

# Title IX Final Rule Changes That Affect K-12 Schools

July 06, 2020

With a required implementation date of **Aug. 14, 2020**, K-12 schools must quickly make changes to sexual harassment policies and procedures.

Among the many challenges faced by K-12 school districts during this school year, the Department of Education **released its long-awaited Final Rules** under Title IX (“New Rules”). The regulations require sweeping changes for districts and are required to be implemented by August 14, 2020. These changes require districts to change policies, procedures and practices around sexual harassment and emphasize the due process rights of the accused.

The Dear Colleague Letters issued by the Office for Civil Rights in 2011, **2014**, and **2016** (all rescinded) were considered non-regulatory guidance. Thus, schools could implement or refuse to implement the recommendations. Failing to follow those recommendations would be at their peril of course. The New Rules followed the administrative requirement of Notice and Comment period, and thus these requirements have the force of law, and all schools are required to follow them.

As of June 2020, we note that **several Attorneys General throughout the United States joined in litigation** against the Department of Education. That suit seeks to overturn some of this guidance and also delay the implementation date of August 14, 2020, giving all education institutions more time to digest and implement requirements. However, this same group appealed to the Department of Education to hold off issuing these new rules during the pandemic, and such pleas fell on deaf ears.

Below is a brief summary of ten of the changes that will have a great impact on how K-12 school districts manage Title IX complaints as well as links to additional Department of Education resources on these new rules.

## 1. Notice of Sexual Harassment

K-12 schools must respond when **ANY employee** has notice of **sexual harassment**. In the past, districts may have designated only some employees as “responsible employees” with this duty. Because ALL employees have this responsibility under the new rules, districts need to ensure that ALL employees are trained on Title IX, how to recognize potential claims, and how to report it internally to the Title IX Coordinator.

## 2. Definition of Sexual Harassment

The Final Rules have redefined sexual harassment, limiting the definition and scope. This narrow definition is contrary to other legislation.

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

- ***Quid pro quo sexual harassment (Something for Something)***
- ***Hostile environment sexual harassment, defined as unwelcome conduct determined by a reasonable person to be so severe, pervasive and objectionably offensive that it***

*effectively denies a person equal access to the recipient's education program or activity (emphasis added)*

- **Sexual assault, dating/domestic violence, or stalking**
  - **Sexual assault - forcible or non-forcible sexual offenses under the Uniform Crime Reporting System of the FBI.**
  - **Dating violence - violence done by a person who is, or has been, in a dating relationship with the other person**
  - **Domestic violence - violence by a current or former intimate partner**
  - **Stalking - a course of conduct directed at a specific person that would cause a reasonable person to fear for personal safety of self or others, or to suffer emotional distress.**

This definition will limit when a sexual harassment policy violation is found. On its face, it appears that the definition restricts when a hostile environment can be found.

A lot of things happen in schools that are inappropriate and sexually oriented, but fall short of this definition. (Walsh Gallegos 2020). Don't jump to "harassment", investigate "behavior". Some things can be resolved by supportive measures such as: counseling, mutual restricts on contact, modification of schedule, escort while on campus. These allow students to continue to learn and engage at school. Other behaviors may require standard disciplinary measures (Student Code of Conduct).

### **3. Jurisdiction for Title IX**

The Final Rules clarify that a school must dismiss actions that do not occur in an education program or activity under Title IX. Initially, it is noted that a complainant must be currently enrolled or attempting to enroll in an educational program or activity for the complaint to be accepted. Thus, an individual who had transferred out of the district and/or graduated from the district could not file a complaint. The prior guidance looked broadly at what would be investigated, and in many cases, schools would be required to look into a matter even if a complainant or respondent was no longer attending school in the district.

Further, the New Rules state that these matters **MUST** be dismissed if they:

- Would not fit within the definition of sexual harassment
- Did not occur in an education program or activity of the school
- Did not occur in the United States

In addition, the New Rules state that a school **MAY** dismiss complaints if the:

- Complainant withdraws formal complaint in writing
- Respondent is no longer enrolled as a student or employed by the school
- Circumstances prevent the school from gathering evidence that would be sufficient to reach a determination

Each of these limits when a school may respond. Under the New Rules, there are more options for a school to dismiss a matter. In fact, the New Rules make some of those dismissals mandatory. The school

is not responsible for responding to allegations of sexual harassment unless the school had “sustantial control” over the harasser and the “context”.

