How Do the New Title IX Regulations Affect HR?

TASPA Conference

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Title IX of the Education Amendments of 1972

- Title IX is all of 37 words.
- It prohibits discrimination based on sex in educational institutions that receive federal financial assistance.

- Harassment based on sex is a form of discrimination based on sex. This has been established in the law for a long time.

- Specific guidance on compliance has been limited, until now.
  - No officially adopted regulations addressing sexual harassment or school response
  - Primary guidance from court interpretations and “Dear Colleague” letters issued by the Department of Education (DOE).
Doesn’t Title IX only address student harassment?

- Yes, but...
- The new regulations also address sexual harassment in the employment context.
- Historically, Title VII of the Civil Rights Act of 1964 has been the exclusive legal avenue for addressing claims of employment discrimination.
- The EEOC and TWC are the agencies that investigate and enforce alleged violations of Title VII. Will OCR now investigate claims of employment discrimination?
- It is yet to be seen whether courts will now recognize a cause of action under Title IX for employees alleging sexual harassment, in light of the new regulations.
How could the new regs impact HR?

- Employee to student harassment
  - Inappropriate relationships
  - Gender-based harassment or stereotyping
- Employee to employee harassment
  - Peer-to-peer
  - Supervisor to subordinate
All employees are potential reporters and must report.

Districts need to train ALL employees on this responsibility. If you do not use an outside trainer, then the T9C is likely going to be tasked with this training.
WHAT IS SEXUAL HARASSMENT?
Definition: Title IX Sexual Harassment
34 CFR 106.30(a)

- Six Types of Sexual Harassment
  - Quid pro quo
  - Hostile environment
  - Sexual assault
  - Dating violence
  - Domestic violence
  - Stalking
Sexual Harassment = unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person's equal access to the recipient's education program or activity (i.e., quid pro quo, hostile environment, sexual assault, dating violence, domestic violence, stalking)
Definitions: Quid Pro Quo

- *Quid pro quo*: When an employee conditions favorable treatment on the acceptance of unwelcome sexual attention.
- This definition applies only to actions of employees.
  - Teacher offers good grades to student.....
Definitions: Hostile Environment

- Conduct that it is so SEVERE, PERVASIVE AND OBJECTIVELY OFFENSIVE that it effectively DENIES a person EQUAL ACCESS to the program.

- What has changed from prior guidance?
  - OR → AND
  - LIMITS → DENIES
  - These changes are consistent with judicial interpretations but a departure from prior OCR guidance.

- This could be student-to-student conduct, employee-to-student conduct, or employee-to-employee conduct.

- Note: Many events that happen in schools are inappropriate and sexually oriented, but will fall short of this definition.
Sexual Harassment: The Clery Act and VAWA

- The Clery Act and the Violence Against Women Act address four types of violence that are each considered forms of sexual harassment under Title IX:
  - Sexual Assault
  - Dating Violence
  - Domestic Violence
  - Stalking
Sexual Harassment: Sexual Assault

- **Sexual assault**: Forcible or non-forcible sexual offenses under the Uniform Crime Reporting System of the FBI.

- **Rape**: The penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.

- **Fondling**: The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is unable to consent (age, disability).

- **Incest**: Sexual intercourse between persons who are related to each other an unable to marry.

- **Statutory Rape**: Sexual intercourse with a person who is under the statutory age of consent.
Sexual Harassment: Dating Violence

- Dating violence: Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim.

- Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse. Dating violence does not include acts covered under the definition of domestic violence.
Domestic violence: A felony or misdemeanor crime of violence committed by:

- a current or former spouse or intimate partner of the victim;
- a person with whom the victim shares a child in common;
- a person who is cohabitating with, or has cohabited with, the victim as a spouse or intimate partner;
- a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred; or
- any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred.
Sexual Harassment: Stalking

- **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.

- **Course of conduct** means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about, a person, or interferes with a person's property.

- **Substantial emotional distress** means significant mental suffering or anguish that may, but does not necessarily require medical or other professional treatment or counseling.

