**TITLE IX REGULATIONS**

**HOW K-12 SCHOOLS MUST ADDRESS SEXUAL MISCONDUCT**

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**On May 6, the U.S. Department of Education (“DOE”) released new regulations (the “Regulations”) under Title IX of the Education Amendments of 1972 (“Title IX”) which became effective on August 14, 2020. These new Regulations are significant because K-12 entities that receive federal funds must respond to sexual misconduct allegations in compliance with the new Regulations.**

**While the attention regarding the Regulations has focused on colleges and universities, the changes will impact K-12 schools. The DOE can enforce the Regulations and enforcement generally occurs if its Office of Civil Rights (OCR) receives complaints about a school’s handling of an incident.**

**The Regulations are a series of formal rules and requirements for how a school must prepare for, and respond to, complaints of sexual misconduct. This paper discusses the key provisions in the new Regulations.**

1. **Sexual Harassment Defined. Under the Regulations**[[1]](#footnote-2)**, *Sexual Harassment* is defined as conduct on the basis of sex that satisfies one or more of the following: (1) an employee of the school conditioning the provision of an aid, benefit or service of the school on an individual’s participation in unwelcome sexual conduct (commonly referred to as “quid pro quo” harassment), (2) 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 education program or activity, or (3) “sexual assault” as defined under the Clery Act**[[2]](#footnote-3)**, “dating violence”, “domestic violence” or “stalking” as defined under the Violence Against Women Act**[[3]](#footnote-4)**.**

**This definition of Sexual Harassment is more restrictive than the definition under New York Law and more restrictive a standard than the EEOC**[[4]](#footnote-5) **or federal courts have required. As a result, for employees who are accused of sexual harassment, it will be important for schools to have “wrap around” policies to deal with complaints that may not rise to the Title IX definition but are nonetheless serious enough to require school action as required by state and federal law.**[[5]](#footnote-6) **In many cases this means that the school’s existing policies can remain and a new Title IX policy and grievance procedure will need to be “fit” into them.**

**Note that the new rules and procedures outlined in this paper will need to be followed for claims of sexual assault, dating violence, domestic violence or stalking. Title IX Coordinators will need to be familiar with these definitions so they can spot allegations that might fall within them and allegations that fall outside of them.**

1. **Reporting and Supportive Measures.** 
   1. **Reporting. Any notice of sexual harassment or allegations of sexual harassment made to any employee of a school is sufficient under the Regulations to establish that the school had actual knowledge of the allegations**[[6]](#footnote-7)**. This means that notice to athletic coaches, custodial staff, administrative personnel, paraprofessionals and all other employees will constitute notice to the school. It will be important to provide training to all your employees that instruct them to notify your Title IX Coordinator for any employee-to-student or student-to-student sexual misconduct that is reported to them or about which they otherwise become aware.**

**Reports of potential sexual harassment can be made by anyone who experienced, observed or otherwise learned of an incident. Reports can be made in person during regular business hours or at any time by mail, by telephone or by electronic mail using the contact information listed for the Title IX Coordinator. Once a school has actual knowledge of potential sexual harassment, it must respond in a manner that is not deliberately indifferent**[[7]](#footnote-8)**.**

**In order to ensure that all members of the school’s community are aware of how reports can be made, the Regulations require the designation of at least one employee who is referred to as the “Title IX Coordinator”**[[8]](#footnote-9)**. The school must notify virtually everyone (including applicants for admission and employment, students, parents or legal guardians of students, employees and all unions or professional organizations under collective bargaining agreements with the school) of the name, office address, electronic mail address and telephone number of the Title IX Coordinator**[[9]](#footnote-10)**. In addition, each school must prominently display the contact information required to be listed for the Title IX Coordinator in each handbook, catalog or other publication that it makes available to potential students, students, parents or guardians, applicants for employment and employees**[[10]](#footnote-11)**.**

