

Startin' in Kindergarten: Lawyering Up on School Sex Abuse

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Investigating sexual misconduct involving schoolkids is about to get more complicated than marching students down to the principal's office to explain what happened on the playground. Now they can lawyer up.

In replacing disputed Obama-era campus-rape policies with more robust protections for the accused, the Trump administration is also expanding federal oversight to K-12 education – and giving even prepubescent pupils the right to a lawyer or an adviser during a sexual misconduct investigation. (The same goes for accused teachers.)

Come next school year, an accused grade-schooler, the accuser and their parents will get to review each other's evidence – such as social media posts, texts, and photos – and submit written responses for the opposing parties and questions for witnesses.

Those are key legal protections embedded in new rules finalized by the U.S. Department of Education in a [2,033-page document](#) issued in May. Lawyers who work with school districts say the new protocols will turn reviews that lasted a few hours or days into quasi-judicial proceedings lasting a month or more.

The rules consolidate and codify legal standards for handling sexual misconduct disputes from campus to kindergarten in the name of ending violations of due-process rights for the accused. But at the same time, they raise the prospect of drawing younger people into prolonged legal confrontations and escalating the disputes they are meant to resolve, critics warn.

The new K-12 policies also expand the reach of the Department of Education under Republicans, a break with their party's past of seeking to limit the agency's powers – or even abolish it – since President Jimmy Carter created it four decades ago.

“We've moved from a fairly unregulated, guided environment, to regulations that are so prescriptive that they give [schools] no latitude to employ best practices,” said Brett Sokolow, president of ATIXA, the Association of Title IX Administrators. “So the fact that that's happened under a Republican administration is truly remarkable.”

School systems now have less than three months to translate the rules into district policies and hire or train staff to administer the rules, which apply the 1972 federal Title IX anti-discrimination law. When Education Secretary Betsy DeVos undertook revising the Obama-era rules three years ago -- a process that generated more than 124,000 public comments -- no one could have foreseen that the new protocols would coincide with the coronavirus pandemic, which forced schools nationwide to close and conduct classes remotely. Now there is great uncertainty over whether and how K-12 classes will resume this fall.

The new regulations have faced opposition from women’s rights advocates and social justice activists since their inception; the critics say the rules favor male perpetrators and will make victims less likely to come forward with complaints.

The American Civil Liberties Union has already filed a lawsuit to block the new rules, as have 18 state attorneys general, legal moves that could result in courts delaying them. Rep. Elissa Slotkin, a Michigan Democrat, has introduced a bill in Congress to stop the new rules, and Joe Biden, the presumptive Democratic Party presidential nominee, has vowed to quickly rescind them if he is elected to the White House this year.

The Department of Education’s Office for Civil Rights maintains that expansion of federal oversight is necessary to address a troubling rise in sexual misconduct episodes in K-12 schools. The agency cites an alarming statistic: Harassment and violence complaints have increased nearly 15-fold over the past decade.

Boston College professor R. Shep Melnick, author of a 2018 study on the evolution of Title IX, said the new rule will bring sweeping changes to public schools.

“Despite all the attention devoted to sexual harassment during the Obama years, until recently, OCR [the Office of Civil Rights] devoted few resources to investigating complaints in elementary and secondary schools,” he wrote in Education Next, a journal affiliated with Harvard University.

“Public schools are on notice that the federal spotlight now shines on them,” Melnick wrote. “Complying with Title IX regulation has become more important than ever.”

The Trump administration’s new rules are mainly a response to longstanding concerns that Obama-era policies led universities to abandon impartial adjudications of sexual assault cases in favor of advocacy for accusers. The strategy, led by then-Vice President Biden, turned into a nationwide effort to dismantle so-called campus “rape culture,” based on a disputed contention that one in five campus women were victims of an attempted or successful sexual assault while in college.

The Obama policies prompted a backlash, with hundreds of lawsuits filed by accused students, almost all men, who claimed they had been deprived of due-process rights, including the right to present their own cases, in campus proceedings some called “kangaroo courts.” Some students claimed they were branded as sexual predators and even expelled because of misunderstandings resulting from drunken hookups or ugly breakups.

The Obama-era effort had largely bypassed K-12 schools, which were already covered by a combination of federal standards, child abuse laws, state anti-bullying laws and school district anti-harassment policies. But they have now been swept up in the new rules – the Department of Education’s first Title IX rules that focus on sexual harassment – because Title IX applies both to K-12 and post-secondary schools. (The Obama campus effort had been pursued through a putatively informal “Dear Colleague” letter to college administrations that was technically non-binding.)

Three factors led the Education Department to shift its attention to earlier education, Melnick wrote: Its own data showing that “nearly 10,000 students in elementary or secondary schools were the victim of assault, rape, or attempted rape during the 2015–16 school year”; an

investigation of Chicago schools that found pervasive sexual misconduct by teachers and students; and a new federal law barring schools from passing along employees with a sexual misconduct rap sheet to other school districts.