- **Reasonable person** means a reasonable person under similar circumstances and with similar identities to the victim.
Other Terminology
Terminology

- **Complainant** = victim of sexual harassment
- **Respondent** = person accused of sexual harassment
- **Formal Complaint vs. “Report”** = report is verbal or in writing by *anyone* while a formal complaint may be initiated by complainant or T9C
- **Actual Knowledge** = when *any* employee has knowledge
- **Substantial Control** = over both the alleged harasser and the context in which the harassment occurred
- **Education program or activity** = any academic, extracurricular, vocational or other education program operated by a district
Complainant

- This term always refers to the victim of sexual harassment, even if someone else is the one who made the complaint.

- Employee A reports that Co-worker B is being harassed. Employee A has made the report, but Co-worker B is the “complainant.”
This term refers to the person accused of sexual harassment.

Note: these terms (Complainant, Respondent) apply even when there is a Report, but no Formal Complaint.

Example: Mom complains that Billy is being harassed by a coach based on his sex. Billy is the Complainant and Coach is the Respondent.

Example: Teacher reports that Principal is making sexually inappropriate comments to him. Teacher is the Complainant and Principal is the Respondent.
Supportive Measures

Supportive Measures = Non-disciplinary, non-punitive individualized services offered to Complainant or Respondent at no charge designed to “restore or preserve equal access to…the education program or activity without unreasonably burdening the other party” whether or not a formal complaint is filed.

Examples:
- Counseling.
- Mutual restrictions on contact.
- Modification of schedule.
- Campus escort services.
What does “actual knowledge” mean?

- This term is important because the school’s duty to respond arises only when it has “actual knowledge” of sexual harassment, or of allegations of conduct that, if true, would constitute sexual harassment.

- Under the regs, the school has “actual knowledge” when any employee of the school—other than the actual perpetrator of the harassment—has actual knowledge.

- What has changed?
  - Previously, actual knowledge was imputed to the school only when it was known by someone who had the authority to address it.
  - Now, it is any employee.
Why is that important for HR?

- All employees need to be trained on their duty to report sexual harassment.
- Failure to report sexual harassment could be the basis of adverse employment action, including reprimands or termination.
- Failure to report can lead to potential personal and District liability because we are deemed to have institutional knowledge of anything any employee knows under the new standard.
Is there “actual knowledge”? 

A. My fellow teacher and bowling buddy confides in me that he’s been “fooling around” with a student. He makes sure she gets an A and a college recommendation.

B. Custodian witnesses an act of sexual harassment between students in the bathroom after school.

C. Student confides in a teacher’s aide about what happened on the school field trip.

All three of these are examples of situations that, in the past, did not put the school on notice of “actual knowledge.” Now they do.
The school is not responsible for responding to allegations of sexual harassment unless the school had “substantial control” over the harasser and the “context.”

Consider how this will be applied to:
- extracurricular activities;
- field trips;
- out of town, overnight trips;
- cyberbullying off campus.
- Informal staff get-togethers

Scenario: At the end of the school year, the faculty has a traditional end of year party at the principal’s house.
- Does the school have “substantial control”? 

What does “substantial control” mean?
Key Roles Outlined in Regulations

- Title IX Coordinator (T9C)
- Investigator
- Decision Maker
- Facilitator
- Appeals Decision Maker
Question:
Who Should be the Title IX Coordinator?
Role of Title IX Coordinator (T9C)

- The Title IX Coordinator (“T9C”) coordinates the district’s efforts to comply with Title IX of the Education Amendments of 1972.

- The new regulations set to take effect on **August 14, 2020** significantly expand and change the role and responsibilities of the Title IX Coordinator (“T9C”) with regard to dissemination of information, training, setting standards, and conducting investigations.
Every district must have at least one, and that person must be designated as and identified as the “Title IX Coordinator”.

- Must have authority to coordinate the school district’s compliance efforts.
- May investigate complaints, but may not be the “decision maker.”
- Must be referred to as the “Title IX Coordinator” in district policies and publications, including website.
- A district must notify all potential reporters of sexual misconduct of the T9C’s contact information: name/title, office and email addresses, and telephone number.
There must be a district wide T9C, but additional T9Cs could also be designated at the individual campus level to assist with responding to reports of sexual harassment.

T9C has specific responsibilities and authority in the report and formal complaint process.
Practical Question:
What constitutes a report of sexual harassment?
Any person may report. Not just the alleged victim.

