

# TITLE IX UPDATE

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May 16, 2020

## Title IX – *what changed and next steps*

On May 6, 2020, the U.S. Department of Education issued long-awaited Title IX final regulations which will become effective on August 14, 2020. Shortly after the Trump administration took office, the DOE withdrew previous Title IX guidance documents (e.g., sexual violence on school campuses and guidance for LGBTQ students). The revised draft regulations were released for public comment in December 2018. Eighteen months later, the final regulations were issued just last week.

The new regulations are a substantial departure from previous guidance. One important thing to bear in mind as you consider the impact of the new regulations is that the requirements for post-secondary institutions are generally much more complex compared to K-12 schools. For example, the 2033-page [DOE comments and analysis](#) document states that [at page 2004]:

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*“We estimate that elementary and secondary schools and other recipients of Federal financial assistance will take **12 hours** and postsecondary institutions will take **104 hours** to establish and maintain a recordkeeping system for the required sexual harassment documentation during Year 1.”*

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Some of the more significant changes include the definition of sexual harassment, when and how schools must respond to allegations of sexual harassment, the requirement to provide supportive measures to all students involved, the grievance and record-keeping process, the standard of proof used in proceedings and the overall rights guaranteed to both victims and perpetrators.

We recognize that you have many other challenges to address at the moment due to the COVID-19 pandemic, but we will be with you every step of the way as you implement these Title IX changes.

#AllInIllinois

## **What is the new definition of sexual harassment?**

The definition of sexual harassment still includes: (1) *quid pro quo* harassment - conditioning aid, benefit, or service in exchange for unwanted sexual conduct, and (2) sexual assault, dating violence, domestic violence, or stalking as defined under the [Clery Act and the Violence Against Women Act](#).

Otherwise, the new definition of 'sexual harassment' is much more narrow than the previous definition which was "unwelcome conduct of a sexual nature." The new definition 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 the [school's] educational program or activity." This definition includes any unwelcome conduct of a sexual nature, including conduct or actions based on sex or sex stereotyping.

## **Must sexual harassment occur at school / on school grounds to be enforceable under Title IX?**

Yes. Effective August 14, 2020, Title IX will only apply to sexual harassment that occurs at school or during an "education program or activity." This includes activities where a school exercises substantial control over the event and the person accused of committing the sexual harassment, whether on school grounds or not.

For K-12 schools, this will include both home and away athletic/extracurricular events, post-prom activities (sponsored by the school only), transportation via bus to and from school, bus stops, transition activities in the community, field trips, etc. It is worth noting that Title IX only governs sexual harassment that occurs in the United States.

## **Does Title IX cover sexual harassment that occurs off-school grounds through electronic means?**

In all likelihood, yes. This determination will depend of the facts of the situation. For instance, a school district's 'education program or activity' will include any communications made on district-issued computers, district-designed digital platforms, and internet networks whether on school grounds or not (remote learning is a perfect example). Another factor to consider will be the 'nexus' of the harassment to the school, *i.e.*, whether the victim is a student or staff member.

Importantly, various Illinois laws require that school personnel investigate and act on inappropriate behavior that violates a school district's code of conduct, no matter where it occurs. For instance, the *Illinois Human Rights Act* protects individuals against sexual harassment. The *Illinois School Code* contains extensive anti-bullying statutes which require school districts to promptly address allegations of bullying between students and staff members, no matter where or how the bullying occurs.

## **When must a school respond to allegations of sexual harassment?**

A school must respond when it has actual knowledge, or notice, of alleged sexual harassment. This is a change from previous guidance, which required school districts to address any instance of sexual harassment that the school "reasonably should have" been aware of. This new standard will likely reduce the number of sexual harassment complaints that are filed and investigations that are conducted.

The new regulations provide that a K-12 school has notice when any employee is aware of the sexual harassment. Any person, including the alleged victim, parent/guardian, teacher, friend or even bystander, has the right to report sexual harassment that would effectively put the school on notice.

When a school has notice of alleged sexual harassment, it must respond "promptly" and in a manner that is not "deliberately indifferent" or otherwise clearly unreasonable in light of the known circumstances. When a school has notice, the Title IX Coordinator must notify the individual who was the victim of the alleged harassment of all options including: 1) the availability of supportive measures to restore access to the educational program and activities (whether or not a formal complaint is filed); 2) the right to file a complaint; and 3) how to file a complaint.

To file a formal complaint, the student (or parent on behalf of the student) must do so with the Title IX Coordinator. To make reporting accessible, districts must prominently display contact information about how to contact the Title IX Coordinator on the district's website and share this information with students, parents/guardians, employees and unions.

