

SEXUAL HARASSMENT INVESTIGATIONS

1. NEW RULES

The United States Department of Education established new Title IX rules governing the obligations of elementary and secondary schools to investigate and remedy sexual harassment. These rules, if they become effective as written, would substantially narrow the definition of sexual harassment—both **student-on-student** and **staff-on-student** or **staff-on-staff**—and would enhance significantly the requirements for investigating complaints of harassment and the procedural rights both accuser and accused. Compliance with these enhanced investigation and procedural rules would render very difficult any effort to sue a school entity for sex discrimination. They will also, however, require a considerable investment of new resources on the part of public schools, which will have to establish elaborate complaint investigation and decision-making processes.

2. NARROWED DEFINITION OF HARASSMENT

The proposed new regulation defines the term “**sexual harassment**” as “**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.**” This change would elevate the standard for harassment to the level currently required to make out a claim for money damages in court. The **existing standard** that the Office for Civil Rights at USDE has applied in its investigations of discrimination claims—for which corrective action does not include money damages—is far more subjective, **hinging more on how the complainant perceived and responded to the alleged harassment, regardless of how objectively severe and pervasive it was.** Under the existing standard, a finding of harassment could be founded on the unwillingness of the complaining student to attend school based on a single incident of alleged harassment. Under the proposed standard, a single incident that did not involve a criminal assault would not meet the “pervasive” test and, even if *multiple* incidents of harassment were alleged, they would have to be so severe as to be offensive to an objective observer, regardless of the perception of the complaining student. Schools, moreover, would be required to dismiss without investigation any complaint that, if proven true, would not survive this test.

3. INVESTIGATION ENHANCED AND FORMALIZED

The obligation to **investigate, prove, and take action to remedy harassment under the proposed regulation would be triggered only by “actual knowledge”** of conduct deemed harassing. Actual knowledge could come either from the filing of a written, signed complaint by the alleged victim of harassment or from awareness of facts constituting harassment by (a) the designated compliance officer for the LEA; (b) an official who is authorized “to institute corrective measures” on behalf of the LEA; or (c) a teacher. Mere knowledge of harassment by an employee or other staff member who is not in one of these roles would not suffice to impute “actual knowledge” to the school entity.

4. TRIPARTATE INVESTIGATION TEAM

While these changes would, if adopted, lower considerably the number of founded harassment claims, the **procedural requirements** of the proposed regulation will be costly and difficult to implement. Schools will be required to **appoint and train Title IX compliance officers, complaint investigators, and decision makers—and these three positions will have to be filled by different staff members.** Currently, the roles of compliance officer, investigator, and decision maker are often filled by a single individual, typically a building administrator. Required training of these staff members would have to be specific to investigating, deciding, and remediating harassment claims based on sex.

5. PROCEDURAL GUIDELINES

Formal notice of harassment allegations and of the procedural rights would have to be provided **in writing to both accuser and accused, and both parties would have the right to be accompanied by an “advisor”—which presumably could include an attorney—at any face-to-face meeting concerning the complaint.** Although schools would not be required to gather evidence through an evidentiary hearing, both accuser and accused, who must be presumed innocent, **would have the right to submit to the appointed investigator questions that each wants asked of the other, and of any witnesses who are interviewed, and the school would have to provide the answers to those questions to the party that submitted them.** In addition to this potentially problematic requirement, **all evidence uncovered in the investigation would have to be accessible to both accused and accuser, regardless of whether the school intends to use that evidence to support its findings.** The evidence thus gathered must be submitted to a decision-maker who must, based thereon, issue a written decision that includes findings of fact, an analysis of how those facts establish or fail to establish a violation of a specific disciplinary code, and a proposed corrective action. In these and many other particulars, the proposed new investigation and fact-finding requirements would lend themselves more to criminal cases than to the sort of flexible, informal processes more suited to children in the elementary and secondary school context. (It should be noted that the proposed regulations appear to have been drafted with the college and university context more in mind, although they would apply equally to younger children).

6. STANDARD OF LIABILITY

The proposed regulations make clear, however, that **schools would only be liable for Title IX discrimination if they are found to be “deliberately indifferent” to harassment**—a standard, again, currently applied only to actions in court seeking money damages. As long as a school adheres to the stringent requirements for investigating harassment complaints, the new rules would bar any finding by USDE that the school was “deliberately indifferent,” even if USDE investigators ultimately disagree with the conclusion reached by school officials, as long as that conclusion, or the process used to reach it, was not “clearly unreasonable in light of the known circumstances.”

One curious provision of the proposed regulations would allow for the **“emergency removal” of an accused harasser pending completion of an investigation of the complaint.** We believe, however, that any such removal would entitle the accused to disciplinary due process, which, if the removal is proposed for more than ten school days, would include a full school board hearing. The proposed regulation allowing “emergency removal,” moreover, expressly retains in the removed student all rights under the IDEA, Section 504, and the ADA.