

Department of Education Releases Long-Awaited Final Rule Amending Title IX Regulations

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Meet the Authors



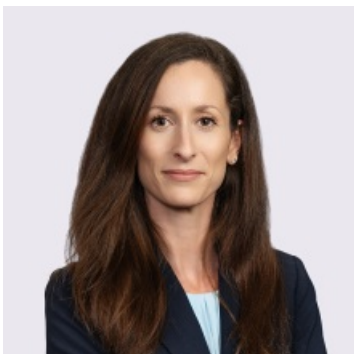
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The U.S. Department of Education (DOE) has released its long-awaited, final amendments to Title IX regulations on how colleges and universities must handle allegations of sexual misconduct. The new regulatory requirements go into effect on August 14, 2020.

Publication of the regulations provides clarity to educational institutions. Since 2017, when the DOE repealed Obama-era Title IX guidance and issued interim guidance, there has been uncertainty as to what the ultimate requirements would be.

The new regulations include the following provisions:

1. For purposes of administrative enforcement, universities will be held to a “deliberately indifferent” standard.
2. The term “sexual harassment” has been defined as “conduct on the basis of sex” that satisfies one or more of the following: (i) *quid pro quo* harassment by a school employee; (ii) unwelcome conduct that a reasonable person would determine is so severe, pervasive, and objectively offensive that it denies a person equal access to the school’s education program or activity; or (iii) sexual assault (as defined by the Clery Act), dating violence, domestic violence, or stalking, as defined by the Violence Against Women Act (VAWA). The term is more narrowly defined than in previous guidance, but broadens the even narrower construction in the proposed regulations.
3. “Actual knowledge” is defined as notice of sexual harassment or allegations of sexual harassment to a school’s Title IX Coordinator or any official of the school “who has authority to institute corrective measures on behalf of the [institution], or to any employee of an elementary and secondary school.”
4. An institution’s Title IX jurisdiction is limited to incidents that occur in the institution’s education program or activity.
5. When filing a “formal complaint,” a complainant must be participating in or attempting to participate in the institution’s education or an activity of the school with which the formal complaint is filed.
6. An institution’s obligations are triggered by an allegation of sexual harassment in an institution’s “education program or activity” “in the United States.” An “education program or activity includes locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.”
7. Universities are required to provide written notice to a respondent upon receipt of a complaint, which must state that the responding party is presumed to be not responsible for the alleged conduct and that a

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determination of responsibility will be made at the end of the grievance process.

8. A school's obligations to ensure its community knows how to report to the Title IX Coordinator are expanded. Instead of providing only students and employees the Title IX Coordinator's contact information, the school also must notify applicants for admission and employment, parents or legal guardians of elementary and secondary school students, and all unions of the name or title, office address, email address, and telephone number of the Title IX Coordinator.
9. Institutions can choose the applicable evidentiary standard (either "preponderance of the evidence" or "clear and convincing evidence") in determining responsibility, with the caveat that the standard used for students and employees must be the same.
10. Schools are required to offer supportive measures to every complainant promptly, at the onset of the investigation. This requirement applies to all informal and formal complaints and is intended to ensure equal access to education programs and activities.
11. The single investigator model is no longer permitted. A postsecondary school's mandatory grievance process must provide for a live hearing, during which all parties must be permitted to have an advisor of their choice. At the request of either party, the institution must allow a technology-assisted live hearing in which the parties participate while located in separate rooms.
12. At the live hearing, cross-examination of the parties and any witnesses must be allowed. The cross examination must be conducted directly, orally, and in real time by the party's advisor of choice. If the party does not have an advisor present at the live hearing, the institution must provide (free of charge to that party) an advisor of the school's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.
13. Schools must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.
14. Schools must offer both parties an appeal from a determination regarding responsibility, and from dismissal of a formal complaint, on the following bases: procedural irregularity that affected the outcome of the matter; new evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made that could affect the outcome of the matter; or the Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias that affected the outcome of the matter. Schools may offer additional bases for appeal if they apply equally to both parties.
15. A school's discretion to choose to offer informal resolution options, if both parties give voluntary, informed, written consent was retained from the proposed regulations. Significantly, the final regulations added, "[An institution] may not require the parties to participate in informal resolution and may not offer informal resolution unless a formal complaint is filed." Further, schools are prohibited from offering or facilitating an informal resolution process to resolve allegations that an employee sexually harassed a student.
16. The regulations do not require a particular definition of "consent."
17. Schools must ensure investigators and adjudicators are trained on the law

and the institution's grievance process. Materials relied on for training must not rely on sex stereotypes and must promote impartial investigations.

Jackson Lewis' Higher Education Group and Collegiate and Professional Sports Practice Group are well-versed in Title IX issues and are continuing to analyze the new regulations and ongoing developments in this area.

Institutions should stay tuned for additional guidance from Jackson Lewis, including in-depth legal analyses and webinars devoted to a deep dive into the new regulations and the practical implications. Please contact the Jackson Lewis attorney with whom you regularly work with any questions about the new regulations, training, and other Title IX issues.

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