

NAICU Technical Summary of Final Title IX Rules May 11, 2020

The Department of Education released final Title IX regulations on sexual harassment and sexual assault on May 6, 2020. The following analysis summarizes the requirements contained in the regulations.

This summary provides an overview of requirements in several overarching categories, including **Coverage, Definitions, Responding to Complaints of Sexual Harassment, Grievance Procedures, Notice, Investigations, Hearings, and Appeals and Informal Resolution.**

Background

In 2017, the Department of Education rescinded Obama-era campus sexual assault guidance and announced its intent to develop Title IX regulations governing sexual harassment. The official notice of proposed rulemaking (NPRM) was published in the *Federal Register* on November 29, 2018. In general, the provisions contained in the final regulations appear to be similar in many respects to the NPRM.

The implementation deadline for the new regulations is August 14, 2020.

COVERAGE

- For purposes of administrative enforcement by the Department, the regulations adopt the same standards that the Supreme Court has applied in individual Title IX sexual harassment lawsuits for monetary damages.
- Institutions with actual knowledge of sexual harassment in an education program or activity are required to respond to complaints of harassment in a manner that is not deliberately indifferent.
- The Title IX definition of sexual harassment covers three categories of conduct:
 - Quid pro quo sexual harassment by employees;
 - Sexual assault, dating violence, domestic violence, and stalking, as defined by the Clery Act; and
 - Any other “unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it denies a person access to the recipient’s education program or activity.”
- The Title IX framework is applicable both to students and employees.
- An institution’s treatment of both victims and accused students may constitute discrimination on the basis of sex under Title IX.

DEFINITIONS

The regulations adopt several new definitions.

- “Education program or activity” includes locations, events, or circumstances over which the institution exercised substantial control over the accused student and the context in which the harassment occurs, as well as any buildings owned or controlled by an officially recognized student organization.
- “Deliberate indifference” is defined as a response to sexual harassment that is clearly unreasonable in light of the known circumstances.
- “Actual knowledge” occurs only if a school official with the authority to institute corrective measures receives notice of sexual harassment.
 - Schools are not deemed to have “actual knowledge” of harassment solely on the basis of the actions of its employees or agents.
 - The obligation to report sexual harassment does not cause an employee to be deemed an official with authority to take corrective action.
 - Title IX coordinators always qualify as officials with authority to take corrective measures.

RESPONDING TO COMPLAINTS OF SEXUAL HARASSMENT

- Institutions must designate at least one employee to serve as a Title IX coordinator.
 - Institutions must:
 - Notify all students and employees of the name and contact information of the Title IX coordinator;
 - Publish such information on its website and relevant handbooks; and
 - Notify students and employees of its nondiscrimination policy.
- The regulations create a two-part process for responding to complaints of sexual harassment.
- First, when an institution receives a report of sexual harassment, the Title IX coordinator is responsible for contacting the victim to offer supportive measures.
 - Supportive measures are defined as “non-disciplinary, non-punitive individualized services” that are available to both parties and that are designed to support continued access to an education program or activity “without unreasonably burdening the other party.”
 - Supportive measures must be made available regardless of whether the victim decides to file a formal complaint.
 - Anyone can report a potential violation to the Title IX coordinator, and anonymous reports are permitted.
- Second, institutions must conduct an investigation if, and only if, a formal complaint of harassment is filed.
 - Institutions are required to dismiss formal complaints alleging conduct that does not meet the new, narrower definition of sexual harassment, that has not occurred within the institution’s educational program or activity, or that did not occur against a person in the United States.
 - An institution is still permitted to rely upon its student conduct code to respond to misconduct that does not meet these standards.
 - Formal complaints can only be filed by a complainant or the Title IX coordinator.
 - Institutions must comply with the required grievance process when conducting an investigation.
- If, after conducting a risk analysis and determining that an accused student poses an immediate threat to the health or safety of a student or other individual, institutions are allowed to remove such a student from campus, provided that the student receives notice and an opportunity to respond.
- Institutions are permitted to place accused employees on administrative leave.

GRIEVANCE PROCEDURES

- For purposes of addressing formal complaints and conducting investigations, institutions must comply with the grievance procedures required by the regulations.
 - Institutions must publish their grievance procedures.
 - If an institution adopts additional procedures that aren't required by the regulations, such procedures must apply equally to both parties.

- The regulations require grievance procedures to:
 - Be prompt and equitable;
 - Include an objective evaluation of all relevant evidence, including both inculpatory and exculpatory evidence;
 - Preclude conflicts of interest or bias on the part of coordinators, investigators, and decision-makers;
 - Ensure training for coordinators, investigators, and decision-makers;
 - Rely on training materials that promote objective investigations and disciplinary procedures and that do not rely on sex stereotypes;
 - Include a presumption that the respondent is not responsible;
 - Allow delays in investigations for good cause, including absence of parties or witnesses, law enforcement activity, or disability accommodations;
 - Describe the sanctions and remedies that are available;
 - Specify the standard of evidence to be used;
 - Detail the procedures available for appeals, if any;
 - Specify the supportive measures that are available; and
 - Preclude the use of questions that would violate a legally recognized privilege, unless waived.

- Institutions are permitted to use their own employees to investigate and adjudicate complaints or to hire outside individuals for this purpose.