* 1. **Role of the Title IX Coordinator. Once the Title IX Coordinator becomes aware of an incident of potential sexual harassment, the Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures, consider the complainant’s wishes with respect to supportive measures, and explain the process for filing a formal complaint**[[11]](#footnote-12)**. Supportive measures are defined to be non-disciplinary, non-punitive individualized services offered, without fee or charge to the complainant or respondent, designed to restore or preserve equal access to the school’s educational program or activity without unreasonably burdening the other party**[[12]](#footnote-13)**. The most common examples of supportive measures include mutual no-contact orders between the parties or changes to class schedules or courses. A range of possible supportive measures that a school might provide must be listed in the school’s Title IX policy**[[13]](#footnote-14)**.**
  2. **Title IX Coordinator’s Additional Responsibilities. The Regulations make it crystal clear that a school must treat complainants and respondents equitably from the outset of any allegations of a complaint until a decision is made at the end of the Title IX grievance process. This means that a student-respondent cannot be removed from school during the pendency of a complaint without first undertaking a individualized safety and risk analysis that determines that there is an immediate threat to the physical health or safety of a member of the school community arising out of the allegations in the complaint**[[14]](#footnote-15)**. A school can, however, place an employee-respondent on administrative leave during the pendency of a grievance process without undertaking a safety and risk analysis**[[15]](#footnote-16)**.**

1. **Formal Complaint. In order for the Title IX grievance procedure to be triggered, the complainant must file a formal complaint with the Title IX Coordinator. This document must be signed by the complainant, who must be an individual participating in or attempting to participate in the educational program or activity of the school**[[16]](#footnote-17)**. The filing of the formal complaint may be done by the parent or guardian acting on behalf of a complainant**[[17]](#footnote-18)**. There are limited circumstances in which the Title IX Coordinator can file a formal complaint.**

**What happens if a complainant does not want to file a formal complaint? Under a strict reading of the Regulations, the school cannot proceed to investigate the matter or discipline the alleged respondent under the Regulations. The whole aim of the Regulations is to construct a grievance procedure that assures the due process of all parties, particularly the respondent, by transparently disclosing all relevant allegations and information. If the complainant does not file a formal complaint to initiate that process, the school cannot proceed under the Regulations.**

**If the allegations involve student conduct that is outside the scope of sexual harassment under Title IX (e.g. the use of alcohol or similar rules violations), the school may follow up on those allegations under its normal conduct procedures but must ensure that it is careful about holding a student responsible for any conduct that would be covered under the grievance procedures outlined by the Regulations.**

**If the allegations are against an employee, Title VII employment-based sexual harassment procedures may be available to the school**[[18]](#footnote-19)**.**

**Once a formal complaint is filed, the respondent must be offered the same access to supportive measures as provided to the complainant.**

**Upon receipt of a formal complaint, the school must provide the following written notice to the complainant and respondent: (a) notice of the school’s Title IX grievance process, (b) notice of the allegations against the respondent in sufficient detail for the respondent to prepare a response before any interview, (c) a specific statement that the respondent is presumed not responsible for the alleged conduct and that a determination of responsibility is made at the conclusion of the grievance process, (d) that the parties may have an advisor of choice who may be an attorney, and (e) notice of any provision of the school’s code of conduct that prohibits knowingly making false statements or submitting false information during a grievance process**[[19]](#footnote-20)**.**

1. **Grievance Procedure**
   1. **General Requirements**[[20]](#footnote-21)**. A school’s grievance process must require that any Title IX Coordinator, investigator, decision-maker or facilitator in an informal resolution process be free from conflict of interest or bias for or against complainants or respondents generally or a specific individual complainant or respondent. The school must ensure that Title IX Coordinators, investigators, decision-makers and facilitators in informal resolutions receive training on the Regulations and other skills necessary to conduct their responsibilities. See also 7. Training, infra. The grievance process must proceed using reasonably prompt timeframes although no specific number of days in the various steps of the grievance process is specified. It must state the standard of evidence to be used to determine responsibility and apply the same standard of evidence for formal complaints in all other proceedings against students or employees. In addition to describing the range of supportive measures mentioned above, the school’s procedure should also describe the range of possible disciplinary sanctions and remedies that the school might implement following any determination of responsibility. It must outline the procedures and permissible bases for any appeal following a determination. See 4.g. Appeals, infra.**
   2. **Investigation**[[21]](#footnote-22)**. A school must investigate a formal complaint**[[22]](#footnote-23)**. When investigating, it must ensure that the school has the burden of proof and the burden of gathering sufficient evidence to reach a determination and not the parties. It must provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses and other evidence. It must not restrict the ability of either party to discuss the allegations under investigation. It must provide the parties with the opportunity to have an advisor of choice with them at any meeting and provide both parties an equal opportunity to inspect and review any evidence obtained that is directly related to the allegations raised in a formal complaint. The investigator must complete an investigative report, however, prior to its completion, the school must send the evidence and the parties must have at least 10 days to submit a written response, which the investigator must consider prior to the completion of the investigative report. Once the investigative report is completed, it must be sent to both parties and their advisors of choice.**

