

Summary of New Major Title IX Regulations vs. Prior Regulations: THEN & NOW

	THEN	NOW
Schools’ Scope of Responsibility	Schools have broad responsibility to change the culture, to end any harassment, and to address the effects of rape culture on the entire student population .	Now , the focus is on schools’ responsibility to address particular cases of serious sexual misconduct.
K-12 in Relation to Title IX	Judges and administrators simply acknowledged important differences between K-12 students and those in postsecondary institutions. Sexual harassment in K-12 schools, however, was not directly addressed.	Now , the new rules go far beyond the court’s bare-bones framework to explain what constitutes harassment, what schools must do to identify and adjudicate cases of misconduct, and the remedies they must provide to victims of such misconduct. The new regulations are the first time the regulators addressed the issue of sexual harassment in K-12 schools directly.
Definition of Sexual Harassment Under Title IX	Previously, the Office of Civil Rights (OCR) advised that sexual harassment of a student by a student created a hostile environment if: <ul style="list-style-type: none"> • the harassment was severe, pervasive, <u>or</u> persistent; and • interfered with or limited a student’s ability to participate in or benefit from school services, activities, or opportunities. 	Now , the new definition of sexual harassment adopts a higher standard . Prohibited “sexual harassment” means conduct on the basis of sex that satisfies one or more of the following: <ol style="list-style-type: none"> 1. An employee conditioning the provision of an aid, benefit, or service on an individual’s participation in unwelcome sexual conduct (i.e., quid pro quo); 2. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, <u>and</u> objectively offensive that it effectively denies a person equal access to an education program or activity (i.e., hostile environment); or 3. Sexual assault (as defined by Clery Act), or “dating violence,” “domestic violence,” and “stalking” (as defined by Violence Against Women Act (VAWA)).

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“Program or Activity”	OCR’s 2014 guidance required schools to “process all complaints of sexual violence, regardless of where the conduct occurred , to determine whether the conduct ... had continuing effects on campus.”	Now , schools must respond when harassment occurs “in the school’s education program or activity. ” For K-12 purposes, the definition of “program or activity” has been expanded to include “ locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurs ” (e.g. campus, field trips, athletic events, conferences, etc.).
Designating a Title IX Coordinator	Title IX regulations required recipients to designate an employee to coordinate the recipient’s efforts to implement the law.	Now , the final rule requires that recipients not only designate but also “authorize” this individual to coordinate the recipient’s compliance efforts.
Who Can Report?	Previously, sexual harassment was to be reported by a “ responsible employee. ” According to OCR’s 2001 Guidance, a responsible employee included any employee: who had the authority to take action to redress sexual violence; who had been given the duty of reporting incidents of sexual violence or any other misconduct by students to the Title IX coordinator or other appropriate school designee; or whom a student could reasonably believe had this authority or duty.	Now , the new regulations protect K-12 students by requiring elementary and secondary schools to respond promptly when any district employee has notice of sexual harassment (teachers, guidance counselors, bus drivers, etc.). This replaces the former requirement where a “responsible employee” had an obligation to report.
Actual Knowledge	Previously, schools were held responsible for addressing a complaint and were required to intervene if they " reasonably " should have known about a violation.	Now , schools will be held responsible for addressing a complaint if they have "actual knowledge" that an offense occurred, a higher bar than under the old guidance. Under the new regulations, “actual knowledge” means a mandated reported has notice of “sexual harassment <i>or</i> allegations of sexual harassment.” In the K-12 context, all employees are now

		mandatory reporters. A school cannot be liable for failing to respond to known allegations of harassment unless it acts with “deliberate indifference,” defined as actions that are “clearly unreasonable in light of the known circumstances.”
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Standard of Evidence	Previously, schools had to use a preponderance of the evidence standard (i.e., it is more likely than not that sexual harassment or violence occurred).	Now , schools are required to select <u>one</u> of <u>two</u> standards of evidence , the preponderance of the evidence standard or the clear and convincing evidence standard—and to apply the selected standard evenly to proceedings for all students and employees, including faculty. This is a new and higher standard than what schools used previously.
Investigative Requirements	Previous Obama-era guidance imposed no requirements on schools to share exculpatory evidence with the accused student, nor to document any exculpatory evidence that a Title IX investigator might have uncovered.	Now , the new regulations codify additional investigative requirements. For example, after a student reports an assault or a harassment covered by Title IX, the school must tell the students involved and their parents in writing about the allegations and the entirety of the evidence that is gathered.
Hearings	Schools were strongly discouraged from permitting an accused student from directly cross-examining his accuser. Since most schools <i>also</i> prohibited the lawyer for an accused student from questioning the witness, this effectively meant that OCR discouraged all cross-examination .	Now , there is a requirement that colleges and universities hold live hearings with cross-examination in sexual harassment disciplinary proceedings. The final rule recognizes the importance of cross-examination in determining the truth and requires schools that use hearings to permit some form of questioning of the accuser, but does not require allowing a lawyer or an advocate for the accused to conduct that questioning. The requirement of live hearings does <u>not</u> apply to elementary and secondary schools.

	THEN	NOW
“First Response” Protocol	“First response” protocol is not necessary.	<p>Now, the new regulations establish a “first response” protocol on the part of the Title IX coordinators that was not required previously. Specifically, if anyone reports sexual harassment through any method, the Title IX coordinator or designee must:</p> <ul style="list-style-type: none"> • promptly contact the complainant to discuss the availability of supportive measures; • consider the complainant’s wishes with respect to supportive measures; • inform the complainant of availability of supportive measures with or without filing a complaint; and • explain to the complainant the process for filing a formal complaint.
Training	Before the changes, Title IX required schools to train certain personnel (Title IX coordinators, investigators, decision-makers, any person who facilitates an information resolution process) on the law.	<p>Now, the new regulations, however, identify new training topics, including on the regulation’s <i>new</i> definition of sexual harassment and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.</p>