A formal complaint can be filed in person, by mail, email, or any other reasonable method. The new regulations provide that the wishes of the victim must be taken into account. When the victim does not file a formal complaint, the Title IX Coordinator may still initiate grievance procedures when discipline might be warranted for the perpetrator. Once a formal complaint is initiated, it must be investigated to completion.

School districts must also use grievance procedures that are consistent with the final regulations before implementing disciplinary or other actions that are not supportive measures. Changes to the investigative and grievance procedures will be addressed later in this newsletter.

### **What are supportive measures?**

Supportive measures are available for both victims and perpetrators. They consist of free, individualized services designed to restore or preserve equal access to education, protect safety or deter sexual harassment from occurring again. Supportive measures must be made available to the complainant even in situations where a formal complaint is not filed. As the name implies, supportive measures are intended to support a student and may not be punitive, disciplinary or unreasonably burdensome.

Examples of supportive measures include counseling, modifying a student's schedule, extending deadlines for assignments and restricting contact between students. The DOE has noted that actions such as sending a student to the principal's office or changing a student's seat or schedule fall well within the school's right to maintain order and protect safety and are not inherently punitive or disciplinary. Conversely, suspensions and expulsions are considered punitive in nature; they cannot be imposed without following the established grievance procedures. The Title IX Coordinator is responsible for the implementation of supportive measures.

### **How have the new Title IX regulations changed how a school must respond to sexual harassment?**

The new Title IX regulations have changed the entire landscape of a school's obligations when responding to instances of sexual harassment. First and foremost, the Title IX regulations will have the force of law on August 14, 2020. Under the Obama administration, Title IX obligations were issued in the form of guidance documents, typically in question and answer format.

Second, the new Title IX regulations create two separate and distinct obligations governing investigations and hearings. Previously, a Title IX complaint could be resolved with an investigation and a determination by the investigator or Title IX Coordinator that sexual harassment occurred. Under the new Title IX regulations, the investigation process is separate and distinct from the hearing process and the person conducting the investigation may not be the same person that ultimately decides whether the harassment occurred or not.

In the case of higher education institutions, a live hearing is required. For K-12 institutions, a live hearing is not required, however, a school district must, after investigation and before decision, provide each party with the opportunity to submit written questions that they want to ask any party or witness. The school is required to 'shuttle' these questions and answers back and forth between the parties. The school is also charged with deciding which questions are (or are not) relevant, in the school's sole discretion. Based on these new requirements, Title IX policies will require extensive revision.

### **Has there been a shift in the underlying principles surrounding a school's obligations to respond to sexual harassment?**

The new regulations evidence a significant shift in the underlying policy of Title IX. The Obama administration prioritized the reporting of sexual harassment without providing robust due process rights for alleged perpetrators. The new Title IX regulations seek to provide more balance in this respect, with a focus on fairness to all parties, including individuals accused of sexual harassment. The new Title IX regulations give a host of rights to perpetrators to be able to investigate the alleged incident and confront witnesses and victims either through back and forth written questions or a formal hearing process. On the other hand, the new regulations create a much higher standard for making a determination that sexual harassment has occurred, which critics fear will result in fewer complaints being filed.

### **Do the new regulations include protections that are specific for LGBTQ students?**

No. The DOE declined to include any specific provisions relating to LGBTQ individuals. The DOE analysis states that the sexual harassment of any student, including LGBTQ students, is strictly prohibited.

### **Do the DOE regulations address locker room or restroom use for LGBTQ students?**

No. The DOE specifically declined to address discrimination on the basis of gender identity or other issues raised in the DOE's 2015 letter regarding transgender students' access to facilities such as restrooms and the 2016 "Dear Colleague Letter on Transgender Students." Both of these guidance documents have been archived, which is a polite term used to mean 'not in effect' and not subject to enforcement by the DOE.

### **Should investigations under the new Title IX regulations be conducted differently than before?**

School districts are still required to gather evidence and investigate whether the alleged sexual harassment occurred. Schools must also provide notification to the parties at various stages of the investigation just as they have in the past.

One significant change is that the new Title IX regulations give the parties (not just the school district) the ability and right to gather evidence regarding allegations of sexual harassment. Although the school district still determines the time frame of the investigation and the decision making process, schools will now have to take into consideration a party's request to interview witnesses, request records, etc. This will prove to be unwieldy in K-12 settings and will require extensive policy language revisions.

Another significant change that was not anticipated is that the individual conducting the Title IX investigation (typically the Title IX coordinator) may not be the same person who makes the ultimate finding or decision regarding whether the sexual harassment occurred. The final decision maker will potentially be another administrator in the school district (*e.g.*, superintendent) or perhaps even the board of education.