**After the investigative report has been sent, and before reaching a determination of responsibility, the decision-maker must afford each party the opportunity to submit written, relevant questions to be asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party. The decision-maker must explain to the party proposing the questions any decision to exclude a question as not relevant.**

* 1. **Advisor of Choice. While the parties are entitled to an advisor of choice, who may be an attorney, to assist them through the grievance process, the school can establish restrictions regarding the extent to which the advisor may participate in the proceedings as long as the restrictions apply equally to both parties**[[23]](#footnote-24)**.**
  2. **Notices. Notices must be given to both parties and any of their respective advisors of choice at every step of the grievance process: upon the filing of the formal complaint, of the evidence collected from the investigation prior to finalization of the investigative report, of all investigative interviews or other meetings. The notices must give the date, time, location and participants of the interviews or meetings and the purpose of them**[[24]](#footnote-25)**.** **Parties and advisors of choice must also be given the investigative report, the written questions asked of other witnesses, and the responses to all questions asked. Both parties must also receive the decision-maker’s written determination simultaneously and all appeals and responses to appeals filed.**

**These requirements regarding notices of all meetings and disclosure of all evidence, investigative report, questions asked and answers to questions asked are much more extensive than schools are used to providing. Care should be taken that the school follows these requirements so that its effort to follow the grievance process to resolve a complaint is not forgone because of a slip-up in one of these notice requirements.**

* 1. **Mandatory Dismissal. If, after appropriate investigation, the conduct alleged in the formal complaint would not constitute sexual harassment as defined in the Regulations or did not occur in the school’s education program or activity**[[25]](#footnote-26)**, then the school must dismiss the complaint under the Title IX grievance process**[[26]](#footnote-27)**. The school may pursue the allegations in the complaint using other provisions of its code of conduct or policies.**
  2. **Determinations**[[27]](#footnote-28)**. The decision-maker can be any person or panel but cannot include the Title IX Coordinator or the investigator. The decision-maker must issue a written determination regarding responsibility, which must include (i) identification of the allegations, (ii) a description of the procedural steps taken since the formal complaint,(iii) findings of fact supporting the determination, (iv) conclusions regarding the application of the facts to the school’s policy, (v) a statement of, and rationale for, the result as to each allegation including a determination regarding responsibility, and disciplinary sanctions imposed on respondent, and (vi) the procedures and bases for appeals. The written determination much be provided to the parties simultaneously.**
  3. **Appeals**[[28]](#footnote-29)**. Schools must offer both parties an appeal from a determination regarding responsibility on the following bases: (i) a procedural irregularity that affected the outcome of the matter, (ii) new evidence that was not reasonably available at the time the determination was made that could affect the outcome of the matter, and (iii) the Title IX Coordinator, investigator or decision-maker had a conflict of interest or bias for or against complainant or respondent. The school must notify the other party when an appeal is filed and give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome. The decision-maker for the appeal cannot be the same person as the decision-maker in the original determination, the investigator or the Title IX Coordinator. The decision-maker for the appeal must issue a written decision describing the result of the appeal and the rationale for it and provide the written decision simultaneously to both parties.**

1. **Potential for Hearings. Schools have the option of allowing for hearings that comply with the Regulations. The Regulations impose some strict requirements if hearings are held. The decision-maker must permit each party’s advisor of choice to ask the other party and any witness relevant questions, including questions that challenge credibility. The questioning must be done directly and in real time, although the parties can be in different locations and technology can be used for the direct communication. If a party does not appear at the hearing or does not answer questions posed by the other party’s advisor, the decision-maker cannot use statements made by the non-appearing or non-answering party in the determination. The decision-maker should exclude questions that are not relevant and must necessarily make that determination “on the spot” during the hearing, and the entire hearing must be recorded.**

