



A New Day on Campus: The Final Title IX Regulations

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A New Day on Campus: The Final Title IX Regulations

Today's Panel



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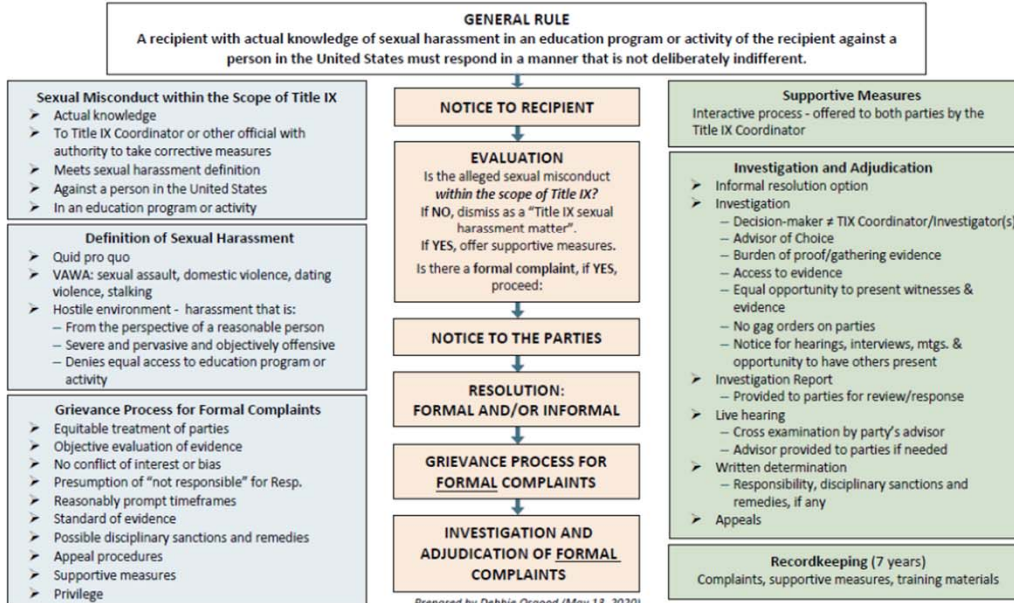
Agenda

1. What do the final Title IX regulations require?
2. What steps do schools need to take by August 14, 2020?
3. How will the Department's Office for Civil Rights (OCR) handle Title IX complaints going forward?
4. Special considerations for elementary and secondary institutions

HMBR Supplemental Resources



RESPONDING TO SEXUAL HARASSMENT UNDER THE NEW TITLE IX REGULATIONS A Desktop Guide



Prepared by Debbie Osgood (May 13, 2020)
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HMBR Summary: Key Provisions in the New Title IX Regulations on Sexual Harassment

On May 6, 2020, the U.S. Department of Education released its much anticipated final Title IX regulations on sexual harassment. These new regulations amend the current regulations for implementing Title IX of the Education Amendments of 1972 (Title IX). The effective date of the final regulations is August 14, 2020. The Department's press release, the final regulations and analysis, and related documents, and a video are available [here](#).

We hope that the following summary of the final Title IX regulations will be useful to colleges and universities as they consider what changes are needed to ensure compliance with the final Title IX regulations. Please note that this summary will be posted on our website, and will be updated as appropriate as we continue to closely review the final regulations and analysis. The information provided in this summary is for your general information and is not intended to constitute legal advice for any specific institution.

TITLE IX GLOSSARY (34 C.F.R. Part 106) ¹	
<p>Actual Knowledge 34 C.F.R. § 106.30(a)</p>	<p>New section defines "actual knowledge" as notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school. Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge. This standard is not met when the only official of the recipient with actual knowledge is the respondent. The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient. "Notice" as used in this paragraph includes, but is not limited to, a report of sexual harassment to the Title IX Coordinator as described in § 106.8(a).</p>
	<p>New section, <i>Investigation of a formal complaint</i>, states that when investigating a formal</p>

--Available at <https://www.hmbr.com/news-insight/title-ix-compliance/>

Words to remember.....

Keep me safe....your duty is...

Known or should have known

Failure to disclose knowledge
of prior offenses

Protected perpetrator, did you??

Take action

Numbers to remember.....