#### **4. Requirement of Formal Complaint**

Schools are required to investigate formal complaints received in writing from the complainant. The Title IX Coordinator may file and sign a formal complaint. However, the New Rules note that if the complainant does not file a formal complaint, the wishes of the complainant should be respected unless the Title IX Coordinator decides to initiate the complaint and it is “clearly not unreasonable in light of the known circumstances.” The New Rules include no guidance on what a Title IX Coordinator should consider in a determination about bringing a complaint.

#### **5. Response to Report**

The obligation imposed on a school is that it cannot be deliberately indifferent to a report of sexual harassment (this Gebser standard was issued in a Supreme Court decision in 1999). Mandatory obligations include offering “**supportive measures**” to a complainant that must be non-punitive, non-disciplinary, and not unreasonably burdensome on the other party. The measures must be designed to provide both parties with equal access to their education, protect safety, and deter sexual harassment. A school cannot take any measure that could be construed as disciplinary against a respondent at this stage.

The New Rule indicates supportive measures are available to a respondent after a formal complaint is filed. Many of the “interim measures” that schools provided in the past would not be available to the school at the report stage, potentially opening up the door to continued harassment.

#### **6. Grievance Process**

The New Rule identified specific requirements that must be included in the sexual harassment grievance process. Some of these changes are:

- Process must be fair, equitable, without bias or conflict of interest, not reliant upon stereotypes
- Advisors for the parties are permitted, and in some instances, must be provided to the parties
- Separate decision-makers must be involved in the process – i.e., investigator separate from the ultimate decision-maker (policy violation decision)
- Either a preponderance of the evidence or clear and convincing standard can be used to make determinations
- The burden is on the school to gather evidence to support a finding
- Process cannot violate any constitutional protections of any party – First, Fifth and Fourteenth Amendments
- All information gathered in the investigation process must be shared with both parties before a decision is issued
- Appeal allowed for both parties

#### **7. Hearing Panel**

The New Rule permits but does not require K-12 schools to hold a hearing to adjudicate the matter after the initial investigation is completed. A hearing would allow for cross-examination of parties and witnesses by the advisor to a party. If one party has an advisor and the other does not, then the school must provide a trained advisor for the other party for its hearing. The hearing could be run by an officer or a panel. Specific training is required for all panelists/officers.

In the absence of a live hearing, the parties will be permitted to submit questions that will be asked of other parties and witnesses by the decision-maker before a final decision is issued. Because of the substantial burden of instituting a hearing process, it is unlikely that most K-12 schools will voluntarily adopt this model.

## **8. Informal Resolution**

Informal resolution is permitted after the filing of a formal complaint, review of the informal process by the parties, and agreement to participate in the informal process. Either party can leave the informal process and return to the formal process at their election before a final decision is made. In light of the new procedural requirements, schools are expected to develop informal resolution processes to provide a viable option for participants to resolve the matter without going through a time-consuming process.

## **9. Appeal**

The Final Rules indicate that both parties should have an appeal process available after the dismissal of a formal complaint or a finding of a policy violation. This appeal process must include the following basis:

- Procedural irregularity that affected the outcome of the matter
- Newly discovered evidence that could affect the outcome
- Title IX personnel had a conflict of interest or bias that affected the outcome

Schools are permitted to include other bases for appeal beyond those outlined above.

## **10. Timelines**

The New Rules abandon the 60-day investigation completion guideline and advises schools to complete investigations within a reasonable period of time. This open-ended guidance may allow schools to unnecessarily delay investigations in the future.

As the information above indicates, the changes for K-12 school districts are significant. Districts need to assess the changes that must be made and move quickly with the impending implementation date. While many Title IX advocates do not feel that these new regulations do enough to protect victims, they do have the force and effect of law. The implementation date of 8/14/20 means that these changes need to be in place, and staff will need to be trained before the next school year.

**Roles of School Personnel:**

- Title IX Coordinator (usually an administrator)
  - Investigators
  - Decision-makers (can't be Title IX Coordinator or Investigators)
  - Facilitators (mediator) (can't be Investigator or Decision-maker)
  - Advisors (parent / attorney / AP from another campus)
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**Any employee that has knowledge of potential claims of Sexual Harassment of a student or employee at West Rusk CCISD must contact:**

**West Rusk CCISD Title IX Coordinator (Involving a student)**

Gwen Gilliam, Director of Student Services, 903-392-7850 ext. 1111,  
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**West Rusk CCISD Title IX Coordinator (Involving an employee)**

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