

## Preparing for Implementation of the New Title IX Regulations: Recommendations for Human Resources Professionals

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# Preparing for Implementation of the New Title IX Regulations: Recommendations for Human Resources Professionals

Presented by Todd K. Hayden and Emily P. Bothfeld

November 13, 2020

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## Background on Title IX Regulations



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Although the information contained herein is considered accurate, it is not, nor should it be construed to be legal advice.

If you have an individual problem or incident that involves a topic covered in this document, please seek a legal opinion that is based upon the facts of your particular case.

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## Background

- Proposed Title IX Regulations released in November 2018
- 60-day public comment period
- Over 120,000 public comments received

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## Current Status

- Final Rules released on May 6, 2020 and published in Federal Register on May 19, 2020
- Effective date: August 14, 2020.



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## Impact on School Districts

- New Rules require:
  - Revisions to policies and procedures
  - Staffing determinations
  - Training for all personnel involved in a school district's investigation and grievance process
  - Publishing of information and training materials on the district's website and in student/employee handbooks and catalogs

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## Key Provisions and Changes



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## Definition of Sexual Harassment

- Sexual harassment includes:
  1. Quid pro quo harassment by a district employee
  2. Unwelcome conduct that a reasonable person would find so severe, pervasive and objectively offensive that it denies a person equal educational access
  3. Any instance of sexual assault, dating violence, domestic violence or stalking (as defined in the Clery Act/VAWA)

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## Jurisdiction

- School districts must respond when sexual harassment occurs “in the district’s education program or activity, against a person in the United States.”

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## Jurisdiction

- “In the district’s education program or activity” includes “locations, events, or circumstances over which the district exercised substantial control over both the respondent and the context in which the sexual harassment occurred.”

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## Definitions

- Complainant = individual alleged to be the victim of conduct that could constitute sexual harassment
- Respondent = individual reported to be the perpetrator of conduct that could constitute sexual harassment

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## Definitions

- Supportive measures = individualized services reasonably available that are non-punitive, non-disciplinary, and not unreasonably burdensome to the other party while designed to ensure equal educational access, protect safety, or deter sexual harassment.



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## Definitions

- Formal complaint = written document filed by a complainant or signed by a TIX Coordinator alleging sexual harassment against a respondent and requesting that the school investigate the alleged harassment

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## Definitions

- At the time a complainant files a formal complaint, the complainant must be participating in or attempting to participate in an education program or activity of the district.
- A parent or guardian may file a complaint on behalf of their child.
  - But note: For purposes of the resulting investigation, the student is the “complainant.”



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## School District Response Obligations

- A district’s response obligation under Title IX is triggered when any employee of the district has notice of Title IX sexual harassment or allegations of Title IX sexual harassment.

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## School District Response Obligations

- Once a school district has actual knowledge of alleged Title IX sexual harassment in the district's education program or activity, the district must respond to the allegations:
  - Promptly; and
  - In a manner that is not "deliberately indifferent."
    - "Clearly unreasonable in light of the known circumstances"

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## School District Response Obligations

- The district must, at a minimum:
  - Promptly contact the complainant confidentially to discuss supportive measures and options for filing a formal complaint.
  - Where a formal Title IX sexual harassment complaint is filed:
    - Investigate the allegations; and
    - Follow a grievance process that complies with the Final Rules before imposing any disciplinary sanctions against a respondent.<sup>3</sup>



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## Mandatory Dismissal Requirement

- If the allegations in a formal complaint do not meet the Title IX definition of sexual harassment, or did not occur in the district's education program or activity against a person in the United States, the district must dismiss such allegations for Title IX purposes.
  - Note: Dismissal does not preclude action altogether – just for purposes of Title IX.

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## Informal Resolution

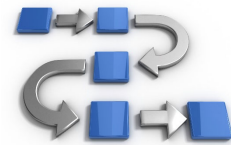
- A district may (but is not required to) offer and facilitate an informal resolution process, within certain parameters to ensure such informal resolution occurs only with the voluntary, written consent of both parties (or their parent(s)/guardian(s)).
- Informal resolution is not permitted to resolve allegations that an employee sexually harassed a student.

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## Required Elements of Grievance Process

- A school district must send written notice to both parties (complainants and respondents) of the allegations upon receipt of a formal complaint.
- Must provide equal opportunity for both parties to present fact and expert witnesses and other inculpatory and exculpatory evidence.
- “Gag orders” not permitted.



