

NAICU Executive Summary of Final Title IX Rules

BACKGROUND

The Department of Education has released its long-awaited [final regulations](#) governing Title IX and sexual harassment, including sexual assault. The new regulations are expected to radically transform how colleges and universities handle sexual misconduct cases by imposing strict new procedural requirements that institutions must follow when addressing such complaints.

The new regulations, which have been nearly three years in the making, are similar in many respects to the [proposed regulations](#) that emerged in 2018. Those proposed regulations were published the year after the Department released [interim guidance](#), when it rescinded Obama-era campus sexual assault guidance.

SUPPORTIVE SERVICES AND PROCEDURAL PROTECTIONS

The new rules require supportive services for survivors of sexual assault and procedural protections for accused students. Although some of these procedural protections may be warranted to assure fairness for accused students, there are also concerns about the impact these new procedural requirements are likely to have on sexual assault survivors and educational institutions alike.

Several requirements in the final regulations are likely to present concern for institutions that are striving to balance the need to provide both a safe and supportive campus and a fair and equitable process for students within the context of an academic environment. For example, many of the new procedural protections that regulations establish for accused students are likely to transform the institutional disciplinary process into a more burdensome legal proceeding and may deter victims of sexual assault on campus from coming forward.

Such requirements include provisions that: mandate that institutions allow cross-examination and provide advisors to students for purposes of cross-examination; demand that institutions apply the same evidentiary standard to Title IX complaints as they do to complaints against employees; grant students access to all evidence gathered in an investigation; exclude conduct that does not occur within the institution's education program or activity; eliminate the single investigator model; and prescribe numerous detailed requirements related to grievance procedures.

INSTITUTIONAL LIABILITY AND FLEXIBILITY

Among the provisions in the final rules that are likely to be welcomed by institutions of higher education are provisions that hold institutions responsible only for responding with deliberate indifference to conduct for which they have actual knowledge, thus potentially reducing liability for institutions in some respects. Institutions are also likely to appreciate increased flexibility with regard to the timing of investigations and the option to offer informal resolution. In addition, religious institutions will not have to submit written requests in order to invoke the religious exemption from Title IX regulations.

NOTABLE CHANGES FROM THE PROPOSED RULES

The final regulations also make several changes that differ from the proposed rules. Many of these changes respond to [concerns](#) raised by the higher education community. Specifically, the final regulations:

- Address concerns about the narrower definition of sexual harassment by adopting the Clery Act's definitions of sexual assault, dating violence, domestic violence, and stalking as per se Title IX violations;
- Clarify that institutions can pursue other forms of sexual misconduct that falls outside the scope of Title IX;
- Add protections for victims by specifying that cross-examination cannot be conducted by a party personally and that medical treatment records cannot be used as evidence without consent;
- Require institutions to offer supportive services to survivors, regardless of whether or not the survivor chooses to pursue a formal complaint;
- Amend the burden of proof provisions to eliminate the requirement that institutions apply the same standard as is used in other disciplinary hearings with the same maximum penalty;
- Add a provision prohibiting retaliation;
- Clarify the definition of "program or activity" to include buildings controlled by recognized student groups, such as fraternities.
- Respond to concerns about "due process" requirements that do not apply to private institutions by eliminating such references and incorporating principles of fairness into grievance process requirements; and
- Clarify that the federal regulations preempt state law when there is an actual conflict that prevents an institution from complying with both federal and state law.

Additional changes of note in the final regulations include:

- Application of the Title IX framework to sexual harassment complaints by employees;
- Elimination of the safe harbor for institutions that comply with the specified grievance procedures in favor of a requirement that institutions must follow those procedures;
- Exclusion of conduct that did not occur against a person in the United States, thus raising questions about Title IX's application to study abroad programs; and
- Adoption of a provision that requires institutions to 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.