MEMORANDUM

TO: Local Education Agencies
FROM: IDOE-Office of Legal Affairs
DATE: December 12, 2018
RE: New Proposed Title IX regulations – Sexual Harassment

Title IX protects every student’s right to educational opportunities and benefits free from sex discrimination. The Secretary of Education has proposed new regulations which would govern Title IX requirements pertaining to how schools must respond to incidents of sexual harassment in order to prevent sex discrimination. The proposed regulations refer to every entity Title IX applies to as ‘recipients’. Recipients are defined as school entities that receive federal financial funds this includes Charter Schools. Although, Title IX regulations have been around since the 1970s, those regulations have never specifically addressed sexual harassment/assault grievances. The Department of Education has only ever addressed sexual harassment/assault grievances through guidance, never through regulations. The proposed regulations address K-12 and pose-secondary schools. This memo is limited to K-12.

The proposed regulations are based on U.S. Supreme Court case law and therefore fall clearly within the law. The proposed regulations will make clear that Title IX addresses misconduct by recipients of federal funds, not by third parties such as teachers or students. Gebser v. Lago Vista Indpt. School Dist., 524 U.S. 274 at 292. The proposed regulations also adopt the Supreme Court standard that schools must have actual knowledge of an alleged incident to be required to respond, therefore affirming the standard that schools are liable only for their own misconduct. Gebser, 524 U.S. at 291-92; Davis, 526 U.S. at 642-43.

The purpose of this document is to explain, in part, and provide guidance on the proposed regulations. The proposed regulations are currently in the public comment phase and therefore are subject to change. The Federal Register officially published the proposed regulations on November 28, 2018. The 60 day period during which individuals and organizations can submit comments is open with the deadline of January 28, 2019. However, the final version of the regulations will most likely resemble the current version. Below is a summary of the proposed regulations. This summary is not all inclusive, but instead focuses on providing a general outline with attention to certain issues. It is intended to provide schools with a general understanding of terminology as well as a framework for schools to understand their responsibilities. After a review of the proposed regulations, the Indiana Department of Education encourages schools to submit comments detailing any and all concerns regarding the proposed regulations.
**Title IX**

The proposed regulations include the following three sections:

1. What constitutes and is defined as sexual harassment for purposes of rising to the level of a civil rights issue under Title IX;
2. What triggers a school’s legal obligation to respond to incidents or allegations of sexual harassment; and
3. How a school must respond.

**Defining Sexual Harassment – 34 CFR 106.44(e)(1)**

The proposed regulations define sexual harassment actionable under Title IX to mean any of three types of behavior:

1. A school employee conditioning an educational benefit or service upon a person’s participation in unwelcome sexual conduct (often called *quid pro quo harassment*); or
2. Unwelcome conduct on the basis of sex that is so severe, pervasive and objectively offensive that it *effectively denies a person equal access* to the school’s education program or activity, or
3. *Sexual assault*.

**Key points**

These definitions include only sex-based discrimination that is sufficiently serious as to effectively deprive and jeopardize a student’s equal access to his/her educational program or activity. Additionally, these definitions promote protection of free speech and academic freedom in a way that the more expansive and current Title IX definition of harassment (“unwelcome conduct of the sexual nature”) does not.

The proposed regulations do not intend for schools to replace the criminal justice system and prosecute sexual assault crimes. Schools are not relieved from addressing serious sexual harassment that may also be a crime.

**Potential issues**

While the proposed definitions of sexual harassment are far narrower than the one currently used by the Office of Civil Rights (OCR), and would relieve schools of the responsibility to respond to or investigate certain complaints of sexually offensive behavior. Additionally, the definitions suggest that the alleged victim of sexual harassment will have to prove that he/she has already lost access to education as a result of the harassment. Many times alleged victims are still in school, which makes such proof difficult. As a result these definitions place a large burden on alleged victims.
What Triggers a School’s Requirement to Respond- 34 CFR 106.44

A school’s requirement to respond to sexual harassment is only triggered when certain conditions are met. Those conditions are:

(1) School must have **actual knowledge** of sexual harassment or the allegations of such,
(2) The harassment must involve conduct that **occurred within the school’s own program or activity**,
(3) The harassment must have been perpetrated against a person in the United States.

**Actual Knowledge**

‘**Actual knowledge**’ is defined as notice of sexual harassment or allegations of sexual harassment to: 1) a school’s title IX Coordinator, or 2) any official of the recipient who has authority to institute corrective measure on behalf of the recipient, or 3) a teacher in the elementary and secondary school context when the allegations involve student-on-student harassment.

