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LAW FIRM, P.C.

**Key Changes in Title IX Regulations:
A Brief Overview**




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Cristina Patzelt
Katie Vujea

CAUTION

- These slides reflect general legal standards for the related presentation and are not intended as legal advice for specific situations. Future legal developments may affect these topics.
- ***This webinar is not intended to replace comprehensive administrator training or basic all-staff training required by the new regulations.***
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TOPICS

- Statutory Overview
- Key Changes
- New Investigation Procedures
- Action Items



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STATUTORY OVERVIEW


TITLE IX

*“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 USC 1681

THE REGULATIONS


- Effective **August 14, 2020**
- Eliminates “single investigator” model; Title IX Coordinator, investigator, and decision maker must all be different individuals
- Significant changes to investigation process
- 7 year record retention requirement
- Much more documentation required
- Emphasis on due process and constitutional protections



KEY CHANGES

NEW TERMINOLOGY

- Alleged Victim → **Complainant**
- Alleged Perpetrator/Alleged Harasser → **Respondent**
- Resolution → **Grievance Process**
- Educational Institution → **Recipient**
- Interim Measures → **Supportive Measures**



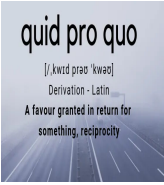
TYPES OF SEXUAL HARASSMENT

- Employee *quid pro quo*;
- Sexual assault, dating violence, domestic violence, stalking (definitions from Violence Against Women Act); and
- Hostile Environment (stricter definition).



QUID PRO QUO

- Recipient's *employee* conditioning an aid, service, or benefit of the recipient on an individual's participation in unwelcome sexual conduct.
- New:** only an employee; not applicable to volunteer, student, etc.



HOSTILE ENVIRONMENT

- "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."
- "Education program" is any location, event, or circumstance over which the recipient exhibits substantial control over both the respondent and the context in which the harassment occurred.
- But keep jurisdictional issues in mind!

HOSTILE ENVIRONMENT: BEFORE & AFTER

Unwelcome conduct determined by a reasonable person to be:

| OLD DEFINITION | NEW DEFINITION |
|---|--|
| Severe, pervasive, or persistent , and to interfere with or limit a student's ability to participate in or benefit from school services, activities, or opportunities. | 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. |

JURISDICTION

Harassment must be:

- Against a person in the United States
- Who is currently participating in a school's educational programs or activities.



WHAT ABOUT TRIPS ABROAD?

"[R]egardless of whether a study abroad program is part of a recipient's education program or activity, Title IX does not have extraterritorial application."



DISMISSAL

MANDATORY

Complaint *must* be dismissed if allegations, if proven:

- Would not constitute sexual harassment under new definition;
- Did not occur in recipient's (school) program or activity; or
- Did not occur against a person in the U.S.

PERMISSIVE

Complaint *may* be dismissed if:

- Complainant requests withdrawal;
- Respondent's enrollment or employment ends; or
- Specific circumstances prevent the recipient (school) from gathering evidence sufficient to reach a determination (e.g., complainant not cooperating with investigation, many years between alleged misconduct and complaint filing)

REMEMBER: Even if complaint is dismissed under Title IX, it can still be addressed under other policy or Code of Conduct provision



NEW INVESTIGATION PROCEDURES

REPORTING

An "**appropriate school official**" must have **actual knowledge** of a sexual harassment complaint to trigger a school's obligation to investigate under Title IX.

OLD DEFINITION

- Individual with decision making authority
- Knew or should have known

NEW DEFINITION

- All K-12 employees
- Actual knowledge

INITIAL RESPONSE TO REPORT

Title IX Coordinator must, upon receipt of report:

- Contact complainant to discuss "supportive measures"
- Inform complainant of "supportive measures" available whether formal complaint filed or not
- Explain process for filing formal complaint

SUPPORTIVE MEASURES

- Available before, during, and after investigation, and in lieu of formal complaint
- Nondisciplinary, non-punitive, individualized
- Designed to restore or preserve equal access to education program or activity without “unreasonably” burdening the other party
- Include counseling, schedule changes, increased monitoring
- Does *not* include anything that completely removes a respondent from an activity; removal considered punitive
 - For students: emergency removal permitted
 - For staff: administrative leave permitted

EMERGENCY REMOVAL

- School officials may remove a student from an educational program or activity **only on an emergency basis**
- Formal complaint required



EMERGENCY REMOVAL PROCESS

School officials must:

- Conduct individualized safety and risk analysis;
- Determine that an immediate threat to the physical health or safety of students or staff justifies removal; and
- Provide the student being removed notice and an opportunity to challenge the removal immediately after being removed.

