



NEW TITLE IX REGULATIONS: TAKEAWAYS

NEW REGULATION EFFECTIVE DATE: AUGUST 14, 2020

TIMEFRAME FOR INVESTIGATION: No more 60-day investigation timelines. The new regulation says “reasonably prompt.”

The Department of Education released 2033 pages regarding the new Title IX regulations. 2007 of them are preamble pages (that have no legal force) and only 26 of them carry the full force of the law. The preamble is divided into four sections. The first section is the background/overview of the new regulations. The second section discusses Title IX’s jurisdictional issues. The third section reviews the grievance process. The fourth section outlines the revision to the CFR to include all types of harassment and other miscellaneous items.

Jurisdiction (remains unchanged from the NPRM issued on November 2018)

1. Prompt response when there is “actual knowledge.” Having actual knowledge has been narrowed to officials with “authority to institute corrective measures.” MCCCCD will have to decide whether to continue to define “responsible employees” broadly (as we do now) or to adopt a narrower definition of responsible employee.
2. of sexual harassment¹—newly defined as quid pro quo, unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to an educational program or activity (i.e., hostile environment) or sexual assault, dating violence, domestic violence, and stalking (as defined by VAWA)
3. in a school’s educational program or activity²—includes locations, events, or circumstances over which the recipient exercised “substantial control” over the Respondent and the context in which the sexual harassment occurred (owned premises, exercise oversight, supervision, or funded, sponsored, promoted or endorsed event.
4. in the United States³—new regulation limits Title IX to discrimination/harassment occurring “against a person in the United States.”
5. Institution cannot be “deliberately indifferent.” General liability standard that uses language from the Supreme Court. The Final rule removed all NPRM safe harbors. The Title IX Coordinator must reach

¹ Institutions can address conduct that is outside of the DOE’s jurisdiction because it does not meet the new definition. This would be done through the code of conduct.

² Institutions can offer supportive measures or initiate a conduct proceeding when students face sexual harassment in places that occur outside of the recipient’s education program or activity.

³ Institutions can address conduct that occurs outside of the United States (study abroad). This would be done through the code of conduct.

out to the Complainant and provide supportive measures and to provide the option to file a complaint. [New regulations say the institution should defer to the complainant's wishes as to whether or not to pursue an investigation, unless it determines it would be deliberately indifferent (necessary to ensure safety), then Title IX Coordinator can sign the complaint, but must be unbiased and neutral.] Institution must investigate all formal complaints.

Definition of Formal Complaint is made clear in the new regulations.

1. There is a difference in the notice to respond between reporting harassment (anyone can report) v. a person who files a formal complaint.
2. Formal complaints must be signed (physical or digital signature, ok).
3. Title IX Coordinator has discretion to sign the complaint, but they are not considered the Complainant.
4. Grounds for mandatory dismissal of a formal complaint: There are three (3) grounds for dismissal. 1) complainant withdraws the complaint. 2) Respondent is no longer enrolled or employed by the institution, or 3) the investigator cannot gather the needed information (frustration of purpose).

The new regulations require the termination of the complaint if the allegations don't meet the jurisdictional conditions. You would dismiss the complaint for Title IX purposes, but could still address it through the Code of Conduct. [*Sexual misconduct not reaching Title IX policy would need to be written into the Code of Conduct.*]

Fair/thorough investigation and live hearings (prior to discipline)

