



Fox Rothschild LLP
ATTORNEYS AT LAW

Title IX Regulations: Immediate Next Steps for K-12 Schools

Kelley B. Hodge, Esq.
Jeffrey T. Sultanik, Esq.
Bonnie A. Young, Esq.
July 6, 2020

Key Questions

- What do schools need to do?
- When do schools need to do it?
- Who is responsible?



Key Questions

➤ What do schools need to do?

Identify or hire key personnel responsible for Title IX

Create or Revise Title IX policies and procedures

Train key personnel

Publish the Title IX Coordinator and all training materials on their website

➤ When do schools need to do it?

August 14, 2020

➤ Who is responsible?

The key personnel = Those who must be trained

Title IX Coordinator, Investigators, Decision-makers, Informal Resolution Facilitators



Fox Rothschild LLP
ATTORNEYS AT LAW

Key Personnel in Title IX Process

- Title IX Coordinator
 - Depending on size of school, may need to designate “deputy Title IX Coordinator” and/or “Title IX liaison/investigators” in each school building
- Investigator
- Decision-Maker/Adjudicator
- Appeal Decision-Maker (i.e. School Board, Principal, External Resource)
- Possible other involved personnel:
 - HR Director (if school personnel are involved)
 - School Counselor



What schools must also consider?

- Costs of Implementation
 - Determine how to allocate in the District's budget what is fiscally required to implement the Department's directives
 - Hiring or reassignment of personnel
 - Retaining external support (consultants, trainers, counselors)
 - IT needs to improve and preserve record-keeping



History of Title IX

- It is a civil rights' statute enacted in 1972 to prohibit discrimination based on sex in education programs and activities.
 - Historically, people have commonly thought of Title IX addressing gender equity in sports.
 - Title IX's reach is much broader.



What does Title IX state?

- *“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.”*

- 20 USCA Sec. 1681



The Purpose of Title IX

- Title IX is a statute “designed primarily to prevent recipients of Federal financial assistance from using the funds in a discriminatory manner”
- Potential consequence for violation of Title IX = loss of federal funding



The New Title IX Regulations

- May 6, 2020 U.S. Department of Education issued the 2,033 page amended Title IX of the Education Amendments of 1972 and which contained the new **Final Regulations**. (34 CFR Part 106)
- In November 2018, the U.S. Department of Education issued proposed changes to Title IX procedures as called the Notice of Proposed Rulemaking or NPRM.
- U.S. Department of Education received over 124,000 comments during a 6 month public comment period following release of the NPRM.
- Eighteen (18) months later, on May 6, 2020, the final regulations were issued.



What are the Final Regulations?

- These Final Regulations specify how recipients (defined as schools, LEAs, postsecondary institutions) of federal financial assistance must respond to allegations of sexual harassment consistent with Title IX's prohibition against sex discrimination.
- Final Regulations, *unlike past guidance* issued in 2011 and 2014 from the Office of Civil Rights (OCR) within the Department, **have the full effect of law and override any past guidance.**



What do the Final Regulations Require?

- Requires schools to
 - Respond **Promptly** and **Supportively** to persons alleged to have been victimized by sexual harassment;
 - Resolve allegations of sexual harassment **promptly and accurately** under a **predictable, fair grievance process** that provides **due process** protections to the alleged victim and alleged perpetrators of sexual harassment; and
 - Effectively implement remedies for victims.



Key Terms Repeated In The Regulations

- Prompt
- Equitable
- Supportive Services
- Due Process
- Remedies

Schools must keep these terms in mind as they create and implement their policies and procedures.



What is due process?

- The U.S. Department made the revisions and enacted these final rules because

*“[D]ue process principles of notice and a meaningful opportunity to be heard and the importance of an **impartial** process before **unbiased** officials, set forth the procedures adapted for the practical realities of sexual harassment allegations in an educational context that are most needed to (i) improve perceptions that Title IX sexual harassment allegations are resolved fairly and reliably, (ii) avoid intentional or unintentional injection of sex-based biases and stereotypes into Title IX proceedings, and (iii) promote accurate, reliable outcomes, all of which effectuate the purpose of Title IX to provide individuals with effective protection from discriminatory practices.”*

Pg. 100 Final Regulations



Fox Rothschild LLP
ATTORNEYS AT LAW

Compliance

- The New Regulations take effect on **August 14, 2020**.
- Every school that has a website must post important information about the school's Title IX policies and procedures on their website.
- The new Title IX Rule specifically requires schools to post on their websites:
 - The *contact information* for the school's Title IX Coordinator(s);
 - The school's *non-discrimination policy*; and
 - *All Training materials* used to train the school's Title IX personnel.



