and remedies to restore equal access to the program or activity. Id. The determination must also include the procedures and bases for either party to appeal. The written determination should be delivered to all parties simultaneously.

The determination is deemed final after the appeal decision is issued or on the date where an appeal would no longer be considered timely. Id. Appeals may be requested for procedural irregularities, new evidence that was not available at the time, a conflict interest or bias by the Title IX Coordinator, investigator(s), or decision-maker(s), or any other basis. In the event of a requested appeal, the school should notify the parties in writing, appoint a decision-maker who is not the same person as the original decision-maker or Title IX Coordinator, give the parties a reasonable opportunity to submit a written statement in support of or challenging the outcome. The person deciding the appeal must issue a written decision describing the rationale and result of the appeal.

Fundamental fairness

A school cannot require either a complainant to make a formal complaint or to undergo an informal resolution process as a condition of their enrollment or employment. 85 Fed. Reg. at 30578. At any time prior to reaching a responsibility determination, the school may facilitate an informal resolution process that does not involve a full investigation and adjudication. An informal resolution process can only commence after the school obtains the parties' voluntary, written consent to the informal resolution process and it provides the parties with a written notice disclosing the allegations and the circumstances where an informal resolution would preclude the parties from resuming a formal complaint. The parties do have a right to withdraw from the informal resolution process and resume the formal complaint at any time prior to agreeing to a resolution. This process cannot be used in cases that allege the sexual harassment a student by an employee.

Furthermore, no disciplinary action may be taken until after a final determination of responsibility has been made. There is a presumption that the respondent is not responsible for the sexual harassment until a final determination has been made. 85 Fed. Reg. at 30577. However, the regulations do not preclude a school from removing a respondent from the program or activity on an emergency basis. 85 Fed. Reg. at 30575. Similarly, the regulations do not preclude a school from placing an employee on administrative leave during the grievance process. Id.

Nothing in the regulations give schools the authority to violate any rights that are protected by the U.S. Constitution, General Education Provisions Act, Family Educational Rights and Privacy Act, Title VII of the Civil Rights Act of 1964, or parental/guardian rights. All investigation and inspection of evidence must not violate these rights. 85 Fed. Reg. at 30573.

Other provisions

A school **must maintain the records** of each sexual harassment investigation including the determination, audio or video recordings or transcripts, any disciplinary sanctions, any remedies provided, any appeal, and any informal resolution results for seven years. 85 Fed. Reg. at 30578. **All materials used to train Title IX coordinators, investigators, decision-makers and informal resolution facilitators must be made public on the school's website.**

The rules also have added provisions to **prohibit retaliation**. Id. A school must not intimidate, threaten, coerce, or discriminate against any individual for making a complaint, testifying, assisting, participating or refusing participation in the investigation. Complaints alleging retaliation may be filed using the same grievance procedures as for sex discrimination. A code of conduct violation for making a materially false statement in bad faith does not constitute retaliation. However, a determination regarding responsibility alone is insufficient to conclude that a party made a materially false statement in bad faith.

Immediate responsibilities for schools

As this law is effective on August 14, 2020, schools should take the following steps to comply as quickly as possible. Each school must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities under Title IX, and this person must be referred to as the Title IX Coordinator. 85 Fed. Reg. at 30573. **Schools must notify applicants for admission and employment, students, parents, guardians, employees, and all collective-bargaining unions with the Title IX Coordinator's name, office address, e-mail address, and telephone number.** Id. **These same people must be notified that the school does not discriminate on the basis of sex, that Title IX prohibits any sex discrimination which includes employment and admission.** **The school must also prominently display the contact information of the Title IX Coordinator on its website and in each handbook or catalog that it makes available.** Id. **A school must adopt and publish grievance procedures that comply with these requirements and notify these person of the grievance procedure and how to report or file a complaint of sex discrimination, sexual harassment, and how the school will respond.**

Finally, this regulation sets the minimum protections against sexual harassment. A school can address harassing behavior that do not meet this definition of sexual harassment in their code of conduct. Even if a formal complaint is dismissed because the allegations do not rise to the definition of sexual harassment, the school is not precluded from addressing the misconduct under their own code of conduct. These regulations represent the Department's

interpretation of a school's legally binding obligations, rather than best practices. Thus, the regulations provide a floor for code of conduct, not a ceiling. 85 Fed. Reg. at 30029.