\$43,395,000

\$162.5 Million

\$234.1 Million

\$4.7 Million

\$14 Million

Final Title IX Regulations Addressing Sexual Harassment

- *Final Title IX* Regulations issued May 6, 2020
- Published in the Federal Register on May 19, 2020
- Effective August 14, 2020
- Accompanied by DOE Press Release; Fact Sheet;; Final Rule Overview; Comparison Charts of Major Provisions; and Videos (DOE Secretary; OCR); Available at www.ed.gov



Keep in mind . . .



- Final regulations are largely the same as the proposed regulations with some clarifications
- Focus on regulations – preamble is illustrative, not legally binding
- Stay tuned: litigation filed, possible Congressional action, and national elections later this year

What Do the Final Title IX Regulations Require?

Title IX Regulations – What's New or Different?

1. Higher standard of liability – deliberate indifference
2. Updated general procedural requirements
3. For sexual harassment, there are specific new regulatory requirements.
4. For sexual harassment or other sexual misconduct outside the scope of Title IX, the Title IX regulations and requirements do not apply.

Higher Liability Standard – Deliberate Indifference

New Section 106.44: [Response to Sexual Harassment](#)

- A school must respond in a manner that is not **deliberately indifferent** to **actual notice of sexual harassment** that is in an **education program or activity** and against **a person in the United States**.
- “Deliberate indifference” means “clearly unreasonable”
- Schools must:
 - With or without formal complaint, offer supportive measures to the complainant and, as appropriate, the respondent
 - For formal complaints, follow grievance process required by Section 106.45 before imposing disciplinary sanctions or other actions on the respondent

Title IX Regulations – Updated Procedural Requirements?

- Existing general procedural requirements:
 - Title IX Coordinator, nondiscrimination notice, grievance procedures, and retaliation
 - Apply to all sex discrimination matters, including but not limited to sexual harassment
 - Updated to reflect more current technology (email, internet)
 - Added new language relating specifically to sexual harassment in the provisions relating to the Title IX Coordinator, grievance procedures, and retaliation

Title IX Regulations – New Requirements for Sexual Harassment

- Added new requirements relating specifically to sexual harassment
- Two questions to ask:
 1. Is the conduct within the scope of Title IX?
 - If no, Title IX regulations do not apply.
 - If yes, must not respond in a manner that is deliberately indifferent – by providing supportive measures.
 2. For conduct within the scope of Title IX, was a formal complaint filed?
 - If no, must still provide supportive measures.
 - If yes, must also follow specific requirements for the sexual harassment grievance process.

Obligation to Respond to Sexual Harassment

Is the alleged misconduct within the scope of Title IX?

YES

- In **all cases**,
 - *Must* not respond with deliberate indifference
 - *Must* offer supportive measures
- Was a **formal complaint** filed?
 - If yes, *must* also comply with Section 106.45 requirements
 - If no, *must* still offer supportive measures

NO

- *Must* dismiss formal complaint as *Title IX matter*
- *May* address as a non-Title IX matter

Title IX Regulations – New Requirements for Sexual Harassment

New Section 106.45 – Grievance Process for Formal Complaints of Sexual Harassment

- Allows informal resolution (but not for student complaints against employees)
- Requires written notice to the parties upon receipt of a formal complaint
- Lists specific bases for mandatory and permissive dismissals
- Specifies “basic requirements” for grievance processes for sexual harassment and emphasizes that any other rules adopted as part of a grievance process must apply equally to both parties
- Describes specific requirements for the investigation and adjudication of a formal complaint of sexual harassment, including for PSE institutions, the requirement to provide a live hearing with cross-examination
- Prohibits discriminatory treatment of either party in response to a formal complaint

Post Secondary Education (PSE) vs. Elementary & Secondary Education (ESE)

- Role of Parents and Guardians
- What constitutes actual notice/knowledge
- Live hearings and cross-examination
- Academic medical centers – follow rules relating to ESE institutions (not PSE)

What Steps Do Schools Need to Take by August 14, 2020?