**Most commentary predict that K-12 schools will not opt to allow for hearings since these Regulations’ formal, prescriptive rules for them are not appropriate in K-12 schools for several reasons. Some reasons include that the live hearing is likely to be off-putting to both parties, that the hearing will require decision-makers to be well versed in ruling on the relevance of questions, and that the age and developmental ability of a student may make cross-examination ineffective and potentially damaging.**

1. **Potential for Informal Resolutions. Schools also have the potential for allowing for Informal Resolutions under the Regulations**[[29]](#footnote-30)**. An informal resolution process is a voluntary process in which a trained facilitator assists the parties in resolving the allegations made by a complainant after the filing of a formal complaint. Under the Regulations, the informal resolution process is not available if the respondent in a sexual misconduct complaint is a faculty, staff member or other employee of the school.**

**Prior to using the informal resolution process, the school must provide the parties with written notice disclosing the allegations, the requirements of the informal resolution process, informing both parties that at any time prior to agreeing to a resolution, any party has the right to withdraw from the process and resume the grievance process. Both parties must consent to the process in writing. No party should feel intimidated, coerced or threatened to participate in an informal resolution process, or to withdraw from it.**

**This may be a viable option for a school to offer under its policies, however schools need to ensure that one or more trained facilitators are available to handle these sensitive discussions and to carefully lay out all the rules associated with the informal resolution process so that they can be disclosed to the parties prior to asking for their consent. For instance, if a party choses to withdraw from the informal resolution process, the school should specify whether and to what extent information disclosed in the informal resolution process would be available in the grievance process and whether the facilitator would be available to be a witness in the grievance process.**

1. **Training and Recordkeeping. Schools must ensure that its Title IX Coordinators, investigators, decision-makers (including appeals decision-makers) and any person who facilitates an informal resolution process, receive training on (a) the definition of sexual harassment under the Regulations, (b) the scope of the school’s education program or activity**[[30]](#footnote-31)**, (c) how to conduct an investigation and grievance process, appeals and informal resolution process (if applicable), and (d) how to serve impartially, including avoiding conflicts of interest or bias and prejudgment of the facts at issue**[[31]](#footnote-32)**.**

**Schools must also ensure that decision-makers receive training on issues of relevance of questions and evidence, including when questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant as set forth in the Regulations. In addition, schools must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence**[[32]](#footnote-33)**.**

**Importantly, materials used to train Title IX Coordinators, investigators, decision-makers and any person who facilitates an informal resolution process must be publicly available on the school’s website**[[33]](#footnote-34)**.**

**While not required under the Regulations, some training will likely be required for all employees so that they are familiar with this new, more formal process for addressing sexual harassment.**

**Schools are required to retain records for seven years of (a) all training materials, (b) supportive measures, (c) investigations, (d) determinations, (e) sanctions and remedies, (f) appeals, and (g) informal resolutions**[[34]](#footnote-35)**.**

1. **Title VII and Title IX. All employers, including schools, have discrimination and harassment policies for employees that cover all protected classes, not just gender. One of the most troublesome aspects of the Regulations is language in the Regulations’ preamble that clearly states that “there is no inherent conflict between Title VII and Title IX” and that the Regulations, including the due process protections, apply to employees.**

**Issues arise because both Title VII and the NY Human Rights Law (NYHRL) do provide conflicting requirements. For instance:**

