Investigating Sexual Harassment Claims

A Roadmap Through Title IX and Its New Implementing Regulation

By Joseph B. Urban

Title IX of the Education Amendments of 1972, which was designed to provide equal access to women in higher education and sports, states:

> No person in the United States shall, on the basis of sex, be excluded from participation in, or denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.[1]

The application of the statute has evolved through the judicial process.[2] The United States Department of Education Office for Civil Rights has used the statute as a means to encourage federally funded education institutions to investigate and adjudicate sexual harassment and sexual abuse.

The Department of Education made significant changes to Title IX's implementing regulations that became effective in August 2020.[3] The revisions modify the standards and procedures for investigating claims of sexual harassment and sexual assault in schools receiving federal funds.

New regulations under Title IX and their impact

One foundational area of change in the regulations is the definition of sexual harassment. Previously, sexual harassment was defined as "unwelcome conduct as determined by a reasonable person that is severe, pervasive or persistent enough to interfere with or limit a student's ability to participate in or benefit from school services, activities or opportunities."[4] Sexual harassment is now defined as *quid pro quo* sexual harassment,[5] certain types of sexual assault, and "unwelcome conduct as determined by a reasonable person that is so severe, pervasive and objectively offensive that it effectively denies a person's equal access to the recipient's education program or activity."[6]

These provisions narrow the definition of sexual harassment to require a more rigorous showing of impact. Care should be taken in reviewing complaints under this new definition, as not all previously prohibited conduct may fall under Title IX.[7] Other components of a student or faculty handbook should be reviewed to assess such allegations.

At a Glance

Title IX has been instrumental in protecting people from sex discrimination in education. Recent amendments to the regulations implementing Title IX have led to major changes in how educational institutions approach, investigate, and assess claims of sexual harassment and abuse.

The definition of "actionable knowledge" is another change from prior practice. Previously, schools which "knew or should have known" about sexual harassment could be liable for sexual harassment. The new standard is one of "actual knowledge."[8]

Under the regulations, there are two distinct standards for actual knowledge depending upon the type of institution. Institutions of higher education have actual knowledge when "notice of sexual harassment or allegations of sexual harassment" is brought to the attention of the "Title IX Coordinator or any official of the [institution] who has the authority to institute corrective measures" on behalf of the institution. Additionally, "the mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf" of the institution.[9]

The above revisions significantly narrow the class of individuals whose knowledge of sexual harassment would constitute actual knowledge under prior guidance. Reporting to an individual who has been trained or is required to forward the information to another official within the institution is now no longer sufficient to trigger an investigation. This provision can be confusing in application; it does *not* absolve the institution from other causes of action whose notice requirements may be differently stated. Therefore, it is of utmost importance that trainings under the regulations consider other statutes and obligations that are not narrowed by Title IX that could be triggered.[10]

For K–12 schools, actual knowledge occurs when notice is given to "any employee of an elementary and secondary school."[11] Practitioners should note the difference in the actual knowledge standard set forth above, particularly in cases of student-on-student sexual harassment in elementary or secondary schools. In the latter situation, a report to any K–12 school employee mandates action. Likewise, any K–12 school employee who witnesses sexual harassment has an obligation to bring it to the attention of the appropriate investigator. In Michigan, this requirement is much broader than what is required under the state's Child Protection Law.[12] Under the Child Protection Law, school employees such as school administrators and counselors, teachers, psychologists, regulated child-care providers, nurses, and social workers are designated as mandated reporters with a duty to report suspected child abuse or neglect.[13] Trainings should educate all staff on this overlap to avoid failures to report abuse, neglect, or sexual harassment due to confusion about the various standards and mandated reporters. A best practice would be directing employees to promptly report suspected sexual harassment to a Title IX coordinator.

The regulations set forth specific procedural requirements and specific requirements for documenting outcomes. Ten main procedural requirements governing all cases involving

Title IX investigations must be set forth in written grievance procedures.[14] As a practical matter due to the ongoing nature of revisions to Title IX requirements and guidance, institutions should consider adopting these procedures as administrative regulations or procedures rather than as official policies so they may be revised in the event the regulations change or further guidance is released. Regardless of the method by which the procedural requirements are adopted, institutions are required to create and publish a grievance procedure under Title IX in writing and make it available to all employees and students.[15]

While only training of decision makers is mandated, experience in the field highlights the need to train all involved in the process to ensure a clear understanding of roles. Care should be taken to ensure investigators clearly understand their role. Unlike under the prior rules where investigators could fill multiple roles through the investigation and appeal, the Title IX regulations now require that the investigator merely gather facts.[16] Therefore, it is important to train investigators to closely review the requirements for impartiality and ensure they are adept at witness interviewing skills, understand the regulations thoroughly, know the various types of investigatory bias that can taint an investigation, and prepare to be called as witnesses either in the hearing mandated by the regulations or subsequent legal proceedings.

Likewise, training should equip all involved in the process to identify and neutralize any impermissible conflicts of interest. Individuals involved in the investigation process—such as the Title IX coordinator, investigators, decision makers, or facilitators of informal, voluntary resolution efforts—must have no bias or conflict of interest.

