

EMERGING LEGAL ISSUES IN URBAN EDUCATION



Final Title IX Regulations and Their Effect on Your District

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What happened?



- Culmination of rulemaking process began in November 2018
- Final rule issued that is effective August 14, 2020
- Final rule has the force of a federal law
- Compliance with the rule is mandatory, not advisory, as with the prior guidance documents, such as the various Dear Colleague Letters



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What will the regulation do?

- Set the standard for administrative enforcement of Title IX
- Will not alter standards for lawsuits seeking money damages for violation of Title IX
- Will necessitate many changes in school districts' Title IX policy, procedures and practices
- Will not alter district policies governing other forms of protected-status harassment (including potentially non-Title IX related sexual harassment)



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When do we need to comply?

- As of now, regulation is effective August 14, 2020
- As of now, non-compliance as of August 14, 2020 could result in an administrative finding of non-compliance
- Litigation challenging the regulation filed by ACLU
- Potential that federal court injunctions may alter the effective date for all or portions of the regulation



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Programmatic Scope

- Title IX obligations apply to “sexual harassment” in an education program or activity
- Includes on school grounds
- Includes education program or activity not on school grounds
- Does not apply to off school grounds, private settings, that are not an education program or activity



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Definition of Sexual Harassment

- Final Rule defines sexual harassment to include three types of misconduct **on the basis of sex**:
 - (1) *quid pro quo* harassment by a school's employee;
 - (2) any unwelcome conduct that a person would find so severe, pervasive **and** objectively offensive that it denies a person equal educational access;
 - (3) any instance of sexual assault (as defined in Clery), dating violence, domestic violence, or stalking (as defined in VAWA)



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Example:

Student A reports that Student B sexually assaulted Student A three weeks ago in a private, off-campus house. No officially recognized student organization or school employee was involved. There is no claim of any additional misconduct occurring on school grounds or in district or school programs or activities.



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Temporal Scope

- “Formal complaint” can be filed by an alleged victim (or his or her parents) (*i.e.*, a “complainant”) or the Title IX Coordinator
- An alleged victim can file a formal complaint only if:
 - The complainant is participating in education programs or activities; or
 - Is attempting to participate in education program or activities
- May close a case if the respondent is permanently separated from district



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Example:

Title IX Coordinator receives a complaint from Alumnus A who graduated in 2019. Alumnus A reports that Student B, who is currently a junior, groped Alumnus A’s genitals without consent on a school bus on the way back from a varsity football game in the fall of 2018. The football program is recognized by the school/district. Alumnus A is now a student at a university located several states away.



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Application to Employees

- The regulation's mandatory requirements for investigation and grievance procedures apply to cases involving students and employees
 - Regulation does not distinguish between at-will employees or those under an employment contract
 - Regulation does not distinguish between classes of faculty
 - Regulation does not supplant other obligations under Title VII or other employment laws



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Example:

An at-will custodial worker is accused of sexually harassing a student in the hallway. A month ago, the custodial worker had been placed on an improvement plan for being late to work. The worker has complied with the improvement plan and but-for the accusation of sexual harassment, the District would have continued to employ the custodial worker. The District is now considering terminating the worker's employment.



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Actual Knowledge

An institution's response obligations are triggered when it has "actual knowledge"

- Who: "any employee of an elementary and secondary school"
- What: Title IX Coordinator must promptly reach out to alleged victim and offer supportive services
- Actual knowledge does not necessarily trigger obligation to conduct formal investigation and hearing process
- Highlights necessity of having clear protocol regarding reporting potential violations to Title IX Coordinator

"promptly contact the complainant to discuss the availability of supportive measures"

"consider the complainant's wishes with respect to supportive measures"

"inform the complainant of the availability of supportive measures with or without the filing of a formal complaint"

"explain to the complainant the process for filing a formal complaint"



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Example:

A school librarian overhears Student A tell Student B that Student A was sexually assaulted in a classroom last weekend after band practice. The librarian observes Student A crying, telling Student B that she hasn't been able to attend class, and that she's planning to file a "Title IX Complaint."