The new policy is “so far-reaching that I can see most K-12 administrators looking at it and being paralyzed,” said Sokolow of the Title IX administrators’ group. “If you think colleges were bad at this, wait ‘til you see K-12.”

The new rules go into effect Aug. 14 and are binding on the nation’s colleges and K-12 schools as well as private and independent schools that participate in the federal Small Business Administration coronavirus relief program.

The Department of Education said the legal safeguards are necessary to protect students from sexual misconduct as well as from bureaucratic misconduct.

They ensure that “students in all grade levels have strong, clear procedural rights so that every sexual harassment incident is resolved fairly and accurately,” said department spokeswoman Angela Morabito in an email.

In their break with the Obama era, the rules scale back some university standards while expanding the standards at K-12 schools. For example, fewer college employees but more K-12 employees are designated as responsible for reporting allegations of sexual misconduct to the Title IX administrator when a student brings a potential problem to the employee’s attention or when the employee has reason to believe there has been a violation.

Currently about 60% to 80% of a university’s staff have that responsibility, but only about 1% will have that legal duty explicitly under the new rules, Sokolow said. However, colleges have the discretion of exceeding the minimum requirement, and most are expected to do so, resulting in little or no change.

Meanwhile, all K-12 employees will now be required to report sexual misconduct to the Title IX coordinator. The Department of Education set different standards because K-12 sexual assault victims are almost always minors and deemed to require the highest level of protection.

The new rules emphasize due process and require a presumption of innocence for those accused of sexual misconduct. No longer will the person who investigates the complaint also be the one who rules on the case. Now K-12 schools and colleges will have to have different people in those two roles.

And the standard of determining responsibility for an offense will no longer have to be the “preponderance of evidence” standard common in civil cases (as opposed to “beyond a reasonable doubt” in criminal cases). Under the new rules, school districts will still be able to use the lower standard of proof, albeit with the new due-process protections, including the right to submit questions to witnesses. Or they can opt for an even tougher standard, called “clear and convincing evidence,” which requires an accuser to have substantially more evidence to win a case.

In the coming school year, K-12 school systems will have to provide and train investigators, adjudicators and appeals officers at their own cost, which could be considerable, especially to smaller school systems.

Melissa Carleton, a partner with Bricker & Eckler LLP in Columbus, Ohio, which provides legal services to 200 districts in the state, calls the federal rules an unfunded mandate.

A Department of Education spokeswoman agreed on background that the requirements are not federally funded but said it's not a mandate because schools don't have to comply. However, non-compliant schools would risk losing federal funding that's contingent on obeying Title IX. Carleton, who works as an investigator and decision-maker in sexual misconduct matters, predicts that most Title IX investigations will be handled by school administrators who handle school disciplinary matters now, and the decision-maker and appeals functions will be assigned to district-level administrators.

Outsourcing the services will not be the norm, she predicted, but when it does happen it will most likely be to retain investigators, because Title IX investigations will take up the bulk of the time, as they will now allow for a minimum of 20 days for the parties to submit questions and comments.

"It wouldn't be unheard of for a single case to run several thousand dollars or more," Carleton said of complex investigations that involve interviewing multiple witnesses and plowing through written evidence, such as emails, texts and social media exchanges. "I have had cases with literally hundreds of pages of written evidence."

The impact of the changes will vary, as the nation's school systems are anything but monolithic. The largest districts have hundreds of thousands of students and easily eclipse the biggest statewide university systems, while small, rural school districts with just several hundred students can have principals whose duties include athletic director or school bus driver.

"It's easy to say that a university like Harvard or Ohio State should have a big department with lots of people that are trained and can do this stuff," said Texas attorney Chris Gilbert, a partner at Thompson & Horton LLP in Houston, which provides legal services to close to 100 school districts in Texas.

"But you're talking about a school district like Devers ISD [independent school district] in Texas, which is a K-8 district, doesn't even have a high school. There's just no way they can have people on their staff, as many people as the system now calls for, that have been trained in this kind of thing."

School districts are in limbo as they await legal analyses of the new regulations and recommendations on how to revise local K-12 policies to conform to the federal standards. This process is expected to work its way through school board meetings over the summer, said Patrick Corbett, executive director of Neola Inc., which provides services to 1,500 school districts in six states and is creating template policies for its clients based on the new Title IX rules.

Then the policy revisions would have to come before local school boards for adoption.

"Some of those board meetings could get contentious because there are high voltage emotions involved on both sides," said Heidi Maynard, an attorney at Vandenberg, Johnson & Gandara LLP in Tacoma, Wash., who represents a dozen school districts in the state and is a board member of the National School Board Association's Council of School Attorneys.

“It’s just the concept that more protections are necessary for the accused,” Maynard said. “That right there is the trigger for a lot of people who believe that women are not believed to begin with and that a lot of allegations go unaddressed.”

A sexual misconduct allegation at the K-12 level had long been presumed to be harder to brush off as soured romance, because such charges almost always involve minors or children, and sometimes an adult with a minor. But that assumption has been put to the test lately.