- Can be verbal or written.
- Can be made by mail, by telephone, or by email at any time (business or non-business hours) to the T9C or any employee.
- T9C may also receive reports from any employee who observes or receives notice of sexual harassment or alleged sexual harassment.
- All employees need to know the designated person to whom they should turn over sexual harassment allegations.
- Employee reporting requirement does not replace requirement to report child abuse to law enforcement and/or CPS.
The Duty to Respond:

- If the district has "actual knowledge" of "sexual harassment" it "must respond promptly in a manner that is not deliberately indifferent."

- The district’s response must not be "clearly unreasonable in light of the known circumstances.

- Nothing in writing is very potentially going to be deliberately indifferent conduct.
Responding to a "Report"

- T9C must promptly contact a complainant to discuss:
  1. The Report;
  2. Supportive Measures Available; and
  3. Provide the Process to file Formal Complaint

- Initial determination of whether allegations, if assumed true, meet the definition of sexual harassment.

1. If it does not, document that decision and provide it to parties
2. If it does, then you need to start the Formal Complaint process.
Although reports of sexual harassment should be made in a timely manner, unlike other district grievances, a sexual harassment complaint can be made as long as the Complainant and Respondent are either or both still enrolled in or employed by the district.
Prompt Response with Criminal Allegations

- Regulations provide limited flexibility to temporarily delay the formal grievance process (formal complaints) due to pending law enforcement action. 106.45(b)(1)(v).

- Because the regulations only permit “temporary” delays or “limited” extensions of time frames even for good cause such as concurrent law enforcement activity, this provision does not result in protracted or open-ended investigations in situations where law enforcement’s evidence collection (e.g., processing rape kits) occurs over a time period that extends more than briefly beyond the recipient’s designated time frames.
Step-by-Step Guide for T9C’s Response to a Formal Complaint
The regs distinguish a “report” from a “formal complaint.”

A “formal complaint” is a printed document or electronic submission filed by a complainant that alleges sexual harassment and requests the recipient school investigate the allegation.

At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed.
How does the Formal Complaint process work?

- The district must respond to a Report promptly and equitably.
  - The T9C must promptly meet with the Complainant.
  - The T9C must explain the Formal Complaint Process and consider the wishes of the Complainant about pursuing it or not.
  - The T9C must offer “supportive measures.”
- After a Report is made, a Formal Complaint process may be initiated on that Report:
  - Only Complainant or the T9C can initiate.
  - T9C may initiate the process even when the Complainant chooses not to.
Formal Complaint Considerations

- **Must** dismiss a Formal Complaint if the conduct alleged does not constitute “sexual harassment.”
  - Does not preclude action under another provision of the District’s Policies (DIA).

- **May** dismiss a Formal Complaint if:
  - Complainant notifies T9C in writing that the complainant wishes to withdraw the Formal Complaint.
  - Complainant is no longer enrolled or employed by the district.
  - Circumstances prevent the district from gathering sufficient evidence to make a determination.
Responding: Benchmarks for Response to Formal Complaint of Sexual Harassment

1. Equal Access/Treatment
2. Objective Evaluation
3. Bias Free Training
4. Presumption of Innocence
5. Reasonable Time Frames
6. Description of Possible Outcomes
7. Standard of Evidence – Preponderance or Clear and Convincing
8. Appeal
9. Supportive Measures
10. Protection of Privilege
Upon receiving a formal complaint, an institution must provide written notice to the known parties, including:

- Description of the process, including informal resolution process;
- Allegations involved;
- Statement of presumed innocence of the respondent;
- The parties’ right to an advisor of their choice (who may be an attorney);
- Parties’ right to inspect evidence relevant to the allegations;
- Notice any provision in the code of conduct that prohibits knowingly making false statements or providing false information.
1. Provide Written Notice

- Must allow sufficient amount of time for respondent to prepare a response before any initial interview.
- Must be supplemented *each time* new allegations opened for investigation.
2. Investigate Formal Complaint

- Investigations of Title IX grievances come with additional requirements.

- Investigations must:
  - Place the burden of proof and responsibility to gather evidence on the institution, not on the parties; and
  - Present an equal opportunity for parties to present witnesses and other evidence.