- Institutions must inform students if their code of conduct prohibits students from providing false information during the grievance process.

- Institutions will not be found deliberately indifferent or to have otherwise engaged in discrimination because the Department of Education would have reached a different determination regarding an accused student's responsibility.

NOTICE

- Institutions are required to provide notice about grievance procedures, including any available informal resolution process, and complaint allegations to both parties.

- Such notice is required to contain:
 - Adequate information about the alleged misconduct, including, if known, identities of the parties involved, date and location of the alleged incident, and the conduct that allegedly constitutes a violation;
 - Sufficient time to prepare for an interview;
 - A statement that the respondent is presumed not responsible; and
 - A statement informing the parties that they may be represented by an advisor of their choice and may request disclosure of evidence.

INVESTIGATIONS

- Institutions are required to conduct investigations of allegations set forth in a formal complaint.
 - Institutions must dismiss formal complaints alleging conduct that:
 - Does not meet the definition of sexual harassment;
 - Has not occurred within the institution's educational program or activity; or
 - Did not occur against a person in the United States.
 - Institutions may dismiss formal complaints if:
 - The victim withdraws the complaint;
 - The accused individual is no longer a student or employee at the institution; or
 - Circumstances prevent the institution from gathering sufficient evidence to reach a determination.

- During investigations, institutions are required to:
 - Assume the burden of gathering evidence, although medical treatment records cannot be accessed or used without consent;
 - Allow both parties an equal opportunity to present witnesses;
 - Not restrict the ability of either party to discuss the allegations or to gather or present relevant evidence;
 - Provide an equal opportunity for both parties to be accompanied to proceedings by advisors of their choice, although an advisor's participation could be limited by the institution;
 - Provide written notice and sufficient preparation time for any meetings related to the investigation or disciplinary process;
 - Provide equal access to evidence and an opportunity to respond to such evidence;
 - Disclose all requested evidence, even if such evidence will not be relied upon in reaching a determination; and
 - Produce an investigative report to be provided to both parties for review and response.

HEARINGS

- Institutions are required to provide for a live hearing and to allow advisors for both parties to ask relevant questions and cross-examine the other party and witnesses.
 - Cross-examination may not be conducted by a party personally.
 - If a student does not have an advisor to conduct the cross-examination, the institution must provide an advisor of its choice.
 - Only relevant cross-examination and other questions may be asked of a party or witness, as determined by the decision-maker, who must explain any decision to exclude a question.
 - Cross-examination may not include questions about a complainant's sexual behavior or disposition, unless evidence of such behavior is offered to establish consent or to demonstrate that another party is responsible for committing the violation.
 - At the request of either party, an institution must permit cross-examination to occur with the parties located in separate rooms.
 - Institutions are not allowed to rely on statements made by a party or witness who does not submit to cross-examination.
 - Institutions must create an audio recording or transcript of the live hearing and make it available to the parties.

- In disciplinary proceedings, institutions may choose between applying a preponderance of the evidence standard or a clear and convincing evidence standard.
 - Institutions are required to apply the same standard of evidence they select for complaints against students as they do for complaints against employees, including faculty.
 - Unlike the NPRM, the final regulations do not contain a requirement that institutions that choose to use a preponderance standard must apply that same standard to other misconduct subject to the same maximum disciplinary sanctions as sexual harassment violations.

- The decision-maker, who cannot be the Title IX coordinator or investigator, must issue a written determination regarding responsibility.

- Institutions must maintain complete records about all investigations, appeals, informal resolutions, training materials, and supportive measures for seven years.

APPEALS AND INFORMAL RESOLUTION

- Institutions must offer both parties the opportunity to appeal based on procedural irregularities, new evidence, or any bias or conflict of interest on the part of the Title IX coordinator, investigator, or decision-maker.
 - If an institution chooses to allow appeals on additional grounds, it must provide the opportunity to appeal to both parties.
 - The decision-maker for an appeal must not be the same person as the original decision-maker, the Title IX coordinator, or the investigator.
- Institutions can offer, but cannot require, an informal resolution process, such as mediation, in lieu of a full investigation and adjudication.
 - Before engaging in informal mediation, an institution is required to disclose information about the process and receive voluntary written consent from the parties.
 - Informal resolution may not be used to resolve allegations that an employee sexually harassed a student.

MISCELLANEOUS

- The regulations preempt state law where there is an actual conflict that prevents an institution from complying with both federal and state law.
- The regulations prohibit retaliation, including retaliation because an individual has made a report or complaint, testified, or participated or refused to participate in a Title IX investigation or hearing.
 - Retaliation against individuals for code of conduct violations that arise out of the same facts or circumstances as a report or complaint of sex discrimination is also prohibited.
 - Speech that is protected by the First Amendment does not constitute retaliation.
 - Institutions must keep the identity of parties and witnesses confidential, except as otherwise permitted by the Family Educational Rights and Privacy Act (FERPA).
- The Department can take remedial action against institutions found to have violated Title IX as it deems necessary, including assessing monetary damages.
- Religious institutions are no longer required to submit written requests in order to invoke the religious exemption from Title IX regulations.
- The regulations clarify that Title IX does not require institutions to restrict speech or other conduct that would be protected by the First Amendment or constitutional due process requirements.
- The regulations clarify that nothing in FERPA would preclude institutions from complying with the Title IX regulations.