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Supportive Measures

Title IX Coordinator has responsibility to oversee offering and implementation

- Must be offered to an alleged victim once an institution has actual knowledge of potential harassment
- Must be offered also to respondent once a formal complaint is filed
- Non-disciplinary in nature; no disciplinary measures until end of investigation and grievance process

- Counseling
- Extensions of deadlines or other course-related adjustments
- Modifications of class schedules
- School escort services
- Mutual restrictions on contact between the parties
- Leaves of absence
- Increased security and monitoring of certain areas of the school grounds
- "Other similar measures"



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Interim Removals

- Permissible for students only when individualized assessment finds:
 - Immediate threat
 - To the physical health or safety of any student or other individual arising from the allegations of sexual harassment
- Must be given opportunity to challenge immediately after the removal
- Employees can be placed on administrative leave



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Example:

Student A files formal complaint against Student B alleging that Student B has repeatedly made inappropriate sex-based comments about Student A during classes and lunch. Student A indicates she is suffering extreme emotional distress as a result of Student B's actions and wants Student B removed from school pending an investigation.



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Informal Resolution

Permissible only after a formal complaint is filed

- Parties must provide voluntary, written consent after receiving detailed notice of allegations and explanation of informal resolution process
 - *How will you assess voluntariness?*
 - *What methodology? Who will facilitate?*
- Never permitted where accusation is that employee sexually harassed a student



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Website Revisions

Districts must prominently display on their websites:

- Name of Title IX Coordinator
- Contact information of Title IX Coordinator, including phone number, e-mail, fax (if applicable) and physical address office/location
- 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
- Training materials



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Investigation Process

- Preliminary investigation required to identify alleged victim if not apparent from report
- Formal investigation triggered by “formal complaint”
 - Detailed written notice
 - Equal opportunity to present evidence and witnesses (including experts)
 - Access to the evidence
 - Opportunity to view written report



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Example:

During investigation, respondent hires an expert who will opine that complainant was not incapacitated at the time of an alleged sexual assault. The complainant does not have an expert and cannot afford one. The investigator is uncertain about the purported expert's credentials and the reliability of his claimed methodology.



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Hearing Process

- Not required for K-12 (required only for higher education) – but permissible
- Formal hearing administered by “decision-maker(s)”
 - Each party’s advisor has the right to ask relevant questions and cross-examine witnesses and parties
 - District must provide advisor (does not have to be a lawyer) to a part who does not have one
 - “Decision-maker(s)” must make contemporaneous rulings on relevancy and objections and explain their rationale
 - Testimony of persons who refuse to submit to cross-examination is excluded
 - “Decision-maker(s)” must issue written decision with rationale



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Standard of Evidence

- May use preponderance or clear and convincing
 - Standard must be used uniformly for all cases regardless of respondent
 - There is a presumption that the respondent did not violated the policy
 - The district bears the burden of proof and of collecting relevant information



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Appeals

- Must be offered to both parties on the following grounds:
 - Procedural irregularity that affected the outcome
 - New evidence not reasonably available that could affect the outcome
 - Conflict of interest by district/school participants that affected the outcome
- Non-appealing party must be given a chance to respond



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Training

- Training required for all district/school participants in the process, including Title IX coordinators, investigators, initial and appellate decision-makers, and any others involved in the process
 - Training must be non-biased and not rely on stereotypes
 - Training for district/school participants in a given case must be retained for seven years
 - Training documents must be posted on district's website



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Records Preservation

- Complete records of every case kept for a period of seven (7) years
 - Formal cases
 - Informal resolutions
 - Cases where only supportive measures are provided (must include rationale for not proceeding formally)
- Parties have right to access the records



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FERPA

- Regulation indicates that Title IX explicitly pre-empts FERPA to the extent of any conflict between the two
- Eliminates need to seek FERPA waivers to the extent information is being shared for a reason mandated by the regulation



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Preemption of State Law

- Regulation preempts state and local laws to the extent those laws are inconsistent with the regulation's definition of sexual harassment and its mandates for the investigation and grievance process



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Example:

District is located in a state that passed a law defining sexual harassment for purposes of the district's Title IX policy as "Any unwelcome conduct of a sexual nature." State law also precludes any direct cross-examination of complainant by the respondent or the respondent's representatives.



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Questions?



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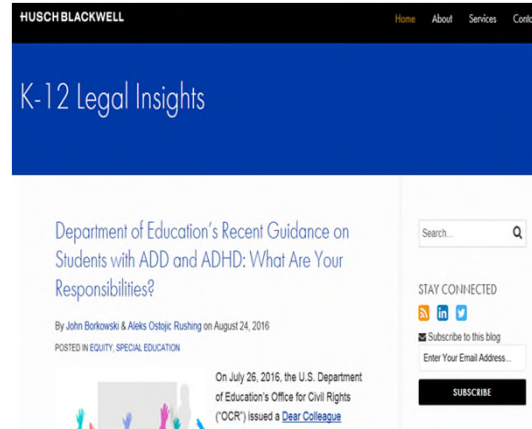
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