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## Required Elements of Grievance Process

- Must afford parties equal opportunity to be accompanied to any interview or meeting by an advisor of their choice, who may or may not be an attorney.
  - Note: Limitations on role of advisor are permissible.
- Must send notice of any investigative interview or meeting at which a party’s participation is requested and afford the party sufficient time to prepare.

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## Required Elements of Grievance Process

- Must send parties (and their advisors) all evidence directly related to the allegations, in electronic format or hard copy, and afford the parties at least 10 days to review and submit a written response to the evidence.
- Must send parties (and their advisors) an investigative report that fairly summarizes relevant evidence, in electronic format or hard copy, and afford the parties at least 10 days to review and submit a written response to the report.

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## Required Elements of Grievance Process

- K-12 school districts are not required to hold live hearings, but the parties must be allowed to submit written questions to test the credibility of the other party and of witnesses before a decision is made.
  - Rape shield protections apply.



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## Standard of Evidence and Written Determination

- School districts may apply either a preponderance of the evidence standard or clear and convincing evidence standard.
- Decision-maker must issue detailed written determination, to be sent simultaneously to both parties, with information about appeal rights.

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## Appeals

- A district must offer both parties an appeal from a determination regarding responsibility, and from a dismissal of a formal complaint or any allegations therein, on the following bases:
  - Procedural irregularity
  - Newly discovered evidence
  - Conflict of interest/bias
- A district may offer an appeal equally to both parties on additional bases.



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## Title IX: Not Just a Student Concern



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## Employees of Educational Institutions Are Entitled to Title IX Protections

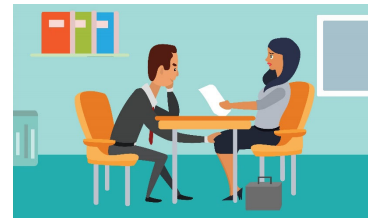
- With these new Rules, the Department of Education makes clear that Title IX applies to employees as well as students:
  - “**No person** in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. §1681(a).

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## Interplay Between Title IX and Title VII

- The Department acknowledges that employers must fulfill their obligations not only under Title IX but also under Title VII.
- Title VII's definitions of "sexual harassment" and "notice of harassment" differ from those under Title IX.



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## Interplay Between Title IX and Title VII

	Title IX	Title VII
Notice of Sexual Harassment for Liability Purposes	When the educational entity has actual knowledge of sexual harassment	<ul style="list-style-type: none"> <li>• If the employer knew or should have known of the harassment.</li> <li>• If the harassment is from a supervisor and it resulted in an adverse job action, the employer is liable.</li> </ul>
Definition of "Hostile Environment" Sexual Harassment	Any unwelcome conduct that a reasonable person would find so severe, pervasive and objectively offensive that it denies a person equal educational access	Unwelcome sexual advances... and other conduct... of a sexual nature having the purpose or effect of interfering with an individual's work performance of creating an intimidating, hostile or offensive working environment.

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## Interplay Between Title IX and Title VII

- The Department, however, states: 
  - There is no inherent conflict between the two statutes and students and employees, including faculty and student workers should not be treated differently.
- Employees are entitled to the same due process protection as students

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## Employee Title IX Complaints: Administrative Actions Only

- The Department's Rules do not create a private right of action for employees.
- The Department recognizes that its authority is limited to administrative enforcement actions.
  - OCR investigations, findings and resolutions
  - Administrative action can include stopping federal funding to the educational institution.

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## Employee Title IX Complaints Now Must Provide Increased Due Process Protections

- **WARNING:** Employees pursuing formal complaints of Title IX sexual harassment are entitled to all of the grievance processes provided students:

- Notice and Inspection of Evidence
- Right to submit written questions to the other party and witnesses
- Written Decision which includes a rationale for each conclusion reached; and
- Appeal Rights



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## Specific Title IX Language Regarding Employees

- Language Specific to Employees
  - The Final Rules allow an educational institution to place employees accused of sexual harassment on administrative leave, paid or unpaid, during the formal complaint grievance process.
    - This administrative provision may have to be squared up with current policy, procedure, and applicable collective bargaining agreement language.
- Informal resolution of a sexual harassment allegation is not an option when it involves employee-to-student claims.

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Recommendations  
for Effective  
Implementation of  
New Title IX  
Regulations



Prepare for  
Success

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Recommendations

- 1) Identify district administrator(s) who is/are responsible for overseeing your district's compliance efforts.