FORMAL COMPLAINT

- A document filed by a complainant or signed by the Title IX Coordinator;
- Alleging sexual harassment by a respondent; and
- Requesting that the recipient investigate the allegation of sexual harassment



FORMAL COMPLAINT: NEXT STEPS

Written notice to both parties that includes:

- Grievance procedures
- Allegation details
- Parties’ right to inspect and review relevant evidence
- Statement that respondent is presumed not responsible
- Notice must be supplemented if new allegations arise during investigation

DELIBERATE INDIFFERENCE

Schools must not be *deliberately indifferent* to sexual harassment.

OLD DEFINITION

The school must take immediate action to eliminate the sexual harassment or sexual violence, prevent its recurrence, and address its effects

NEW DEFINITION

Failure to respond reasonably in light of known circumstances

BEGINNING THE INVESTIGATION

- School has burden of proof
- Standard of evidence must be same for all complaints (employee and student)
- Reasonably prompt timeframe
- Cannot restrict either party from discussing allegations or gathering/presenting evidence
- Both parties entitled to an “advisor” of their choice to assist them in the process
 - E.g., parent, staff member, or attorney
 - May not restrict who is advisor

INVESTIGATION PROCEDURE

- Investigator drafts preliminary report summarizing all relevant evidence
- *At least 10 days before* preliminary report is finalized: Parties/advisors must be permitted to review and respond to *all* evidence directly related to allegations
- *At least 10 days before* hearing or determination of responsibility: Final report (incorporating feedback as necessary) must be provided to parties

HEARINGS

- Live hearing and cross-examination **NOT** required
- If no hearing, after receiving final report, both parties may:
 - Submit written, relevant questions for the other party or any witness;
 - Review answers to the questions; and
 - Provide limited follow-up questions.
- Report updated as necessary.

FINAL DETERMINATION

- Responsibility determination must be in writing and address:
 - Allegations
 - Procedural process
 - Findings of fact
 - Implications from the student code of conduct
 - Conclusion for each allegation
 - Appeal rights
- Decision maker cannot be investigator or Title IX Coordinator

APPEALS

OLD RULE

- Not Required
- School has discretion on whether to offer appeal and what form

NEW RULE

- Required!
- Must be available to both parties at least for:
 - Procedural irregularity
 - New evidence not reasonably available
 - Conflict of interest
- Must be handled by different individual than decision maker



ACTION ITEMS



TRAINING

- Designate Title IX Coordinator and staff who may serve in various positions (investigator, decision maker, appeals, advisor)
- Consider pooling resources or using outside assistance from ISD, legal counsel etc.
- Require any staff involved in grievance process (investigation through appeal) to attend comprehensive Title IX training
- Conduct all-staff training to ensure awareness of reporting obligations



WHAT NOW?

- Train staff
- Update policies and handbooks
- Disseminate new policy/handbook to students, staff and parents
- Post Title IX Coordinator info and training materials on school website

COMING SOON!

- Updated Thrun Title IX Package (policy and template documents)
- Training later this summer
 - All-staff training module; and
 - Comprehensive training (via virtual platform or in-person) for investigators, Title IX coordinators, and decision-makers
- Contact lapsey@thrunlaw.com to be notified when more information about these trainings is available!

#TEAMTHRUN TITLE IX WORK GROUP

- Cristina Patzelt*
- Katie Vujea*
- Jessica McNamara*
- Rob Dietzel
- Meg Hackett
- Jennifer Starlin
- Phil Clark*
- Tim Gardner*
- Michele Eaddy
- Roy Henley*



* = Association of Title IX Administrators Certified Civil Rights Investigator



THANK YOU!

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