Compliance (cont'd)

1. **Notice:** Requires schools to designate **at least one employee** as the Title IX Coordinator and “**prominently display**” the Title IX Coordinator’s contact information (office address, telephone number and an e-mail address) on the school’s website.
2. **Non-Discrimination Policy:** Requires schools to notify students, employees, applicants, parents and guardians, and others that the school does not discriminate on the basis of sex, and that Title IX requires the school not to discriminate. This non-discrimination policy must also be prominently displayed on the school’s website.
3. Schools must ensure that reports **can be made at any time, including during non-business hours**, by using the Title IX Coordinator’s listed telephone number or e-mail address, “or by any other means that results in the Title IX Coordinator receiving the person’s verbal or written report.”

§106.8(a), §106.8(b)(2)(i), §106.8(b)(1)



Fox Rothschild LLP
ATTORNEYS AT LAW

Compliance (cont'd)

- The Department will continue to provide technical assistance after these regulations become effective, including during the investigation of a complaint, a compliance review, or a directed investigation by OCR, if the recipient requests technical assistance.



Training

- Training is key to a successful response to reports of alleged sex discrimination or harassment.
- Training is **required by the federal government** to ensure institutional practice consistent with key laws and guidance
 - On policies, procedures
 - For anyone who is responsible for Title IX in the schools: Title IX Coordinator, Investigator, Decision-Makers, Informal Resolution Facilitators and Advisors
- **Intent:** Under the Title IX Rule, students, employees, the Department, and the public **will be able to examine** a school's training materials, providing a necessary safeguard to improve the impartiality, reliability, and legitimacy of Title IX proceedings. This requirement will improve the overall **transparency and integrity** of a school's Title IX policies and procedures.

§ 106.45(b)(1)(iii) & § 106.45(b)(10)(i)(D)



Fox Rothschild LLP
ATTORNEYS AT LAW

Training (cont'd)

- A school must post on its website: “*All materials used to train* Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process.”
- Posting anything less than “all materials” on the website is insufficient.
- Merely listing topics covered by the school’s training of Title IX personnel, or merely summarizing such training materials is not the same as posting “all materials.”
- If a school’s current training materials are copyrighted or otherwise protected as proprietary business information (for example, by an outside consultant), the school still must comply with the Title IX Rule. This may mean that the school has to secure permission from the copyright holder to publish the training materials on the school’s website.

§106.45(b)(10)(i)(D)



Fox Rothschild LLP
ATTORNEYS AT LAW

Training (cont'd)

- All materials used to train Title IX personnel:
 - Must **not** rely on sex stereotypes
 - Must **promote impartial investigations and adjudications** of formal complaints of sexual harassment
 - Must be maintained by the school **for at least 7 years**
 - If the school does not maintain a website the school must make the training materials available upon request for inspection by members of the public.

§ 106.45(b)(1)(iii) & § 106.45(b)(10)(i)(D)



Fox Rothschild LLP
ATTORNEYS AT LAW

Training (cont'd)

- Title IX personnel include the Title IX Coordinator, any investigator, any decision-maker, and any person who facilitates an informal resolution (such as mediation).
- The Title IX Rule requires schools' Title IX personnel to be **unbiased** and **free from conflicts of interest**.



Training (cont'd)

- Schools must ensure that Title IX personnel receive training as follows:
 - On Title IX's definition of "sexual harassment"
 - On the scope of the school's education program or activity
 - On how to conduct an investigation and grievance process
 - On how to serve impartially, including by avoiding prejudgment of the facts at issue
 - On how to avoid conflicts of interest and bias



Training (cont'd)

- **Decision-makers** must receive training on any technology to be used at a live hearing, and on issues of relevance of questions and evidence, including when questions and evidence about a complainant's sexual predisposition or prior sexual behavior are not relevant
- **Investigators** must receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence



Who can train?

- The Department **does not** certify, endorse, or otherwise approve or disapprove of particular organizations (whether for-profit or non-profit) or individuals that provide Title IX-related training and consulting services to schools.