The proposed regulations make clear and reflect current law, i.e. Title IX governs conduct by the school not third parties and therefore the regulations require that the school as an entity knows of the allegations of sexual harassment. Under Title IX a school can only be held liable for conduct of which it knows and has control.

**Potential Issues – Actual Knowledge**

This standard of actual notice could place a heavy burden on alleged victims and schools. Current guidance dictates that if any representative of the school learns of sexual misconduct, the school is assumed to have knowledge that triggers its responsibility to respond. This will no longer be the case under the proposed regulations.

Determining whether someone is an official with authority to take corrective action will become a fact-specific inquiry. Schools would need to determine if the person to whom a concern was reported is considered an official who has authority to institute corrective measures. This may become a time consuming and confusing process. This definition gives the schools wide latitude to define ‘official’ in different ways with each sexual harassment report made, therefore creating major inconsistencies. Not only that, it would leave the school with the power to define who is an official very narrowly, if it so chooses, and thus limit the sexual harassment complaints that must be investigated.

For student-on-student sexual harassment only, actual knowledge can come from notice to a teacher, not necessarily an official with authority. This is an exception for K-12 schools only. With this exception the department has taken into account the age and vulnerability
of K-12 aged children, as well as the fact that teachers may exercise a considerable amount of supervision and control that almost mirrors that of parents. Therefore, teachers in K-12 schools are deemed to have the required authority to confer actual knowledge on the school.

The chilling effect of the vagueness of the definition of ‘an official’ could extend further making it more difficult for alleged victims to come forward as they would not know who to go to. Even with the exception for K-12 alleged victims of student-on-student harassment, alleged victims are most likely to report to someone they know, trust, and feel supported by, and therefore alleged victims without a trusted teacher to confide in may suffer. Furthermore, if the harassment is employee/teacher-on-student, and a teacher is no longer considered an official, it is even less likely that alleged victims would approach a dean or administrator they hardly know to report such harassment. Lastly, the actual knowledge standard is not met when the only official of the school with actual knowledge is also the accused perpetrator. Therefore, absolving the school of any responsibility.

Ultimately, the proposed regulations definitively point to only one person, the Title IX Coordinator, as the official whose knowledge is attributable to the school, and thereby closing off many other avenues for sexual harassment reports to be made. A better policy is that a school is deemed to have actual knowledge if any of the staff becomes aware of sexual harassment, including teachers, counselors, administrators, etc.

A School’s Program or Activity

The proposed regulations also have a jurisdiction requirement. The alleged sexual harassment must involve conduct that occurred within an education program or activity of the school. An education program or activity includes any academic, extracurricular, research or occupational training.

Notably, there may be situations where the harassment occurs in a school’s program or activity, but the school’s response obligation is not triggered because the alleged victim was not participating in, or even attempting to participate in, the education programs or activities provided by that school. Such a circumstance may occur when an alleged victim from another school is harassed on the campus of the perpetrating student while the alleged victim was merely physically present on campus, but was not, and did not intend to participate in any of the schools programs or activities.

Potential Issues-Program or Activity

The vagueness of this requirement could become confusing for schools to interpret and may lead to schools to applying a narrow interpretation of this requirement, which may limit a schools’ exposure and possibly silence many alleged victims. The language as written, “sexual harassment in an education program or activity of the school” could be interpreted to limit a schools responsibility to the school’s campus only.
Further limited definition interpretations could include: only on school grounds, only during school hours, only during school sanctioned events where a school official is also present, only applies to incidents where the perpetrator and victim are students at the same school. Additionally, electronic conduct such as email, texting, and social media posting/messaging could be excluded even if that conduct occurs on school property. A school may conclude that commonplace communication between two students does not fall within its program or activity as it is not a school activity. Therefore, issues such as cyber bullying/harassment or the posting of derogatory/offensive content or the spreading of a damaging rumor would not be subject to require a schools response under Title IX.

**How a School Must Respond - 34 CFR 106.44-106.45**

Schools are only obligated to respond to reports that meet the requirements laid out in the proposed regulations which meet the definition of sexual harassment, the condition of actual knowledge and the jurisdiction prong. However, schools must respond to all reports that meet the requirements of sexual harassment whether or not a formal complaint is filed.

A school will be found to be in violation of Title IX if its response to a report of sexual harassment is ‘deliberately indifferent’, defined as “clearly unreasonable in light of the known circumstances.”