In February, the Department of Education announced a civil rights initiative “to combat the troubling rise of sexual assault in K-12 public schools.” The Department of Education said it plans to review more than 70 K-12 schools around the country, based on news reports and other information, to assess their record-keeping and responsiveness to sexual misconduct complaints.

According to the latest federal data available, about 9,700 incidents of sexual assault, rape and attempted rape were reported in the nation’s K-12 schools in the 2015-16 year.

As part of its initiative, the department cited chronic deficiencies at Chicago Public Schools, the nation’s third-largest public school district, such as shoddy recordkeeping, investigations by untrained staff or a failure to respond promptly to complaints of misconduct. The agency said that Chicago Public Schools did not have a Title IX coordinator from 1999 until late 2018. The feds reviewed 249 student-on-student sexual harassment and misconduct complaints in the 2017-18 school year, describing “widespread, documented reports of sexual harassment among students at all grades, including complaints involving serious allegations of rape and attempted rape.”

According to one of the incidents cited by the Department of Education’s Office for Civil Rights: “In an elementary school complaint, a male student announced to his peers that he was going to rape one of his female classmates. He then chased this female classmate around the playground during recess, threatening her with anal rape. Six students tried to restrain the male student, but they were unable to hold him back.” The report says when the boy could not catch the girl, he moved on and “ended up suspended for five days after attacking another girl.”

Gilbert, the Texas attorney, said he is handling four Title IX lawsuits currently for his school district clients. One involves a 48-hour investigation that he said would have taken four to six weeks under the new Title IX rules.

According to the federal lawsuit, a ninth-grade student alleged that another ninth-grader forced her to perform oral sex in a band room. The school district investigated and concluded the alleged incident didn’t take place. The girl’s family sued and alleged the school district botched the investigation. A federal judge granted summary judgment for the school district earlier this year and the girl’s lawyers have filed a motion for reconsideration.

“The investigations are all very quick and usually finished within the week,” Gilbert said. “The new regulations are going to require you to stop and sit on your hands.”

But longer investigations could inspire more confidence in the system, Gilbert said.

“If you do a 48-hour investigation and you tell the mother of the daughter, ‘We’ve looked into it and we don’t believe your child,’ there’s still a lot of anger and emotion going on there,” Gilbert said. “It’s possible that the more process that we give, the more it looks like the school district is taking time and thinking about this, the more parties may buy into it.”

Not everyone agrees on the degree to which the new standards will stymie school administrators. School systems are already highly bureaucratized and operate under complex state laws designed to oversee the safety of minors. All K-12 employees are required to report suspected child abuse, for example, and many states have aggressive laws against bullying and harassment.

The new Title IX rules allow K-12 schools to hold hearings as part of their investigations, which would be new in most school districts. School districts have experience conducting hearings for serious disciplinary decisions. A 1975 U.S. Supreme Court decision requires public school districts to provide a hearing when a student is facing a suspension or expulsion, but in some states that hearing can take the form of a non-adversarial, informal conference, lawyers say. Disciplinary hearings will still be required for K-12 disciplinary reviews under the 1975 ruling, whether involving sexual misconduct or some other infraction, when the student faces suspension or expulsion.

Another change the new rules bring is the narrowing of the definition of inappropriate sexual behavior. The new definition defines unwelcome conduct of a sexual nature as conduct that a reasonable person would find severe *and* pervasive *and* objectively offensive, meaning that it has to satisfy all three conditions. The previous federal definition, dating to 2001, said the offensive behavior had to be severe or pervasive, but not both, to trigger a Title IX investigation.

Lawyers say it would be a mistake to assume that some inappropriate misbehavior will go unaddressed and unpunished because it falls outside the new definition of sexual harassment. Rather, misconduct not covered by federal Title IX rules can still be addressed under existing state laws and district policies for inappropriate conduct, and it will likely be resolved more quickly.

"I don't see anyone getting away with anything because of this process. It just may be that a different process will be triggered," said Jennifer Smith, a partner at the Franczek PC law firm in Chicago, which represents more than 100 K-12 districts.

The irony has not gone unnoticed that the Department of Education under Republicans is overriding local jurisdiction in favor of a federal standard, and imposing regulatory burdens on local governments. But at least some conservatives say it was unavoidable, once the Obama administration set the regulatory mechanism into motion. That's because it is more politically viable for the Education Department to fix perceived problems by introducing more civil rights than by revoking policies that had been presented as civil rights.

"Greater Washington control, not less, is paradoxical, but it's not the first time," said Walter Olson, a senior fellow at the Cato Institute who specializes in harassment law. "Even an attempt to rectify a glaring injustice will often get you into new problems and new costs that weren't necessarily on anyone's mind when they exposed the injustice they're trying to fix."

Sarah Orman, a staff attorney for the Texas Association of School Boards, says the days of schools disregarding Title IX as regards sexual misconduct are over.

"We have flown under their radar so long," she said.