

Practice Update

DOE Issues Final Rule Amending Federal Title IX Regulations

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On May 6, 2020, the Department of Education (DOE) released the long-awaited Final Rule amending the federal Title IX regulations and cementing the Trump administration's stamp in addressing sexual harassment in K-12 and higher education. On its face, the Final Rule attempts to "level the scales" by striking a balance between an educational institution's responsibility to take prompt action that protects victims of sexual harassment while also affording more due process protections for the accused in a way that maintains fairness across the board. As applied, however, there is some concern that the new approach will adversely affect victims of sexual harassment and chill reporting.

Notwithstanding, the new regulations present a major shift in federal education policy that will fundamentally change the very landscape of Title IX – from how sexual assault is defined to how investigations and live hearings with cross-examination will be conducted going forward. With an effective date of August 14, 2020 to implement the new regulations (and no signal from the DOE on a delayed implementation date in light of the COVID-19 Pandemic) educational institutions across the country now face the tall task of digesting the new regulations and planning to take swift action in order to come into compliance by the deadline. This will include changes to campus policies and procedures

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as well as updated trainings for school communities on the changes to Title IX that will apply this fall.

Below is an overview of notable changes in the new Title IX regulations. You can find an unofficial copy of the new regulations [here](#).

Definition of Sexual Harassment: Previously, sexual harassment was broken down into two buckets: (1) quid pro quo (“this for that”) and (2) where a hostile environment is created.

The new definition has three prongs that all operate on the basis of sex. While the first prong, quid pro quo remains the same, a reasonable person standard has been applied to the second prong to determine if unwelcome conduct is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to education.

There is also a new third prong that incorporates other sex offenses by reference, including sexual assault (as defined by the Clery Act) as well as dating violence, domestic violence, and stalking (as defined by the Violence Against Women’s Act).

No Definition of Consent: In contrast to the revamped definition of sexual harassment, the DOE has declined to adopt a universal definition of consent. As such, institutions are free to identify and use the definition they believe is most appropriate for their campus.

Filing a Complaint: Parents and guardians can now exercise Title IX rights on behalf of their children, including filing a formal complaint.

Who is a Mandated Reporter: Previously, an institution’s obligations under Title IX were triggered when any faculty or staff (in addition to the Title IX coordinator) observed or became aware of misconduct. Under the new regulations, only the Title IX Coordinator and any school official with

authority to institute corrective measures are so required when they receive ***actual knowledge***.

**Note – Institutions do have the ability to identify and designate school officials they deem fit to serve as mandated reporters.*

Supportive Measures: Previously, institutions could exercise certain interim measures that would end any current misconduct and prevent any future misconduct during the course of the investigation. The new regulations have codified supportive measures, which institutions are now required to offer promptly when Title IX is triggered.

To counter any negative impact such measures may have on the respondent, these measures must be non-disciplinary and non-punitive individualized services for both parties (e.g. mutual no contact order or counseling) whether or not a formal complaint is filed.

**Note - Implementing such measures may require ingenuity to prepare for scenarios where the complainant and respondent are in the same required lab for a particular major, same dormitory floor or athletics team.*

Time to Complete Investigation: Previously, institutions had 60 days to complete a Title IX investigation. Now, the timeline has been lifted. Instead, institutions are required to promptly respond to misconduct in a manner that is not deliberately indifferent, which will include reasonable time frames for the conclusion of the grievance process, informal resolution and appeals.

No More Single Investigator Model: Institutions used to have the ability to utilize one person to conduct the investigation and make recommended findings. The new regulations prohibit the decision-maker from being the same person as the Title IX Coordinator or the investigator.

Informal Resolutions: Where the institution has ***actual knowledge*** of misconduct, but a formal complaint has not been filed, institutions will have the option to explore an informal resolution process (e.g. restorative justice, mutual no-contact order) so long as both parties agree in writing.