Implementation

- Following training – There must be successful and consistent **implementation** of the policies and procedures
 - Recommended that schools create forms to assist in:
 - Making sure information is properly recorded/memorialized
 - Making sure required information is given to the recipients
 - Ensure consistency and transparency in the process
 - Examples of the types of forms:
 - Incident reporting form
 - Internal incident assessment form
 - Complainant information brochure on supportive measures and informal resolution or formal complaint options
 - Mutual no contact letter
 - Formal complaint form
 - Schools must test their systems to make sure that the procedures are being consistently followed and the training is being effectively applied



Policies and Procedures

- School must create or revise policies and procedures that
 1. Meet the directives issued under the final rules
 2. Comply with state law and
 3. Are tailored to the needs and/or culture or climate of the District



Policies and Procedures

Examples of directives in the rules:

- Schools must provide **supportive measures** to a Complainant even if there is no formal complaint filed because once a school has *actual knowledge* they must respond promptly to the allegation of sexual harassment
- Outline a **grievance process** that is
 - predictable and consistent,
 - treats Respondents and Complainants equitably by recognizing the need for complainants to receive remedies where a respondent is determined responsible and
 - for respondents to face disciplinary sanctions only after a fair process determines responsibility.



Grievance Process

- Grievance process must provide notice and meaningful opportunity to be heard
- The final regulations contains ten groups of provisions and offers a standard framework that governs recipients' responses to formal complaints of sexual harassment.
- Some examples of what should be contained in the grievance process:
 - presumes the non-responsibility of respondents until conclusion of the grievance process;
 - includes reasonably prompt time frames for the grievance process;
 - informs all parties of critical information about the recipient's procedures including the range of remedies and disciplinary sanctions a recipient may impose, the standard of evidence applied by the recipient to all formal complaints of sexual harassment under Title IX (*which must be either the preponderance of the evidence standard, or the clear and convincing evidence standard*), the recipient's appeal procedures, and the range of supportive measures available to both parties.

§ 106.45



Fox Rothschild LLP
ATTORNEYS AT LAW

Grievance Process (cont'd)

- Requires **written notice** of the allegations to both parties;
- Keeps the burden of proof and burden of gathering evidence on the recipient (school) while protecting every party's right to consent to the use of the party's own medical, psychological, and similar treatment records;
- Provides the parties equal opportunity to present fact and expert witnesses;
- Does not restrict the parties from discussing the allegations or gathering evidence;
- Gives the parties equal opportunity to select an advisor of the party's choice (who may be, but does not need to be, an attorney);
- Requires written notice when a party's participation is invited or expected for an interview, meeting, or hearing;
- Provides both parties equal opportunity to review and respond to the evidence gathered during the investigation; and
- Sends both parties the recipient's investigative report summarizing the relevant evidence, prior to reaching a determination regarding responsibility.

§§106.45(b)(2) and (b)(5)(i)-(vii)



Fox Rothschild LLP
ATTORNEYS AT LAW

Grievance Process (cont'd)

- Requires a decision-maker who is not the same person as the Title IX Coordinator or the investigator to reach a determination regarding responsibility by applying the standard of evidence the recipient has designated in the recipient's grievance process for use in all formal complaints of sexual harassment (which must be either the preponderance of the evidence standard or the clear and convincing evidence standard), and the recipient must simultaneously send the parties a written determination explaining the reasons for the outcome.
- Requires recipients to offer appeals equally to both parties, on the bases that
 - procedural deficiencies, or
 - newly discovered evidence, or
 - bias or conflict of interest affected the outcome.

§§106.45(b)(6)- (b)(8)



Fox Rothschild LLP
ATTORNEYS AT LAW

Grievance Process (cont'd)

- Schools can offer and facilitate informal resolution processes, within certain parameters to ensure such informal resolution only occurs with the **voluntary, written consent of both parties**.
- Informal resolution is **not permitted** to resolve allegations that an **employee** sexually harassed a **student**.

§§106.45(b)(9) and 106.45(b)(10)



Fox Rothschild LLP
ATTORNEYS AT LAW

Grievance Process in K-12

- Unlike postsecondary institutions, elementary and secondary schools are **not required to hold hearings or require cross-examination procedures** as part of the grievance process.
- U.S. Department of Education stated:
 - “As to live hearings with cross-examination, we have clarified the language in the final regulations to emphasize that ESE recipients are not required to use a hearing model to adjudicate formal complaints of sexual harassment under these final regulations. Moreover, if an ESE recipient chooses to use a hearing model, that recipient **does not** then need to comply with the provisions in § 106.45(b)(6)(i), which applies only to postsecondary institution recipients.
 - Nothing prevents schools from counseling students as to how the grievance procedures will work, or aiding and assisting the parties, on an equal basis, with additional supports as they go through the process. Additionally, many provisions of the final regulations require only that schools provide an equal opportunity to the parties, leave the recipient flexibility to the extent that a recipient would prefer to make the grievance process less formal or intimidating for students.
 - We have also added § 106.6(g) in the final regulations, acknowledging the legal rights of parents or guardians to act on behalf of complainants, respondents, or other individuals with respect to exercising rights under Title IX, including participation in a grievance process.”



