What every school district must do to comply WITH THE NEW Title IX Regulations Addressing Sexual Harassment

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On May 6, 2020, the United States Department of Education issued its long-awaited Final Regulations (the “Regulations”) that focus on Title IX protections for victims of sexual misconduct. The new regulations impose a number of requirements that will significantly alter the response of many school districts to complaints of sexual harassment. Though lawsuits have been filed to enjoin the Regulations, they are scheduled to become effective on August 14, 2020. Accordingly, every school district (“District”) must begin taking steps to comply with these Regulations now. This Article cannot address every requirement, but will highlight the processes and procedures that every District must have in place by the beginning of the 2020-2021 school year.

What is Title IX?

Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (“Title IX”), provides: “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 . . . .” Sexual harassment is a form of sex discrimination and, while the Department of Education has previously addressed the topic through guidance documents, these are the first regulations which will have the force of law when they become effective.

What is Sexual Harassment?

Any of the following conduct on the basis of sex constitutes sexual harassment: 1) a District employee conditioning an educational benefit or service upon a person’s participation in unwelcome sexual conduct (often called “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, dating violence, domestic violence, or stalking.

What Policies, Procedures and Processes Must a District Develop to Comply with the Regulations?

The District must adopt a policy stating that it does not discriminate on the basis of sex in the education program or activity that it operates, and that it is required by Title IX and the Regulations not to discriminate in such a manner. This policy must be set forth on the District’s website and each handbook or catalog it publishes. The District must also notify Interested Persons (e.g., applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions) of this policy.

Each District must also adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints that do not amount to sexual harassment and a grievance process for formal complaints. The District must provide Interested Persons notice of the District’s grievance procedures and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the District will respond.

The grievance process must, among other things: 1) treat complainants (alleged victims) and respondents (accused perpetrators) equitably; 2) require an objective evaluation of all relevant evidence and provide that credibility determinations may not be based on a person’s status as a complainant, respondent, or witness; 3) require that Title IX

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Personnel not have a conflict of interest or bias; 4) start with presumption that the respondent is innocent; 5) include reasonably prompt time frames for conclusion of the grievance process; 6) describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies; 7) identify whether the preponderance of the evidence standard or the clear and convincing evidence standard will be used and apply the same standard to all cases; and 8) include appeal procedures and bases to appeal.

What Positions is a District Required to Create to Comply with the Regulations?

To comply with the Regulations, each District must designate employees and other individuals to serve in the following roles: Title IX Coordinator, Investigator, Decision-Maker and Facilitator of Informal Resolution Process (collectively “Title IX Personnel”). Each role is different and comes with its own set of requirements and restrictions.

As with the notification and publication requirements related to its policies and procedures, the District must notify all Interested Persons of the name and/or title, office address, electronic mail address, and telephone number of the Title IX Coordinator(s) and that it does not discriminate on the basis of sex (the Regulations provide the exact required wording). This information must be set forth on the District’s website and each handbook or catalog it publishes.

What are the Training Requirements for Title IX Personnel?

In addition to designating Title IX Personnel, each District must train them. The required training includes training on: 1) the definition of sexual harassment; 2) the scope of the school’s education program or activity; 3) how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable; and 4) how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.

In addition, Districts must ensure that Decision-Makers receive training on any technology to be used at a live hearing. District Decision-Makers and investigators must receive training on issues of relevance, including how to apply the rape shield protections provided only for complainants.

Finally, Districts must post the materials used to train Title IX Personnel on their websites, if any, or make the materials available for members of the public to inspect.

How Should a District Respond to a Sexual Harassment Complaint?

Generally, the Regulations require a District to respond “promptly” and not in a “deliberately indifferent” manner (i.e., not “clearly unreasonable in light of the known circumstances”) when it has “actual knowledge” of “sexual harassment” in its “education program or activity” against a person in the United States.

Initial Steps

When the District has “actual knowledge” of allegations of sexual harassment, the Title IX Coordinator must: 1) promptly contact the complainant to discuss the availability of supportive measures; 2) consider the complainant’s wishes with respect to supportive measures, 3) inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and 4) explain to the complainant the process for filing a formal complaint.