*Note: the investigation must provide opportunities for the parties to present evidence, but the burden of proof remains on the institution to gather and present evidence*
2. Investigate Formal Complaint

- Permit parties to discuss allegations under investigation and gather relevant evidence.
- Provide parties with equal opportunity to have others present during any complaint proceeding.
- Provide advance written notice of all hearings, interviews, or other meetings to any involved party, with sufficient time for the party to prepare.
- Cannot invoke any discipline for the complaint allegations until completion of the formal complaint process.
2. Investigate Formal Complaint

- Provide equal opportunity to both parties to inspect and review evidence obtained as part of the investigation (including evidence which the institution does not intend to rely on), and send to each party the evidence at least 10 days before completion of the investigative report.

- Create an investigative report summarizing relevant evidence, not making a final determination.

- Must send a copy of the report to each side 10 days prior to the time of determination to permit them an opportunity to send a written response.
3. Live Hearings (Optional)

- Postsecondary institutions are required to hold live hearings as a component of the grievance process, but for K-12, live hearings are optional.
4. Written Questions

- Whether or not a hearing takes place, district must:
  - Provide each party the opportunity after the investigation report is completed to submit written questions to be asked of another party or witness;
  - Provide each party with the answers;
  - Provide for limited written follow-up questions.
A Note: “Rape Shield” Provision

Questions and evidence about a complainant’s sexual predisposition or behavior are categorically not relevant to a Title IX Investigation, unless:

- Evidence is offered to prove someone other than the respondent committed the alleged conduct;
- Evidence concerns the complainant’s prior sexual history with the respondent and is offered to prove consent.
5. Determination of Responsibility

- The school’s decision-maker in a Title IX proceeding cannot be the T9C or any investigator of the allegations.

- The decision-maker must issue a written determination of responsibility with:
  - Findings of fact;
  - Conclusions about whether the misconduct occurred;
  - Explanations of each conclusion; and
  - Any disciplinary sanctions or remedies being enacted.

- Written copy of determination must be sent simultaneously with information on filing an appeal.
6. Appeal

- A school must offer both parties an opportunity to appeal a determination of responsibility based on:
  1. Procedural irregularity that affected the outcome of the matter;
  2. Newly discovered evidence that could affect the outcome of the matter; and/or
  3. An employee involved in the investigation process with a conflict of interest or bias that affected the outcome of the matter.

- A school may offer an appeal on additional bases, as long as the appeal is offered equally to both parties.

- Appeal must be heard by a **new** decision-maker.
Informal Resolution

- May offer informal resolution options, like mediation, as long as both parties give voluntary, informed, written consent.

- Cannot require a party waive their right to investigation or to participate in informal resolution as a condition of enrollment or employment.

- Cannot offer informal resolution until a formal complaint is filed and cannot ever offer informal resolution of allegations of sexual harassment by an employee against a student.

- Any party may withdraw from the informal resolution process and resume the grievance process at any point before an agreement is reached.
Retaliation

- Retaliation is prohibited against any individual for the purpose of interfering with Title IX rights or because an individual has made a complaint or been involved with a Title IX investigation.
- Cannot charge an individual with a code of conduct violation not involving sex discrimination or sexual harassment but arising out of the same events as a report of sexual harassment, for the purpose of interfering with Title IX rights.
- An individual’s exercise of a First Amendment right will not constitute retaliation.
- Charging an individual with a code of conduct violation for making a materially false statement in bad faith during a Title IX grievance proceeding does not constitute retaliation.
Record Keeping

- **SEVEN YEAR RETENTION PERIOD** for records of:
  1. each sexual harassment investigation;
  2. any appeal;
  3. any informal resolution; and
  4. training materials.

- **Retention and publication of training materials:**
  - Retain any materials used with T9C, investigators, decision makers, and any other person who facilitates an informal resolution process.
  - These materials must be publicly available on the district’s website.
Record-Keeping

- Maintain all documents from the Formal Complaint for seven (7) years:
  - The Determination;
  - Any Disciplinary Sanctions issued;
  - Remedies provided to the Complainant;
  - Any appeal; and
  - Any Supportive Measures implemented or if none were provided, the reasons why.
Questions?

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