**Note – measures should be implemented to limit the extent to which complainants are encouraged and/or persuaded against filing a formal complaint, especially in situations that may involve famous or high-profile students or faculty.*

Live Hearings: Hearings were optional under the previous Title IX regulations. Now, when a formal complaint is filed, the institution is required to have a live hearing and permit both parties to present evidence, witnesses, and cross-exam each other through representatives.

**Note –This will apply in cases where school employees, including faculty, are involved as well.*

Additionally, institutions must accommodate requests for the hearings to proceed virtually such that the parties are not in the same room during a portion or the entire proceeding. During the hearing, the decision-maker will have the responsibility to determine which questions and evidence are relevant and appropriate.

Further, where one party does not have a representative for the live hearing, the institution is required to provide one of its own choosing. However, the representative need not be an attorney.

**Note – Special consideration for equity and fairness should be observed in situations where one party has the resources to hire a licensed attorney and the other is required to rely on a school-selected representative.*

Evidentiary Standard: Under the Obama administration, intuitions were encouraged to use

the preponderance of the evidence standard in determining culpability. Now, institutions can use either preponderance of the evidence or the clear and convincing standard, so long as the same standard is used across the board for all formal complaints of sexual harassment that involve students as well as faculty and staff.

Evidence Allowed: Previously, the decision-maker had the ability to consider all available information. Now that live hearings are required, decision-makers will be required to make on the spot determinations about which questions and evidence are permitted to come into the record.

Questions and evidence about a party's past sexual predisposition or prior sexual behavior, for example, are deemed to be relevant and appropriate where it is used to prove that someone else committed the misconduct or if it concerns specific incidents that are used to prove consent.

Additionally, the new regulations prohibit the decision-maker from relying on statements made by a party or witness who does not submit themselves to cross-examination at the live hearing.

Further, records of a party cannot be used or relied upon without voluntary written consent from the party. This would include exculpatory and inculpatory evidence from the record that would otherwise go to the merits of the hearing (e.g. statement of admission of guilt by respondent found in treating physician report).

Appeals: Institutions must now offer both parties the opportunity to appeal a determination on the ground that: (i) there were procedural irregularities; (ii) new evidence arises that was not previously available that would change the outcome; or (iii) bias on the part of a decision-maker, Title IX Coordinator or investigator.

State/Local Law Preemption: The Final Rule contains a preemption provision that requires institutions to comply with Title IX, even in the event that its provisions conflict with that of state or local law. This may lend itself to a legal challenge where institutions must decide which statute to follow (e.g. an institution violates state law and cites compliance with Title IX as a defense).

Title IX only Applies in the U.S.: The new regulations do not extend obligations on institutions beyond the borders of the United States. This will eliminate certain activities from the purview of an institution's liability (e.g. study abroad or international sporting events).

Synopsis: While it will take time to see the true impact of the new regulations, it is clear that by focusing on including more due process protections for the accused, the steps taken by the DOE will likely make it more difficult to find a student or employee liable for sexual harassment under Title IX. For example, the new definition of sexual harassment effectively limits the type of conduct that constitutes sexual harassment, thereby raising the threshold to make such a finding.

Similarly, the requirement for live hearings may deter complainants from filing a formal complaint out of fear of facing cross-examination (even with virtual hearing options and the prohibition of questions by parties).

In light of this dynamic, institutions should proceed thoughtfully in addressing sexual harassment on their respective campuses as well as lesser forms of misconduct that still require some form of disciplinary and/or corrective measures.

We understand that there are a myriad of questions that remain unanswered, including; (i) How the Final Rule will hold up to legal challenges; (ii) What Title IX will look like after the November election; (iii) How educational institutions will comply in the era

of COVID-19; and (iv) The impact it will have on the culture of reporting sexual harassment on college campuses.

As we continue to dig deeper into issues presented by the Final Rule and monitor any new developments, we invite you to reach out to our Akerman team with any questions or concerns about Title IX or higher education generally.

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