



## Title IX New Regulations

Title IX anticipates publication of the final Title IX regulations in the *Federal Register* within the coming weeks. These regulations will be the first issue of new regulations since 1975. These changes are the culmination of the “due process revolution” that has been sweeping the Nation.

### Due Process Changes

1. require more substantive written notice to the respondent of the nature of sexual misconduct allegations,
2. the right of the parties to review investigation materials prior to a final determination,
3. the right to a written rationale for the outcome and any sanctions assigned,
4. the right to due process protections similar to those provided in criminal cases: a presumption of innocence, written notice of allegations, an equal opportunity to review collected evidence, and the opportunity for cross examination in Title IX proceedings (subject to rape shield laws),
5. Schools must hold a live hearing, in which each party could be represented by an advisor and the advisor could conduct cross examination of witnesses,
6. equitable interim resources and supports for responding parties

### VAWA Changes

Previously VAWA Section 304 only extended to what have become known as the “big four” offenses: sexual violence, dating violence, domestic violence and stalking. The new regulations would align Title IX and VAWA so that rights do not vary by the type of sex offense alleged—all would be covered. Institutions would have to provide written notice of the outcome of an allegation to all parties, not just in the big four offenses, but for sexual harassment, too. (adopt the definition of sexual assault from the [Clery Act](#), bringing Title IX into alignment with the [Violence Against Women Act](#).)

Once OCR publishes the final rule, it will expect good-faith efforts to comply and unless (and until) a judge says that they don’t have to comply, colleges and universities will need to become compliant. The compliance time period could be anywhere between 6-12 months, but failure to comply will bring with it OCR inquiry but possible lawsuits because the regulations inform compliance rather than simply guiding documents.

### Interesting Changes:

Proposed provisions on notice, mediation, mandated reporting, live hearings and cross-examination could create significant chilling effects on the willingness of those who experience discrimination, harassment, and sexual violence to report it to administrators and pursue formal resolution pathways.

1. OCR seeks to limit the ways in which recipients are legally put on notice of sex discrimination. The key would be whether the school had actual knowledge of the allegation of sexual harassment that occurred in the school’s educational program or activity against a person in the United States. (no more “knows or should have known.”)
2. Scaling back the “no wrong doors” philosophy regarding reporting.
3. Removal of “soft ban” on mediation of sexual violence cases. We need to be sure that the parties are participating voluntarily and not being pressured to minimize the severity of what has happened to them
4. Live hearings and cross-examination is the most controversial provision of the proposed regulation. Essentially, the OCR is trying to turn educational resolution processes into mini-courtrooms that mirror criminal trials.

5. The new regulations have the potential to create significant public backlash, especially if colleges are seen as institutionally deprioritizing Title IX compliance.

### **Title VII and Title IX**

Both [Title VII of the Civil Rights Act of 1964](#) and [Title IX of the Education Amendments of 1972](#) provide protection against sex discrimination in the context of employment with an institution of higher education—even for student employees. Title VII is a federal law that prohibits discrimination in employment on the basis of sex, as well as race, color, national origin and religion. Title IX is a federal law that prohibits sex discrimination in education, covering all staff and students in any educational institution or program that receives federal funds.

Title VII was created with more of a compensatory purpose in mind, whereas Title IX was created with the goal to prevent federal funding of discriminatory institutions

Hayley Macon, Lisa Mottet, Julia Mujal, & Lara Cartwright-Smith, Introduction to Title IX, 1 GEO.J.GENDER &L.424 (2000).

Title VII contains “an express cause of action, provides for [specific] compensatory damages, and does not rely on a contractual framework.”

Title VII also requires an individual to exhaust all the administrative remedies in an administrative forum first before seeking judicial relief.

Conversely, Title IX does not require a claimant to exhaust the administrative remedies first, there is no damages cap, and if a violation of Title IX is found, federal agencies have a right to withdraw their federal funding to the educational institution (*Doe v. Mercy Catholic Medical Center*, 850 F.3d 545 (3d Cir. 2017)).

The ability for a federal agency to withdraw their funding under Title IX is seen as a contract. It is understood from the statute that when an educational institution accepts federal funding, any violation of Title IX will result in a loss of the funding.

1. Investigations involving both Title VII and Title IX should be investigated by BOTH Title IX Coordinators and HR.
2. When HR is notified of a potential Title IX claim, they must notify the Title IX Coordinator.
3. ONE report should be written.
4. Looking for policy violations and NOT FOR VIOLATIONS OF THE LAW.



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