

## Practice Update

# New Title IX Final Rule: What You Need to Know

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On April 19, the Department of Education (the Department) released the long-awaited Final Title IX Regulation (Final Rule or New Rule), overhauling the previous administration’s Title IX regulations that were published in 2020. The new policy has significantly revised the regulations published under the Trump Administration in 2020. In sum, the Final Rule expands the type of misconduct institutions must address and provides more protection for complainants. Below is a summary of a few of the notable changes.

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## Expanded Definition of Sexual Harassment, Legal Protections for LGBTQ+ Individuals

A noteworthy feature of the Final Rule is its guarantee of protection for LGBTQ+ students who experience discrimination based on their sexual orientation or gender identity. The Biden Administration expanded the definition of “unlawful sex discrimination” to include mistreatment based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity. Consequently, the Final Rule prohibits recipients from discriminating against persons based on sex, which results in greater than de minimis harm, excluding permissible circumstances such as sex-separate living facilities and sex-separate athletic teams. Furthermore, the updated Rule clarifies that a policy or practice that prevents a

student from participating in an education program or activity aligned with their gender identity violates Title IX's nondiscrimination mandate. Still, the Final Rule does not expressly address the critical question concerning transgender athletic participation.

Rather, the Department has stated that its rulemaking process concerning Title IX's application to sports is ongoing. The Department will issue a separate final rule to address Title IX's application to sex-separate athletic teams later this month.

### Stronger Rights for Sexual Assault Survivors, Live Hearing Requirement Eliminated

The prior regulations required postsecondary institutions to conduct a live hearing, including cross-examination by a party's advisor. Under the Final Rule, however, live hearings are permissible, although not required, and are subject to new restrictions. In a live hearing, a recipient must allow each party the opportunity to remotely participate in the hearing. Additionally, after a hearing, the school must provide a party with a transcript of the live hearing upon that party's request. "Unclear or harassing" questions are now also expressly prohibited during a live hearing.

### Other Noteworthy Changes

- The Final Rule enhances existing protections against discrimination based on pregnancy or related conditions. It affirms that "a recipient must protect students, employees, and applicants from discrimination based on pregnancy, childbirth, termination of pregnancy, lactation, related medical conditions, or recovery, including by providing reasonable modifications for students, reasonable break time for employees for lactation, and a clean, private lactation space for both students and employees."
- Under the New Rule, a complainant may file a formal complaint regarding sex discrimination regardless of whether the individual has left the

recipient's education program or activity due to that discrimination or other reasons.

- While the prior rule reserves informal resolutions to situations involving a formal complaint alleging sexual harassment, the New Rule permits a recipient to offer an informal resolution process, if appropriate, **whenever** it receives a complaint of sex discrimination or has information about conduct that may reasonably constitute sex discrimination.
- The final regulations also bar recipients from disclosing personally identifiable information obtained in the course of complying with Title IX, with limited exceptions, including when the recipient has prior written consent or when the information is disclosed to the parent of a minor.
- Additionally, the New Rule permits the single investigator model. Under the final regulations, as long as there is no bias or conflict of interest present, the investigator can serve also as the decision-maker.

The Final Rule becomes effective on August 1, 2024, applicable to complaints of sex discrimination regarding alleged conduct occurring on or after August 1, 2024. Because the New Rule expands the scope of conduct considered sexual harassment, it is likely that institutions will see an uptick in Title IX matters that arise as compared to the previous 2020 regulations.

Akerman is committed to supporting institutions in all aspects related to compliance with the new Final Rule. Please contact your Akerman attorney for any questions or assistance in implementing the Final Rule, including but not limited to conducting a comprehensive review and update of your institution's Title IX policies and procedures, as well conducting trainings of your institution's personnel.

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