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Legal Sidebar

New Title IX Sexual Harassment Regulations Overhaul Responsibilities for Schools

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The Department of Education (ED) published new regulations implementing Title IX of the Education Amendments of 1972 (Title IX) on May 19, 2020. Title IX prohibits discrimination on the basis of sex in education programs or activities that receive federal financial assistance. While Title IX does not specifically mention sexual harassment, courts and ED have determined that the response of a recipient educational institution to incidents of sexual harassment can constitute discrimination based on sex. The new Title IX regulations establish requirements that schools must follow in responding to sexual harassment allegations, marking a major change from the expectations announced in previous guidance documents, as well as departing in many ways from the provisions in the Notice of Proposed Rulemaking (NPRM) that invited public comment on the rules.

The new regulations take effect on August 14, 2020, and apply to schools that receive federal financial assistance, including postsecondary institutions and elementary and secondary schools. For many K-12 schools, the entity ultimately responsible for ensuring compliance is the "recipient" of financial assistance—often the "local educational agency" to which the school belongs.

This Sidebar examines some of the major changes established by the Title IX regulations, highlighting many of the most significant new requirements and noting where those obligations depart from prior ED guidance and the NPRM. Given the rather complex background surrounding Title IX, including nonbinding ED guidance documents, case law, and the NPRM, this Sidebar builds on previous CRS reports and Sidebars that discuss those materials.

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Title IX Enforcement Background

Like many federal civil rights statutes, Title IX makes compliance with its nondiscrimination requirements a condition for receiving federal financial assistance. ED's interpretation of what Title IX requires of schools responding to sexual harassment allegations has shifted considerably over the past decade. As discussed more fully in other CRS products, before the new regulations, ED largely relied on a series of guidance documents to articulate its interpretation of schools' obligations. This guidance led to changes in procedures schools used to handle sexual harassment allegations. In turn, some federal courts ruled that certain procedures adopted to resolve sexual harassment allegations against students violated constitutional due process requirements, requiring revisions to the procedures these schools employed.

New Title IX Regulations Regarding Sexual Harassment

Unlike its earlier guidance documents, the new Title IX regulations addressing schools' responsibilities when responding to sexual harassment allegations are binding requirements. According to ED, its prior guidance documents caused confusion and failed to articulate how schools could satisfy Title IX's prohibition on discrimination while ensuring that the handling of sexual harassment allegations satisfied due process requirements. Notably, the regulations specify that both a school's treatment of someone who complains of sexual harassment (complainant) and its treatment of the person formally accused of misconduct (respondent) can violate Title IX. And the regulations define "education program or activity" as including buildings owned or controlled by student organizations recognized by a postsecondary institution (e.g., a school-recognized fraternity or sorority).

Definition: What *Conduct* Constitutes Sexual Harassment?

The regulations define sexual harassment as "conduct on the basis of sex" that meets one of three prongs. The first prong is when an employee conditions the provision of an aid, benefit, or service on an individual's participation on unwelcome sexual conduct (quid pro quo harassment). Another prong is when a student or employee commits sexual assault, dating violence, domestic violence, or stalking as defined in the Clery Act and the Violence Against Women Act (VAWA).

Besides these two prongs, conduct is covered by the new regulations when a student or employee suffers "[u]nwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity." This standard draws from the Supreme Court's decision in *Davis v. Monroe County Board of Education*, which crafted a standard for damages liability against schools for student-to-student sexual harassment. It seems a more exacting standard than used in prior ED guidance on student-to-student harassment, which covered conduct based on sex that was "sufficiently serious" to limit or deny a student's ability to benefit from or participate in a school's program. And it is also more difficult to meet than the standard used under Title VII for employment discrimination, which only requires "severe *or* pervasive" harassment.

Notice: *When* Must a School Respond to Sexual Harassment Allegations?

ED similarly draws on *Davis* (as well as the related Supreme Court decision *Gebser v. Lago Vista Independent School District*) to define the circumstances in which a recipient must respond to sexual harassment allegations. The Court in *Gebser* required, among other things, the recipient to have actual knowledge of harassment for damages liability under Title IX. The Court rejected predicating liability on theories of respondeat superior or constructive notice. The regulations similarly provide that recipients with "actual knowledge" of harassment (or allegations of sexual harassment) must respond consistent with the requirements discussed below. The regulations also note that "[i]mputation of knowledge based solely on vicarious liability or constructive notice is insufficient." This contrasts with previous ED guidance, which provided that a school was sometimes automatically responsible for harassment by a teacher or employee; otherwise, such as in cases of student-to-student harassment, a school had notice if a responsible employee knew, or should have known, of the harassment.

The regulations provide, however, that the notice provision operates differently for K-12 schools than for postsecondary institutions. At postsecondary institutions, only notice to the school's Title IX coordinator or any official with authority to institute corrective measures constitutes actual knowledge; this allows a university to designate certain employees as confidential resources for students without a requirement that they report the allegations to the school. But for K-12 schools, besides notice to the individuals mentioned above, notice to *any employee* establishes actual knowledge. This departs from the NPRM's proposal and correlates with common state laws that require K-12 employees to report sexual abuse.

Response: What *Actions* Must a School Take Once It Has Notice?

The regulations provide that if a school has "actual knowledge" of sexual harassment in an education program or activity, it must respond "promptly in a manner that is not deliberately indifferent." The regulations again draw upon *Davis* and *Gebser* in adopting this standard. In those cases, the Supreme Court ruled that institutions would not be liable for damages under Title IX in cases of sexual harassment unless their response was "deliberately indifferent." The regulations also depart from the NPRM by eliminating proposed "safe harbors" that would have precluded finding deliberate indifference if a school followed certain procedures.

