



On The Alert!

Date: September 22, 2020
Attention: ASCIP Members
Affected Department(s): Admin, Legal, Risk Management, Faculty & Staff
Applicability: K-12, Community College Districts & Charters

UPDATES TO TITLE IX REGULATIONS: FINAL CHANGES

Effective August 14, 2020, the U.S. Department of Education's [final regulations](#)¹ governing how K-12 schools and community colleges handle incidents of sexual misconduct on campuses were finalized. These rules narrow the definition of sexual assault, require officials to hold live hearings with cross-examination, and reduce institutional responsibility in investigating certain incidents. The significant final changes are summarized below.

Actual Knowledge Standard

Under these regulations, schools may use either the preponderance standard or the "clear and convincing" standard in sexual harassment and assault cases. Under the prior rules, K-12 schools and community colleges were held responsible for failing to act if they knew about or "**reasonably should**" have known about an occurrence of harassment or assault. Under the current guidelines, schools must have "**actual knowledge**" of the occurrence in order to be held liable. This potentially reduces schools' liability.

In addition, K-12 schools and community colleges are now only held responsible for incidents on school property or at school-sponsored events and not at most private, off-campus residences (although schools can still be held responsible for occurrences at school-sanctioned fraternities or sororities). K-12 schools must now include all employees having actual knowledge.

Sexual Harassment Redefined

The regulations have redefined "sexual harassment" under Title IX. The prior guidelines defined sexual harassment as "**unwelcome conduct of a sexual nature.**" The current regulations define sexual harassment as "**unwelcome conduct that a reasonable person would determine is so severe, pervasive and objectively offensive that it denies a person access to the school's education program or activity.**" This change to Title IX may lead to fewer reports of harassment and assault claims.

Accused students and alleged victims are now allowed to question the other either directly or through a representative. Prior guidelines had discouraged direct contact between the two parties. The accused and their accuser also potentially have access to all evidence in the case. Previously, schools were allowed to exclude information from a case file that they believed might not have bearing on its outcome. These rules also require that dating violence be addressed as part of school's Title IX obligations.

School Policy Changes

Schools may choose to alter their policies on prohibited discrimination, harassment, and related misconduct in a restrained manner based on these changes. For instance, misconduct that explicitly falls under the narrowed scope of Title IX is subject to the Title IX process. All other misconduct that violates prohibited discrimination, harassment, and related misconduct would still be investigated under the prior (non-Title IX) policy. The primary differences between cases that are evaluated in the prior process and the Title IX process are who makes the determination of the case and what the hearing process looks like. Of course, other approaches may be taken by schools.

¹ Sources: *Summary of Major Provisions of the Department of Education's Title IX Final Rule* <https://www2.ed.gov/about/offices/list/ocr/docs/titleix-summary.pdf> and *Federal Register / Vol. 85, No. 97 / Tuesday, May 19, 2020 / Rules and Regulations* <https://www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf>.

Please contact your ASCIP risk services consultant at (562) 404-8029 to discuss further.