

Wednesday, December 11, 2019

Dear K-12 Title IX Coordinators,

The US Department of Education's proposed regulations on Title IX recently took an important step forward in the adoption process and the regulations may become official policy in the next few weeks. The regulations are currently under final review by the Office of Management & Budget. Once released, the new regulations will have the force of law. While it's very likely that there will be a "grace period" to allow K-12 Districts to make required modifications to policies and procedures, it's not clear how much time will be provided (e.g., it could be as short as 90 days).

Now is the time for K-12 Districts and Schools to consider in depth how they will remain in compliance with the new regulations. While many experts and observers predict that litigation against the proposed regulations will be initiated as soon as the new regulations are officially released, and while the courts may issue injunctions against the implementation of certain provisions, it's now time to plan for their release.

We encourage K-12 Districts to consult their legal counsel on the proposed regulations. The following does not represent legal advice. From our perspective as consultants and researchers in the K-12 space, our analysis of the regulations yields several significant implications on Title IX infrastructure, practices, and compliance, including: significant procedural changes; increased notification requirements; enhanced staffing implications; a need for additional training; and funding issues.

Please note that this document provides information on the *proposed* regulations. There may be changes in the final regulations. ETR's K12T9 Initiative will conduct another review once the regulations become official and update this information accordingly. Finally, the K12T9 Initiative is grateful for the editorial assistance generously provided on this document by Brett A. Sokolow, Esq., President of [ATIXA](#).

Here is an overview of the proposed changes – please click on the link(s) below to navigate the document:

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1. Change to the Definition of "Harassment":

- a. The proposed regulations change the definition of harassment to (emphasis added) "Unwelcome conduct of a sexual nature **on the basis of sex** that is so severe, pervasive, ~~or~~ **and** objectively offensive that it ~~limits~~ **effectively denies** a person equal access to educational programs and activities."
- b. Brett Sokolow of ATIXA notes that this is "only the definition that OCR uses in its own enforcement. The proposed regulations do not require that Districts/Schools change their existing definitions. There remains an important debate about whether harassment can be either severe or pervasive, or whether it must be both. For any state that has legislated a definition by law or education code, that definition should be followed."

2. Change to regulations on Case Resolution Timeline:

- a. The proposed regulations change previous timeline guidance for the investigation and remediation of Title IX cases from "60-days" to "a reasonably prompt timeframe".

3. Change to the definition of what constitutes "Notice":

- a. The proposed regulations change the definition of what constitutes "notice", that is, what needs to happen for a District/School to be legally required to respond to a Title IX case. The proposed regulations stipulate that "actual notice" is required – that is, a formal, written complaint that is submitted to the Title IX Coordinator.
- b. Brett Sokolow of ATIXA notes "this is the standard that will guide OCR's own enforcement. It does not limit a District/School from using a broader definition of notice, and no policy change is explicitly required."

4. Changes to the definition of a "Responsible Employee":

- a. The proposed regulations designate all K-12 "teachers" as "responsible employees" (i.e., are required to report allegations of Title IX to their District's Title IX Coordinator) when the conduct is student-to-student only. The regulations do not address if non-teacher (i.e., non-certificated) personnel would also be considered "responsible employees" (e.g., social workers, nurses, credentialed personnel in the classroom, and others).
- b. Brett Sokolow of ATIXA notes this is "only the standard to guide OCR's own enforcement. It does not limit a District/School from using a broader definition of who is a responsible employee, since most school personnel are already mandated reporters of child abuse under state law."

5. Adds Guidelines around "Informal Resolutions":

- a. The regulations call for the following elements in response to "informal reports" and for "informal resolution" procedures:
 - i. Informal resolution will require detailed notice to involved parties, including specific details around allegations.
 - ii. The regulations call for Districts/Schools to clarify specific informal resolution protocols in policy and administrative regulations.

- iii. The specific criteria which would preclude an informal resolution, although it's been noted that there's no clarification on the precluding criteria in the proposed regulations.
- iv. Requires that Districts/Schools make clear to parties the anticipated consequences of parties' participation in informal resolution processes.

6. Requires Separation of Roles in K-12 Title IX Investigation & Remediation:

- a. The regulations mandate new separation of roles. The regulations contemplate three roles:
 - 1. The Title IX Coordinator
 - 2. The Investigator
 - 3. The "Decision-Maker" (the person who makes the final determination on the allegations)
 - a. Note that the "decision maker" cannot be the Coordinator or Investigator.
 - b. Brett Sokolow of ATIXA notes that a Coordinator can serve as an investigator if resources do not permit a separation of those functions, but that it is far better to create a separation, if possible.
 - 4. If a District has an internal appeals process, the appellate decision maker cannot be any of the three persons above.

7. Changes to Guidelines on "Supportive Measures" (previously known as "interim measures"):

- a. Any "supportive measure" may "not unreasonably burden" any party, and that any "supportive measure" cannot be disciplinary or punitive. The implication here is that heretofore routine practices, such as moving a reporting or responding party to another section of a class to separate the parties, might be considered "punitive." We expect lawsuits on behalf of responding parties.
- b. Suspensions as "supportive measures" are allowed, but only after a documented, rigorous "risk analysis" that stipulates a safety concern. Risk assessments must be conducted in compliance with a District's special education processes.