If a formal complaint is filed, the District must provide to all known parties: 1) written notice of the allegations with sufficient time to prepare a response before any initial interview; and 2) a copy of the District’s grievance process.
In addition, the written notice must: 1) include a statement that the respondent is presumed not responsible for the alleged conduct; 2) inform the parties that they may have an advisor of their choice (e.g., an attorney) and may inspect and review evidence; and 3) inform the parties of any provision in the District’s code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

Investigation:

The District must investigate the allegations made in a formal complaint. When investigating a formal complaint and throughout the grievance process, the District must: 1) ensure that it bears the burden of proof and the burden of gathering evidence; and 2) not restrict the ability of either party to discuss the allegations or to gather and present relevant evidence.

The Investigator, in turn, must: 1) provide an equal opportunity for the parties to present witnesses and other inculpatory and exculpatory evidence; 2) give the parties the same opportunities to have others present at any grievance proceeding; 3) provide sufficient notice so that a party can prepare for and participate in the hearings, investigative interview or other meetings to which they are invited or expected to participate; and 4) provide an equal opportunity to inspect and review any evidence obtained as part of the investigation.

The Investigator must create an investigative report that fairly summarizes relevant evidence and share it with the parties at least 10 days prior to a hearing or other time of determination so that the parties can respond. Prior to the completion of the investigative report, the District must provide the evidence subject to inspection and review to the parties and the parties must have at least 10 days to submit a written response which must be considered by the investigator prior to completing the report.

The Determination

After the District has sent the investigative report to the parties and before reaching a determination regarding responsibility, the Decision-Maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants 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(s) must issue a written determination regarding responsibility based on the standard of evidence adopted by the District’s grievance process (preponderance of the evidence or clear and convincing evidence).

Appeal

The Regulations provide that Districts must offer both parties an appeal from a determination regarding responsibility determination or from a dismissal of a formal complaint or any allegations therein, if a party asserts that: 1) a procedural irregularity that affected the outcome of the matter; 2) newly discovered evidence that could affect the outcome of the matter, and/or 3) Title IX personnel had a conflict of interest or bias, that affected the outcome of the matter. Districts may offer additional bases for appeal.

If an appeal is filed, the Appeal-Decision Maker may not be initial Decision-Maker, the Investigator, or the Title IX Coordinator.

How Can Formal Complaints Be Resolved Prior to the Determination?

Dismissal of the Formal Complaint
The Regulations provide that a District must dismiss the formal complaint if the conduct: 1) would not constitute sexual harassment even if proved; 2) did not occur in the recipient’s education program or activity; 3) or did not occur against a person in the United States. Such a dismissal does not preclude action under another provision of the recipient’s code of conduct.

The District may dismiss the formal complaint if: 1) a complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein; 2) the respondent is no longer enrolled or employed by the recipient; or 3) specific circumstances prevent the District from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

Informal Resolution Process

Though not required, Districts may offer an informal resolution process (e.g., mediation) for cases involving allegations that a student sexually harassed a student if a formal complaint has been filed. An informal resolution process cannot be offered if the alleged perpetrator is an employee.

To engage in an informal resolution process, the District must obtain voluntary, written consent from the involved individuals and their parents/guardians after providing written notice disclosing: 1) the allegations; 2) the requirements of the informal resolution process; and 3) the consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.

Under What Circumstances Can a Respondent be Removed Prior to a Determination?

Districts may remove a respondent on an emergency basis, provided that the District undertakes an individualized safety and risk analysis, determines that an immediate threat arising from the allegations justifies removal, and provides the respondent with notice and an opportunity to challenge the determination immediately following the removal.

Conclusion

While this article cannot address every issue and requirement contained in the Regulations, it certainly conveys the fact that Districts have a lot to do before the 2020-21 school year begins. Districts should work with their solicitor to determine what they must do this summer to ensure that they are in compliance including: 1) review and revise Title IX policies and procedures; 2) review and revise codes of conduct and handbooks; 3) conduct training for Title IX Personnel and staff; and 4) provide via the District website information such as the Title IX Coordinator’s contact information, the District’s grievance process, and the District’s professional development materials.