### **Are Title IX hearings required for K-12 school districts?**

No. Although there is a live in-person hearing requirement contained in the regulations, it is only applicable to post-secondary institutions. K-12 school districts may opt to hold hearings but are not required to do so. As mentioned directly above, K-12 institutions is required to provide each party the opportunity to ask questions of each other and any witnesses in writing before a final decision is made. Once the school obtains answers to these questions, the school must provide those answers to all parties and allow the opportunity for further follow-up. This rather convoluted process of passing written questions back and forth must be taken into consideration by school districts and calculated into their Title IX investigation timelines.

### **How has the grievance and/or hearing process changed?**

Most of the major changes contained in the new Title IX regulations fall within the grievance process and focus on increasing the rights of perpetrators. Many of these requirements are general principles that have always underscored the Title IX investigation and grievance process. A school district's grievance process must:

- Ensure the decision-maker is not the same person as the investigator or the Title IX Coordinator (*i.e.*, no "single investigator models");
- For postsecondary institutions, convene a live (in-person) hearing and allow cross-examination by party advisors (never by the parties personally);
- K-12 schools do not need to hold a hearing, but parties must be invited to submit written questions for the other party/witnesses to answer, if the questions are determined in advance to be relevant by school personnel;
- Protect all complainants from inappropriately being asked about prior sexual history (known as "rape shield" protection);
- Give both parties written notice of the allegations, an equal opportunity to select an advisor of the party's choice (who can be an attorney or advocate), and an equal opportunity to submit and review evidence throughout the investigation;

- Use trained Title IX personnel to objectively evaluate all relevant evidence without prejudgment of the facts at issue and free from conflicts of interest or bias for or against either party;
- Apply a presumption that the respondent is innocent until proven guilty (“presumption of innocence”); and
- Use either the preponderance of the evidence standard or the clear and convincing evidence standard (which must be the same for complaints against students as well as employees).

### **What standard of evidence must K-12 schools use?**

In a development that will undoubtedly add confusion to the process, K-12 schools may now choose between the “preponderance of evidence” (easier to meet) standard or “clear and convincing” (harder to meet) standard of evidence when determining Title IX violations. Previously, all schools were required to base their investigations on the preponderance of evidence standard, which is the easier standard to meet.

- *Preponderance of evidence standard:* means a finding that it is more likely than not that the sexual harassment occurred. Essentially, the preponderance of evidence standard is met when a finder of fact has determined with 50.1% certainty that sexual harassment occurred.
- *Clear and convincing” standard:* is considered a medium level burden of proof. Although more rigorous than the preponderance of the evidence standard, it is less rigorous than the standard used in criminal cases, which is “beyond a reasonable doubt.” The clear and convincing standard of evidence means that it is highly and substantially more likely to be true than untrue. In layperson terms, a fact finder must be convinced that it is highly probable that the sexual harassment occurred. If asked to quantify the clear and convincing standard, it would more or less translate into the fact finder being 75% sure that the sexual harassment occurred.

While K-12 schools are now free to choose which standard of evidence to use, all sexual harassment proceedings must use the same standard of evidence whether the respondent is a student or employee.

### **How have complainant (victim) rights changed?**

Under the new Title IX regulations, the decision to file a formal complaint and initiate an investigation of sexual harassment rests with the complainant. The only way a complainant’s wishes can be overridden is if the Title IX coordinator signs a formal complaint to move forward with an investigation. This decision must not be clearly unreasonable in light of the known circumstances. This new rule gives much more power to complainants to decide whether to pursue complaints and is expected to result in fewer complaints of sexual harassment being filed. Previously, a school was obligated to investigate sexual harassment complaints regardless of the complainant’s cooperation as long as the school maintained the confidentiality of the victim, to the extent that was possible to ensure a thorough investigation.

### **Where can I get more information about the new Title IX regulations?**

The [U.S. Department of Education](#) is a good first stop for information regarding the new Title IX regulations. The DOE has published the following documents: Title IX Final Rule Overview, Summary of Major Provisions of the Department of Education’s Title IX Final Rule, Summary of Major Provisions of the Department of Education’s Title IX Final Rule and Comparison to the Notice of Public Rulemaking. The DOE also conducted a webinar on the new regulations which gives a helpful overview of the new regulations.










### **What are the next steps a school district should take in response to the new regulations?**

Although the regulations do not go into effect until August 14, 2020, it would be prudent for school districts to train the administrator that acts as the Title IX Coordinator and all other administrators that oversee these types of complaints. Under the new regulations, Title IX coordinators, investigators, decision-makers, and anyone involved in informal voluntary resolution efforts must receive training on the new regulations. School districts will also be required to revise their Title IX policies to comply with the new regulations prior to taking effect on August 14, 2020. We will continue to provide more information and are available to help you navigate these changes.



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