1. NO MORE single investigator model is allowed. Also, the decision maker (cannot be the same person as the investigator or the Title IX Coordinator) must issue a written determination on responsibility.
2. The new regulations confirm it is appropriate to employ trauma-informed practices, as long as they are fair.
3. Look at §106.45 for new process issues. Procedural changes: a) Burden of proof is on institution w/ presumption of innocence; b) institution can use preponderance or clear and convincing standard; c) live hearings with opportunity to "test the credibility" through cross-examination; and d) written notification of allegation (and continued notification as process continues), opportunity to review evidence, and must produce investigation report with certain elements.
4. "Live" hearing does not need to be in person. At the request of either party, hearing can occur with parties located in separate rooms with technology enabling the decision-maker and parties to see and hear each other. [Telephone will not work].
5. At the hearing, the party's advisor may ask witnesses questions and cross examine [parties cannot question each other—no right to self-representation]. BEFORE the cross-examination, the decision-maker must first determine whether question/cross-examination is relevant. If not, it must be excluded.
6. If a party does not submit to cross-examination at the hearing, the decision-maker MUST NOT RELY on any statement of that party or witness in reaching a determination.
7. If a party does not have an advisor at the hearing, institution must provide one (at no charge). Advisor of choice may be an attorney.
8. Only 2 specific reasons why questions or evidence of complainant's sexual predispositions or prior sexual history is relevant—to demonstrate that someone else committed the alleged conduct or if

question or evidence concerns specific incidents of the complainant's prior sexual behavior with respondent is offered to prove consent. Otherwise, rape shield protection.

9. Relevance is the evidentiary gatekeeper. Institutions can create rules of order and decorum for hearings.

Title IX and Title VII

1. The new regulation states: "A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student AND EMPLOYEE complaints alleging any action which would be prohibited by this part."
2. The preamble to the new regulations says that employees may have rights under both Title IX and Title VII and views there as being no inherent conflict between the two laws.
3. Section 106.8(c) clarifies that the institution's policy and grievance procedures apply to all student and employee complainants.
4. Live hearing and cross-examination requirements apply to employees as well.

Informal Resolutions

1. Institutions may facilitate informal resolution of FORMAL COMPLAINTS of all forms of sexual harassment if it provides both parties with written notice of the allegations, the requirements of the informal resolution process (right to withdraw, it is voluntary), consequences of participating (records maintained and could be shared).
2. There must be a written consent (signed) to engage in informal resolution process
3. Informal resolutions ARE NOT allowed in cases where the allegation is that an employee sexually harassed a student.

Appeals

1. Institutions must offer appeal option to BOTH parties.
2. There must be an appeal from a determination regarding responsibility and from the dismissal of a formal complaint.
3. Regulations provide three (3) grounds for an appeal. 1) procedural irregularities that affected the outcome of the matter. 2) new evidence that was not reasonably available at the time the determination was made that could have affected the outcome of the matter; and/or 3) the Title IX Coordinator or decision-maker had a conflict of interest or bias for or against one of the parties that affected the outcome of the matter.
4. Schools MAY offer an appeal to both parties on additional bases—sanctions, for instance.

Anti-Retaliation

1. This is a new part of the regulation.
2. Applies broadly to ALL participants, including witnesses.
3. It is not retaliation to charge a code of conduct violation for providing false statements.
4. Confidentiality—cannot enjoin the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence.

Training

Institutions must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must receive training on: 1) definition of sexual harassment, 2) how to conduct an investigation, 3) the scope of definition of educational program or activity, 4) grievance process—hearings, appeals, and informal resolution process, and now to be impartial.

1. Training material must not rely on sex stereotypes and must promote impartial investigations and adjudication of sexual harassment.
2. Training material must be posted on institution's website and should include: 1) how to conduct virtual hearings, 2) Definitions of prohibited conduct, including harassment, 3) how to process—formal or informal work, 4) that the process is impartial, free of bias, and will not prejudge the facts for either side.

Recordkeeping

Institutions must maintain records for seven (7) years.

1. Records that must be kept are: each sexual harassment investigation, any appeal that results thereof, and any informal resolution and the results thereof.
2. All material used to train coordinators, investigators, decision-makers, and persons who facilitate in the informal resolution process (and make such material available on the institution's website)
3. Hearing recordings/transcripts and records of any action—including supportive measures taken in response to a report or formal complaint of sexual harassment.

I will continue to update as information regarding the new regulations is released.

For additional information on this subject please feel free to email Melissa Flores or Robert Beinkowski.



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