8. Sets New Guidelines Around "Notice to Parties":

- a. The proposed regulations require that the responding party receive advance, written notice of the allegation(s) and be provided "sufficient time to prepare a response" before an interview can be conducted.
- b. In the case of a formal, written complaint, the proposed regulations require notice to the reporting and responding parties to include:
 - i. The identity of the parties.
 - ii. The allegation(s), with reference to policy violation(s).
 - iii. The date and location of the alleged misconduct.
 - iv. NOTE: There must be "sufficient time" to prepare a response, although there's no specific guidance on the amount of time. Experts differ on this, and we have

heard a minimum of three school days and a maximum of ten. This requirement applies to all interviews, meetings, and appeals, if applicable.

9. Requires Access to an "Advisor of Choice" to Involved Parties:

- a. The proposed regulations require that parties have an "advisor of choice" during the investigation and remediation processes. Advisors may be present at interviews, meetings, and appeals, if applicable.
 - i. An "advisor of choice" could be anyone selected by the involved party – a parent/guardian/caregiver, an attorney, a teacher or other adult at school, a friend, etc.
 - ii. If the student doesn't choose an advisor, the District must select one who is "aligned with the party."
 - iii. The proposed regulations do not provide guidelines on the nature or extent of the advisor's participation in an interview, meeting, and/or appeals processes.
 - iv. Brett Sokolow of ATIXA notes that it is reasonable to expect that some training for advisors will be necessary.

10. Clarifies "Burden of Proof":

- a. The proposed regulations stipulate that the "burden of proof" is on the District/School, not the involved parties.
- b. The proposed regulations stipulate that a District's/School's investigation efforts must be "sufficient to reach a determination" as to the findings of fact.
- c. The proposed regulations clarify that evidence obtained by law enforcement agencies, if applicable, is "admissible" in the District's/School's investigation and findings processes.

11. Requires the Provision of Access to "All Evidence" to Involved Parties:

- a. At least 10 calendar days prior to the finalization of their investigation report, the District/School must make available all relevant evidence (i.e., inculpatory and exculpatory) to the reporting and responding parties.
 - i. On the issue of "relevance", some experts interpret this to mean evidence that is relevant to the specific allegation(s) in the case. However, other experts conclude that the District/School must provide equal opportunity to parties to review "all evidence" gathered.
 - ii. The evidence may be made available electronically, as long as there are restrictions on the parties' capacity to download the material. There are technologies that prevent the taking of screen shots, but those can be expensive and ultimately ineffectual.

12. Clarifies Guidelines on the Development and Sharing of an "Investigation Report":

- a. The investigation report must "fairly summarize" all relevant evidence.
- b. The investigation report must be made available at least 10 calendar days prior to the findings of fact (i.e., the "outcomes report").

- c. Parties can submit written responses to the investigation report which must be considered in the findings of fact.
- d. The proposed regulations are not clear on the level of detail that is required in the report, opening the door to the possibility that a "detailed summary" may demonstrate sufficient compliance.
- e. The proposed regulations are not clear whether information about parties' credibility/reliability or findings of fact should be included in the investigation report.

13. Provides Option to Conduct "Live Hearings" in K-12 Districts/Schools:

- a. If a District/School does call for live hearings, there are stipulations in the proposed regulations around "providing an opportunity for questioning" (i.e. this could be called "cross-examination" in post-secondary or courtroom settings).
 - i. The hearing must allow parties to submit written questions to be asked of parties, including witnesses. There is language that suggests that the "decision-maker" could ask the questions.
 - ii. The proposed regulations do not detail guidelines for the determination of "relevance" or "appropriateness" of submitted questions.
- b. If choosing to conduct live hearings at the K-12 level, please also note:
 - i. The "decision maker" cannot be the Title IX Coordinator or Investigator.
 - ii. Parties must attend the hearing. If a party does not appear, their evidence must be excluded.

14. Allows Adoption of Different Standards of Evidence:

- a. Districts/Schools may use "preponderance of the evidence" (i.e., the 51% standard – "more likely to have occurred than not") only if the District/School uses that same standard in any other student conduct violation process (e.g., expulsion). If a "clear and convincing" evidence standard is used in any other student or employee conduct process, then the District/School must use the "clear and convincing" evidence standard for Title IX cases.

15. Adds Requirements to the "Outcome Report" (i.e., Findings of Fact):

- a. The outcome report must include a statement of and rationale for each finding of fact for each allegation.
- b. The outcome report must detail any and all remedial actions to all parties.
 - i. Any remedial actions (i.e., sanctions, discipline) on the responding party must be designed to ensure ongoing access to educational programs and activities.
- c. The outcomes report must be provided to the reporting and responding parties at the same time.

16. Provides Guidelines on any Internal Appeals Processes:

- a. While internal appeals are not required by the proposed regulations, they do stipulate guidelines should a District/School choose to conduct internal appeals.
 - i. All involved parties must be notified of a request for an appeal.

- ii. The hearing must provide for parties to express their support or opposition to the outcome of the case.
- iii. The decision-maker may not have had any role in the investigation or resolution process.
- iv. There must be a “reasonably prompt” timeline for the issuance of the appeal decision.

While the future of the proposed regulations is uncertain, their release seems more imminent than ever. We at the K12T9 Initiative hope this primer is useful to you as you contemplate mandated changes to your Title IX infrastructure, practices, and compliance. Please feel free to reach out with your questions, and we look forward to the possibility of supporting your District/School through this changing regulatory landscape.