Documentation

- **Document, Document, Document**
- It cannot be overstated that schools must keep accurate records of reported incidents
 - School may want to consider adding an electronic reporting system that permits anonymous reporting and allow reports to be received at any time and generates automatic record.
 - An electronic method of reporting does not replace the requirement that the Title IX Coordinator and their contact information needs to be prominently posted on the district's website to receive reports and provide information
- Evaluate your records to identify trends, gaps and issues on an annual basis (recommend summer break)



Documentation

- The Who, What, When and How
 - Who received the report
 - Who made the report
 - When was the report received and when any other steps were taken
 - What steps were taken: Notice to Title IX Coordinator, call to parents/legal guardians of student, call to law enforcement, call to Childline
 - What support was provided to the complainant (person reporting)
 - For example, applying interim measures (i.e. Putting a Safety Plan in Place) to make sure the complaint is safe in school and not restricted in participating in schools programs and activities



Supportive Measures and Confidentiality

- These final regulations define “supportive measures” in a manner that gives ***ESE (elementary and secondary education) recipients wide discretion*** to quickly, effectively take steps to protect student safety, deter sexual harassment, and preserve a complainant’s equal educational access.
- Supportive measures cannot “unreasonably burden” the respondent but this does not mean that supportive measures cannot place any burden on a respondent, ***so actions such as changing a respondent’s class or activity schedule may fall under permissible supportive measures, and supportive measures must be offered without waiting to see if a grievance process is eventually initiated or not.***

§ 106.30



Fox Rothschild LLP
ATTORNEYS AT LAW

Supportive Measures and Confidentiality

- Schools also retain the authority to remove a respondent from education programs or activities on an emergency basis if the respondent presents an imminent threat to the physical health or safety of any individual
- Schools must keep confidential the provision of supportive measures to a complainant or respondent to the extent that maintaining confidentiality does not impair the ability of the recipient to provide the supportive measures.
- For example unless a particular supportive measure affects the respondent in a way that requires the respondent to know the identity of the complainant (for example, a mutual no-contact order), the ***Title IX Coordinator need not, and should not, disclose the complainant's identity to the respondent during the process of selecting and implementing supportive measures for the complainant.***



Key Definitions

- Sexual Harassment
- Actual Knowledge
- Supportive Measures
- Formal Complaint
- Jurisdiction of Title IX
- Deliberate Indifference
- Grievance Process
- Standard of Proof: preponderance of the evidence or clear and convincing
- Formal Resolution
- Informal Resolution: Mediation and/or Restorative Justice
- Due Process
- Final Outcome Determinations
- Appeal



Sexual Harassment

- Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:
 - (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct (also known as *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 recipient's education program or activity; **or**
 - (3) "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30)



Actual Knowledge

Current Rule: Is defined as **notice** of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to **any employee of an elementary or secondary school**.

*Past OCR Guidance: Schools had a responsibility to respond promptly and effectively if the school (i.e. a Responsible Employee) **knew or should have known** about the sexually harassing behavior.*



Fox Rothschild LLP
ATTORNEYS AT LAW

Transparency, Confidentiality and FERPA

- Final regulations were enacted to ensure that recipients respond to sexual harassment by offering supportive measures designed to restore or preserve a complainant's equal educational access without treating a respondent as responsible until after a fair grievance process.
- The Department clarifies that schools (and, as applicable, parties) must follow relevant State and Federal health care privacy laws throughout the grievance process. Nothing in the notice should divulge the complainant's (or respondent's) medical information or other sensitive information, nor does § 106.45(b)(2) require disclosure of such information
- Family Educational Rights and Privacy Act
 - Schools must have written permission from the parent or eligible student in order to release any information from a student's education record. However, [FERPA](#) allows schools to disclose those records, without consent, to the certain parties or under the specifically conditions outlined by the Department (34 CFR § 99.31)



Processing Steps to Keep in Mind

- Notification
- Publication
- Implementation
- Communication
- Documentation
- Conclusion



Questions



Fox Rothschild LLP
ATTORNEYS AT LAW

Kelley B. Hodge
215.444.7256
khodge@foxrothschild.com

Jeffrey T. Sultanik
610.397.6515
jsultanik@foxrothschild.com

Bonnie A. Young
215.299.2076
byoung@foxrothschild.com



Fox Rothschild LLP
ATTORNEYS AT LAW