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## Recommendations

### 2) Ensure key roles are assigned:

- Title IX Coordinator
  - Must be a district employee
- Investigator(s)
- Decision-maker(s) and appellate decision-maker(s)
  - May not be the Title IX Coordinator
- Informal resolution facilitator(s), if offering informal resolution option

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## Recommendations



### 3) Revise district policies, procedures, handbooks, notices and forms.

- Employee sexual harassment policies and procedures will likely need to be revised to comply with the new Title IX Rules.
- IASB PRESS Title IX materials released in August 2020.
- Robbins Schwartz Title IX Toolkit for K-12 School Districts.

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Recommendations

4) Review collective bargaining agreements.

- Identify any provisions that may conflict with the new Title IX requirements.

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Recommendations

5) Coordinate training of Title IX personnel.

- Employees charged with investigating and/or adjudicating sexual harassment complaints involving employees must be trained.
- Robbins Schwartz 3-hour training for school district Title IX personnel.

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Recommendations



- 6) Post all materials (or link to materials) used to train Title IX personnel on district website.

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Recommendations

- 7) Publish Title IX sexual harassment policy (Board Policy 2:265, for districts that subscribe to PRESS) and contact information for Title IX Coordinator on district website and in student and employee handbooks.

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Questions?



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Todd Hayden practices in the areas of school and municipal law. He provides governmental employers with guidance and counseling regarding labor and employment, including employee discipline and termination, board governance, collective bargaining, contract, public finance and transactional matters.

Todd has represented employers in various employer-employee disputes including federal and state litigation, EEOC/Department of Human Rights charges, State Labor Board Proceedings and grievance and arbitration proceedings. Todd has extensive experience in collective bargaining, including unit formation proceedings, negotiations, mediation and interest arbitration. He has performed construction contract reviews, served as local bond counsel and worked on school boundary changes.

Todd is approved by the Illinois State Board of Education to provide school board member training.

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Illinois Leading Lawyer, Employment Law: Management, Labor Law: Management, School Law and Governmental, Municipal, Lobbying & Administrative Law, 2015

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Contributing author, "Civil Rights Litigation," *Illinois School Law*, IICLE (2017)

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*Collective Bargaining for School Board Members and Administrators*, IASB/IASA/Illinois ASBO Joint Annual Conference (November 2018)

*Employee Free Speech and the Public Employer*, HR Source Employment Law Conference at Northern Illinois University (September 2018)

*Practical Advice for Maintaining a Harassment Free Workplace*, IASA (February 2018)



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Emily practices in the area of education law with a focus on student and higher education matters. She counsels school districts and higher education institutions on a variety of issues, including matters related to student discipline, Title IX, free speech, student disability rights, student data privacy and policy development. She has extensive experience representing educational institutions in responding to complaints filed with the U.S. Department of Education's Office for Civil Rights, Illinois State Board of Education, Office of the Illinois Attorney General and Illinois Department of Human Rights. Emily regularly represents school districts and higher education institutions in state and federal court on civil rights and constitutional claims and breach of contract claims.

Prior to joining Robbins Schwartz, Emily represented students with disabilities in special education matters. Emily attended the George Washington University Law School, where she was a member of the George Washington International Law Review and the GW Law Moot Court Board. Prior to attending law school, Emily taught high school mathematics and science in Hangzhou, China.

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"Disabled Athlete Can't Support ADA Claims," *Chicago Daily Law Bulletin* (2018)

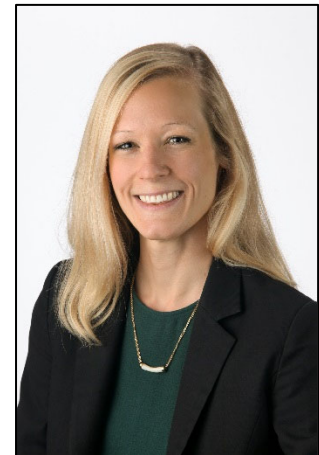
### RECENT PRESENTATIONS

*Legislative Update: A Review of New (and Proposed) Laws Affecting Illinois Community Colleges' Risk Management Practices*, Illinois Community College Chief Financial Officers Fall Conference (October 2019)

*A Student's "Right" to a College Education: Due Process Rights in Academic and Non-Academic Discipline*, Illinois Community College Chief Student Services Officers' Summer Meeting (June 2019)

*Updates and Recent Developments out of the U.S. Department of Education*, Chicago Bar Association Education Law Committee Spring Seminar (March 2019)

*Legal Hot Topics for Nursing Program Administrators and Faculty*, Illinois Organization of Associate Degree Nursing (March 2019)



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