**A School’s Response Requirements**

- Alleged victim has the option to file a formal complaint
- May facilitate an informal resolution via mediation, etc.
- A formal complaint can be filed by the alleged victim or the Title IX Coordinator
- Have a Title IX Coordinator on staff to intake reports and formal complaints
- Investigate every formal complaint
- Must still offer free of charge supportive measures to the alleged victim even when no formal complaint is filed
  - **Supportive measure** are defined as non-punitive and non-disciplinary individualized services such as counseling, no-contact orders, and course/academic adjustments
- The Title IX Coordinator must file a formal complaint to investigate a possible pattern of harassment of a serial/repeat offender (even if the alleged victim[s] do not wish to file a complaint)
- Must have a grievance process to handle all formal complaints and the grievance process must have certain protections for the parties included:
  - Presumption of innocence
  - Objective evaluation of all relevant evidence
  - Title IX coordinators/investigators/decision-makers cannot have a conflict of interest or bias
  - The investigator of a report cannot then be the decision-maker for that case
- School's must have training materials for Title IX coordinators/investigators/decision-makers
- Where perpetrator is found responsible, the alleged victim must be given remedies designed to restore and preserve equal access to education

**Potential Issues-Response Requirements**

The restriction that limits only the alleged victim or the Title IX Coordinator as those who can file a formal complaint eliminates a large number of potential sexual harassment reports. Current guidance allows third parties to file a complaint on behalf of the alleged victim. However, if a Title IX Coordinator chooses not to file a formal complaint, the school is not immune from risk. Colleges and universities that respect the wish of a complainant to not file a formal complaint, yet offer the complainant supportive measures, get a safe harbor against a finding of deliberate indifference. The same safe harbor is not offered to K-12 schools in recognition that elementary and secondary schools need to protect younger students in ways that may more often require the Title IX Coordinator to file a formal complaint even when a young victim does not want to file. Either way, schools, are incentivized to offer supportive measures with or without a formal investigation.

The ‘deliberately indifferent’ standard is a high bar, much higher than the current standard which calls for the school’s response to be ‘reasonable’. Therefore, a school could provide a minimal response and still be in compliance with Title IX. This could potentially send the wrong message to alleged victims who have not yet reported. More importantly, this lowers a school’s liability to the bare minimum, when a school’s goal should be to protect and educate children.

Additionally, all the requirements above necessitate schools to have a detailed and functional structure and procedure in place to ensure compliance with Title IX. This could place a heavy burden on the schools to investigate and provide administrative hearings. However, under the proposed regulations it is within a school’s discretion on whether it conducts a hearing or not, after the formal filing of a complaint. A school can choose to proceed with a live hearing or to conduct the hearing via formal written exchanges between the parties.

**Grievance Procedure after the Filing of Formal Complaint – 34 CFR 106.45**

A school must:

- Proceed with an investigation
- Ensure burden of proof rests with the school, not the parties
- Allow parties to have representation such as a lawyer
• Create and maintain records for each investigation
• Allow parties equal access to all records
• Provide for a hearing to be held where cross examination can take place. If a hearing is not selected then the school must ensure that the parties are allowed to submit written questions to challenge each other
• Make the determination using either the preponderance of the evidence standard or the clear and convincing standard
  o The school may use the preponderance of the evidence standard only if the school uses that standard for conduct code violations that do not involve sexual harassment but carry the same disciplinary sanction

Potential Issues—Grievance Procedure

Even though K-12 schools can choose whether or not to engage in a live hearing, the fact that a school may choose to proceed with a live hearing could deter some alleged victims from reporting. An alternative would be to allow the alleged victim to choose whether or not to proceed with a live hearing. Also, if a live hearing is held in a case, it may be inappropriate to subject a student of K-12 age group to be cross examined.

Additionally, the proposed regulations allow the schools to choose the burden of proof that applies to the complaint procedure during the grievance process. This may cause schools to begin using the clear and convincing standard which raises the burden of proof considerably. The clear and convincing standard would require that the evidence of sexual harassment be determined to be highly and substantially more likely to be true than not. This may result in making it more difficult to support a claim of sexual harassment. However, supportive measures must be in place even if a formal complaint is not pursued.

Lastly, OCR will not find a recipient school to have violated Title IX solely because OCR may have weighed the evidence differently, as long as the school has responded in a way that is not deliberately indifferent. This lessens OCR’s ability to investigate noncompliance.

Procedure after a Determination

After the investigation and grievance process, schools must:

• Provide a written determination to all parties explaining the outcome
• Allow all parties to appeal
• Maintain all records created and allow parties to request copies of their records.
Public Comments

The public comment phase for these proposed regulations is open until January 28, 2019.

To submit your comments regarding the proposed rules, click here or visit https://www.regulations.gov/document?D=ED_FRDOC_0001-0830.

If there are any questions or concerns please contact:

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