

## Part II in a Series: Is Your District Prepared to Implement the New Title IX Regulations at the Start of the 2020-2021 School Year? Initial Response to Allegations of Sexual Harassment

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### Education Law Notes

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The U.S. Department of Education has placed much emphasis lately on its concerns over sexual harassment occurring on college campuses and how colleges are investigating complaints and disciplining students accused of harassment and assault. Recent well-publicized law suits have been brought against colleges and universities by students claiming they were not given sufficient due process prior to being expelled for allegedly engaging in sexual misconduct. While the new Title IX Regulations (the Regulations) place significant emphasis on postsecondary schools, their detailed and onerous processes almost all

apply to elementary and secondary schools as well. A major focus in the Regulations is to ensure that alleged victims and perpetrators are treated equitably during any complaint process. Commentators on the Regulations have expressed concern either that the new Regulations will deter students from reporting sexual harassment and assaults or that the Regulations do not go far enough to protect the rights of students accused of sexual misconduct. One thing, however, is clear, that districts will need to put new sexual harassment complaint processes in place in order to comply with the August 14, 2020 implementation deadline.

#### When Must A School Respond to Sexual Harassment?

A response is required if the school has knowledge of the alleged harassment. A K-12 school is required to respond to sexual harassment “whenever any employee has notice of sexual harassment.” The school must respond in way that at a minimum shows it is not being deliberately indifferent (i.e. not clearly unreasonable in light of the known circumstances at the time) to the harassment. This will put districts in the precarious position of potentially being liable for sexual harassment that was revealed to a custodian, cafeteria worker, or even a part-time clerical worker. While a school must always respond, that does not mean that a formal

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complaint investigation must always happen. A response in an appropriate situation could be as simple as providing the complainant or the respondent with supportive measures or as complex as a formal finding of harassment and issuance of official discipline.

### **Who Can Report Sexual Discrimination Including Harassment?**

In short: Anyone. The report can be made in person, through the mail, by telephone or electronic mail to the Title IX Coordinator.

### **What Must a School's Response to a Complaint of Sexual Harassment Include?**

Upon receipt of an allegation of sexual harassment, the Title IX Coordinator must promptly contact the complainant to discuss supportive measures and explain the complaint process. If a formal complaint is filed, the school must follow its grievance procedures, which procedures must comply with the Regulations. Even if the victim chooses not to file a formal complaint, the school still must, at a minimum, offer supportive measures.

### **What is the Standard That Must be Met Before Finding a Respondent Engaged in Sexual Harassment?**

Districts must specifically choose whether to use the "clear and convincing evidence" or the "preponderance of the evidence" standard for all formal complaints of sexual harassment. The standard chosen must apply both to situation where a student is the alleged perpetrator and where a staff member is the alleged perpetrator.

### **What Are the Training Requirements?**

As will be discussed in a future installment, the grievance process includes not only the Title IX Coordinator, but an investigator, an original decision maker, and an appeal decision maker. All these individuals, as well as any person who facilitates an informal resolution process, must, at a minimum, receive training on: (1) the definition of sexual harassment, (2) how to conduct an investigation, (3) issues of relevance to create an investigative report that fairly summarizes the relevant evidence, and (4) to the extent the district chooses to use live hearings, the use of technology required for the hearing and determining relevancy of questions and evidence. The training materials used must be published on the district's website. To the extent that a district cannot comply with this requirement because the training materials are copywrite protected, it is suggested that the district maintain the materials in a central location where the public can review them upon request.

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Don't Forget About School Employees' Mandatory Reporter Obligations!

While the Regulations focus solely on Title IX, employees need to be aware of their continuing obligation to report suspected child abuse and neglect to the Department of Children and Families. This obligation runs concurrently with any obligations under Title IX to the extent the conduct in question qualifies as suspected child abuse and/or neglect.

If you wish to discuss any of these issues further, please contact any of the attorneys in our School Law practice group.

Please join Pullman and Comley School Law attorneys for a webinar on the new Title IX regulations on June 4, 2020. You can register for the program [here](#). There will be time for Q&A at the end of the presentation. Participants may submit questions in advance to [mkaufmann@pullcom.com](mailto:mkaufmann@pullcom.com).

**Posted in** Title IX

**Tags:** Sexual Harassment, Sexual Misconduct, U.S. Department of Education