To avoid potential conflicts, the regulations prohibit the investigator from being the decision maker; likewise, the decision maker may not be an investigator or the Title IX coordinator. The person or body adjudicating appeals cannot be anyone previously involved in the process. Given the narrow allocation of roles, many K–12 school boards have stepped into the appellate role. To the extent that a K–12 board of education seeks to undertake the role of appellate adjudicator, it is vitally important that the board is trained in the regulations and the processes, particularly conflicts of interest.

When it comes to determinations regarding responsibility, the standard for assessing evidence becomes important. The Title IX regulations created a significant revision in this area. As the regulations were being drafted and commented upon, there was robust input regarding the appropriate standard of

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evidence for adjudication of Title IX complaints. Previously, the standard mandated by the Department of Education Office of Civil Rights for assessing culpability was the "preponderance of the evidence" standard, also referred to as the "more likely than not" standard.[17] Some commentators argued that the regulations should mandate or permit entities to use the criminal "beyond a reasonable doubt" standard, while others argued for a "clear and convincing evidence" standard for sexual assault claims involving the Clery Act[18] or where expulsion or suspension was a potential sanction.[19] Significant consideration was given by the drafters to the "clear and convincing" standard as a method of reducing erroneous adjudications and protecting academic freedom of speech.[20]

The regulation's supplemental materials did not discuss comments in support of the "preponderance of the evidence" standard. Instead, the regulations permit the use of either the preponderance of the evidence or the clear and convincing standard, provided the institution adopts one of the two standards and uses it consistently, regardless of the origin of the claim.[21] That standard must then be published in the institution's grievance procedure.

Conclusion

Changes to Title IX's implementing regulations have caused a great deal of confusion among practitioners. Of the 10 procedural requirements, those related to training and standard of evidence have an importance that is highlighted in practice. ■

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ENDNOTES

1. 20 USC 1681 *et seq.*
2. *Cannon v. Univ of Chicago*, 441 US 677; 99 S Ct 1946; 60 L Ed 2d 560 (1979) (implied private cause of action under Title IX); *Franklin v. Gwinnett Cty Public Schools*, 503 US 60; 112 S Ct 1028; 117 L Ed 2d 208 (1992) (monetary damages available in implied private cause of action), and *Gebser v. Lago Vista Indep School Dist*, 524 US 274; 118 S Ct 1989; 141 L Ed 2d 277 (1998) (actual knowledge required for damages in harassment case under Title IX).
3. 34 CFR 106 *et seq.*
4. *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, Office for Civil Rights, US Dept of Education (January 2001), p iv, available at <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> [https://perma.cc/PHZ4-TU52]. All websites cited in this article were accessed February 3, 2021.
5. *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, Office for Civil Rights, US Dept of Education (January 2001), p 42, available at <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> [https://perma.cc/PHZ4-TU52]. *Quid pro quo* sexual harassment is "conditioning the provision of an aid, benefit, or service of the recipient on the individual's participation in unwelcome sexual conduct." *Id.* at FN 94.
6. 34 CFR 106.30(a)(1)–34 CFR 106.30(a)(3).
7. Supplementary information to 34 CFR 106 denies that the new standard requires clearing a high bar as "showing the victim dropped out of school… or otherwise reached a 'breaking point' in order to report and receive [an institution's] supportive response to sexual harassment." 34 CFR 106 assumes the negative educational impact of sexual harassment and assault and use a "reasonable person" standard to assess the impact.
8. *Id.*
9. 34 CFR 106.30(a).
10. Two such obligations that may contain less limited requirements related to institutional knowledge are 42 USC 1983 and Michigan's Elliott-Larsen Civil Rights Act, promulgated at MCL 37.2101 *et seq.*
11. 34 CFR 106.30(a).
12. MCL 722.621 *et seq.*
13. MCL 722.623.
14. The requirements mandate that investigators: (i) treat parties equitably, (ii) evaluated evidence objectively; (iii) operate from a presumption of innocence; (iv) undertake the investigation promptly; (v) describe the range of outcomes to participants; (vi) observe consistent and specific standards of evidence; (vi) explain the range of possible outcomes to the parties; (vii) provide a right to appeal the decision; (viii) make supportive measures available; (ix) observe evidentiary privileges such as the attorney client privilege and (x) observe specific prescriptions related to training and disqualifying conflicts. 36 CFR 106.8(b).
15. 36 CFR 106.8(c).
16. *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, Office for Civil Rights, US Dept of Education (January 2001), p 279, available at <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> [https://perma.cc/PHZ4-TU52].
17. "Dear Colleague" letter from Asst Secretary for Civil Rights Russlyn Ali, United States Dept of Education (April 14, 2011) (the "2011 Guidance"), available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [https://perma.cc/L2BW-BM4Q]. This standard was adopted, according to the 2011 Guidance, because the United States Supreme Court in *Desert Palace, Inc v Costa*, 539 US 90; 123 S Ct 2148; 156 L Ed 2d 84 (2003) had previously adopted the preponderance of the evidence standard in civil litigation involving Title VII of the Civil Rights Act of 1964, 42 USC 2000e *et seq.*
18. Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act of 1990, codified at 20 USC 1092(f).
19. Supplementary information to 34 CFR 106.
20. *Id.*
21. *Id.* The concern articulated by the drafters was that institutions would adopt a higher standard for students accusing professors of sexual harassment, but a lower standard for students accusing students of sexual harassment.