* **Under Title VII and NYHRL, employers are obligated to conduct a prompt and confidential investigation that ensures due process, but process for how an employer investigates and takes corrective action is largely left to the employer. The Regulations mandate many formal requirements that are meant to ensure due process protections that are not commonly used in harassment investigations in the employment context.**
* **Title VII and NYHRL cover all protected classes and requirements for complaints are applied to all. Under the Department of Education’s view, schools would have a much more formal process for handling complaints of sexual harassment than the process used for complaints based on other protected classes. This formal process will not be required for any employer not subject to Title IX.**
* **Under Title VII and NYHRL, the employer has knowledge when a supervisor becomes aware of harassment but under the Regulations, the employer has knowledge when any employee becomes aware.**
* **Under Title VII and NYHRL, no formal complaint is required before an employer has a duty to investigate and complaints can be filed directly with the Division of Human Rights. Under the Regulations, the complainant must file a formal complaint to enable a school to investigate sexual harassment.**
* **Under the Regulations, the definition of sexual harassment is narrower than under Title VII and much narrower than NYHRL.**
* **These differences will make it challenging for schools to decide what to do if a situation of potential sexual harassment arises in the employment context (e.g. no student is involved as a respondent or complainant).**
* **Further clarity will need to come from the Department of Education or the courts.**

1. The definition can be found in 34 C.F.R. §106.30. [↑](#footnote-ref-2)
2. Sed 20 U.S.C. §1092(f)(6)(A)(v). [↑](#footnote-ref-3)
3. See 34 U.S.C. §12291(a)(10), (8) and (30). [↑](#footnote-ref-4)
4. See 29 C.F.R. §1604.11(a). [↑](#footnote-ref-5)
5. For a discussion of the overlap between Title VII employment law and Title IX see 8. Title VII and Title IX, *infra*. [↑](#footnote-ref-6)
6. See 34 C.F.R. §106.30(a). [↑](#footnote-ref-7)
7. 34 C.F.R. §106.44(a). [↑](#footnote-ref-8)
8. 34 C.F.R. §106.8(a). [↑](#footnote-ref-9)
9. 34 C.F.R. §106.8(a). [↑](#footnote-ref-10)
10. 34 C.F.R. §106.8(b)(2). [↑](#footnote-ref-11)
11. 34 C.F.R. §106.44(a). [↑](#footnote-ref-12)
12. 34 C.F.R. §106.30. [↑](#footnote-ref-13)
13. 34 C.F.R. §106.45(b)(1)(ix) [↑](#footnote-ref-14)
14. 34 C.F.R. §106.44(c). [↑](#footnote-ref-15)
15. 34 C.F.R. §106.44(d). [↑](#footnote-ref-16)
16. 34 C.F.R. §106.30 [↑](#footnote-ref-17)
17. 34 C.F.R. §106.6(g). Parents or guardians may act on behalf of a complainant, a respondent or any other individual involved in the Title IX grievance process. [↑](#footnote-ref-18)
18. But see 8. Title VII and Title IX, infra. [↑](#footnote-ref-19)
19. 34 C.F.R. §106.45(b)(2). [↑](#footnote-ref-20)
20. See 34 C.F.R. §106.45(b)(1)(iii). [↑](#footnote-ref-21)
21. 34 C.F.R. §106.45(b)(5) and (6). [↑](#footnote-ref-22)
22. 34 C.F.R. §106.30. [↑](#footnote-ref-23)
23. 34 C.F.R. §106.45(b)(5)(iv). [↑](#footnote-ref-24)
24. 34 C.F.R. §106.45(b)(5)(v) [↑](#footnote-ref-25)
25. Locations, events or circumstances over which the school exercised substantial control over the respondent and over the context in which the sexual harassment occurs. See 34 C.F.R. §106.44(a). [↑](#footnote-ref-26)
26. 34 C.F.R. §106.45(b)(3). [↑](#footnote-ref-27)
27. 34 C.F.R. §106.45(b)(7). [↑](#footnote-ref-28)
28. 34 C.F.R. §106.45(b)(8). [↑](#footnote-ref-29)
29. 34 C.F.R. §106.45(b)(9). [↑](#footnote-ref-30)
30. 34 C.F.R. §106.44(a) [↑](#footnote-ref-31)
31. 34 C.F.R. §106.45(b)(1)(iii). [↑](#footnote-ref-32)
32. 34 C.F.R. §106.45(b)(1)(iii). [↑](#footnote-ref-33)
33. 34 C.F.R. §106.45(b)(10). [↑](#footnote-ref-34)
34. 34 C.F.R. §106.45(b)(10. [↑](#footnote-ref-35)