Initial Response to Allegations

Proving that a school responded with deliberate indifference can be difficult in a Title IX suit for damages. ED's adoption of this standard in the administrative context presumably narrows the situations in which a school's response could violate Title IX. However, the regulations also impose requirements on schools that may go beyond what the deliberate indifference standard requires in the judicial context. In particular, the regulations outline specific steps schools must take once they have notice of sexual harassment, including offering "supportive measures" to a complainant. In addition, schools must explain to complainants the process for filing an optional formal complaint.

Grievance Procedures

When a formal complaint is filed (by a complainant, a school's Title IX coordinator, or parent or guardian), a school must investigate and follow specific grievance procedures. Written notice must be given to the parties of the allegations with enough details to allow them to prepare a response before any initial interview. A school must presume that the accused is not responsible for the alleged misconduct. Throughout the grievance process, schools must ensure that the burdens of proof and evidence gathering rest with the school, not the parties; provide equal opportunity to present witnesses and inculpatory and exculpatory evidence; not restrict the parties from discussing the allegations or gathering evidence; provide the parties with equal opportunity to have an advisor present; and provide parties with an equal opportunity to review relevant evidence. Schools also must provide training for Title IX coordinators, investigators, the individual (or individuals) rendering decisions in the proceeding (decisionmaker), and anyone that facilitates informal resolution procedures. Training materials must be published on the school's website.

While schools must investigate allegations in formal complaints, they must dismiss complaints if the alleged conduct (1) would not constitute sexual harassment under the definition articulated above; (2) did not occur in the recipient's educational program or activity; or (3) did not occur against a person in the United States. The recipient must provide written notice to the parties when dismissing a case. Even so, this dismissal notably does not preclude a school from applying its own code of conduct to a student.

Investigative Report

Schools must create an investigative report summarizing the relevant evidence. Before completion, they must send copies of the evidence to each party. Parties then have 10 days to respond, and the investigator will consider that response before completing the report. The parties must receive the completed report 10 days before a hearing or other determination of responsibility for their review and response.

Hearings

For postsecondary institutions, the grievance process must provide for a live hearing. Each party's advisor shall "directly, orally, and in real time" ask the other party and any witness relevant questions. Upon request, this can occur in separate rooms with the aid of technology. Decisionmakers must determine whether questions are relevant and may exclude nonrelevant questions. If a party does not have an advisor, recipients must provide one free of charge to conduct cross-examination. In determining responsibility, decisionmakers may not rely on any statement by a party or witness who does not submit to cross-examination (explained in more detail here), although absence from a hearing may not support an inference of responsibility.

Elementary and secondary schools need not conduct a hearing, but may choose to do so. Whether or not they do, following delivery of the investigatory report, and before a determination of responsibility, the decisionmaker(s) must afford each party a chance to submit written, relevant questions; provide parties with the answers to those questions; and allow for follow-up.

Determinations of Responsibility, Standard of Evidence, and Appeals

The person who determines responsibility may not be a school's Title IX coordinator or the investigator in the case, prohibiting schools from using the same person to fill multiple roles in a case. Schools may apply the preponderance of the evidence (greater than fifty percent chance) or the more demanding clear and convincing standard for determining responsibility, but must apply the same standard to formal complaints against students as it does against employees, including faculty. (It bears mention that faculty at some schools may have already engaged in collective bargaining agreements that adopt a "clear and convincing standard" for employee disciplinary proceedings.) This provision departs from the NPRM, which would have only permitted use of the preponderance standard if a school used the same standard in other disciplinary proceedings that carried the same sanctions; and it contrasts with guidance issued under the Obama Administration, which instructed schools to use a preponderance of the evidence standard to adjudicate allegations, rather than giving schools an option to employ a more stringent standard.

Schools must allow for appeals of decisions (and dismissals of a formal complaint) to both parties in cases of procedural irregularity, new evidence, or a conflict of interest or bias by a Title IX coordinator, investigator, or decisionmaker(s). This provision contrasts with the NPRM, which did not require schools to offer appeals. Schools may also offer appeals on different grounds to both parties equally. The decisionmaker(s) in an appeal may not be the original decisionmaker(s), investigator(s), or Title IX coordinator. The regulations do not specify which sanctions that schools must apply in cases of misconduct.

Informal Resolution

In cases of student-to-student harassment in which a formal complaint was filed, schools may facilitate informal resolution procedures such as mediation that lack the formal procedures described above. Schools must first obtain the parties' voluntary, written consent to do so, and must permit parties, at any time before resolution, to withdraw and resume the formal grievance procedures. This contrasts with earlier ED guidance that cautioned against the use of mediation to resolve complaints.

Retaliation

Finally, the regulations prohibit retaliating against individuals for participating (or not participating) in Title IX procedures. Charging someone for a code of conduct violation that does not involve sexual harassment, but stems from the same circumstances in a complaint, can constitute retaliation.

Conclusion

The responsibilities of schools in responding to allegations of sexual harassment under Title IX have shifted significantly in recent administrations. ED's regulations will impose new obligations that depart from the agency's previous requirements; and the regulations are already being challenged in federal court. Given their promulgation after a notice and comment period, agency alteration in the future will require a new round of rulemaking procedures, accompanied by a reasonable explanation for any changes. If Congress is dissatisfied with the regulation, options include amending Title IX to provide a definition of sexual harassment or delineating more specifically a school's obligations under the statute. Alternatively, pursuant to the Congressional Review Act, Congress could pass a joint resolution of disapproval within the time limits that statute requires. Finally, Congress may also seek to limit

enforcement of those aspects of the regulation it might disagree with through appropriations riders, though these provisions generally expire at the end of the relevant appropriations cycle.

Author Information

Jared P. Cole
Legislative Attorney

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