Steps to take by August 14, 2020

Assemble a cross-campus team of stakeholders to:

1. Revise your **Policies and Procedures** to comply with the new regulations
2. Have the Right **Organizational Structure** in Place
3. Address your **Campus Climate** through Training and Clear Communications

Requirements for Title IX Sexual Harassment Policies and Procedures

1. Apply Title IX policies to students and employees
 - Umbrella or separate policies and procedures?
 - State law requirements relating to standard of evidence
 - CBA requirements relating to faculty or staff disciplinary action

Requirements for Title IX Sexual Harassment Policies and Procedures

2. Define what sexual misconduct is within the scope of Title IX

1. Actual notice
2. Sexual harassment
3. In an educational program or activity
4. Against a person in the United States

Requirements for Title IX Sexual Harassment Policies and Procedures

2. Define what sexual misconduct is within the scope of Title IX (cont.)

- Actual notice (knowledge) –
 - allegation made to Title IX Coordinator or person with authority to take corrective measures
- Sexual harassment
 - Quid Pro Quo
 - New -- VAWA categories: sexual assault, domestic violence, dating violence, stalking
 - Narrower definition of sexually hostile environment – includes harassment that is severe *and* pervasive *and* objectively offensive enough to effectively deny equal access to education program or activity
- Against a person in the U.S.
- In an education program or activity

Requirements for Title IX Sexual Harassment Policies and Procedures

3. Provide supportive measures – without or without a formal complaint of sexual harassment

- Required when the sexual harassment is within the scope of Title IX
- Non-disciplinary, non-punitive individualized services
- Designed to restore or preserve equal access without unreasonably burdening the other party
- To be provided to both parties
- Use interactive process to determine supportive measures – consider “wishes” of the complainant
- Document decisions relating to supportive measures
- Offer internal grievance process for challenging adequacy or burden of supportive measures

Requirements for Title IX Sexual Harassment Policies and Procedures

4. Make clear what is considered a formal complaint of sexual harassment

- Formal complaints must be signed and filed by a complainant who is participating (or attempting to participate) in the educational or employment program or activity
- May also be filed by Title IX Coordinator
- Recipient may dismiss complaint against a respondent who is no enrolled or employed
- Make clear if and how sexual misconduct that occurs outside the scope of Title IX will be addressed (e.g., codes of conduct)

Requirements for Title IX Sexual Harassment Policies and Procedures

5. Include “basic requirements” in grievance process

- Treat complainants and respondents equitably
- Objective evaluation of all relevant evidence
- No bias or conflict of interest
- Training
- Presumption that the respondent is not responsible
- Reasonably prompt timeframes, extensions for good cause
- Standard of evidence: *Preponderance* (more likely than not) or *Clear and Convincing* (highly probable)
- Possible disciplinary sanctions and remedies
- Appeal procedures (now mandatory)
- Supportive measures available to both parties
- Restrictions relating to privilege

Requirements for Title IX Sexual Harassment Policies and Procedures

6. Comply with specific requirements relating to investigation and adjudication, including:

- Initial and continuing written notice to parties
- Burdens of proof and of gathering evidence rest on school
- Equal opportunity for parties to present witnesses, including fact and expert witnesses,
- No gag orders
- No single-investigator model
- Advisor of choice
- Live hearing and cross-examination (PSE)
- Decision-maker cannot be the same as the Title IX Coordinator(s) or investigator(s)
- Access to evidence
- Draft investigation report given to the parties for review and response
- Written determination of responsibility regarding responsibility

Requirements for Title IX Sexual Harassment Policies and Procedures

6. Comply with specific requirements relating to investigation and adjudication (cont.)

Live hearing with opportunity for cross-examination required in every case

- To be conducted by the Decision-maker, who is either the hearing officer or multiple hearing officers (a hearing panel)
- May be held in the same geographic location or virtually
- Location to be determined by recipient
- Technology must allow the parties (and their advisors) to see and hear one another and any witnesses
- Recording or transcript of hearing required

Requirements for Title IX Sexual Harassment Policies and Procedures

6. Comply with specific requirements relating to investigation and adjudication (cont.)

Live hearing with opportunity for cross-examination required in every case

- *Advisors* must be allowed to cross-examine parties and witnesses
- Must be conducted directly, orally, and in real time
- School must provide free advisor for a party at a hearing if the party does not have an advisor for the hearing – just for cross-examination?
- If a party or witness does not submit to cross examination at the live hearing, the hearing officer or panel must not rely upon any statement in reaching a determination regarding responsibility

Requirements for Title IX Sexual Harassment Policies and Procedures

7. Comply with additional procedural requirements

- Informal resolution opportunities (New: may not be used to resolve allegations that an employee sexually harassed a student)
- Mandatory Training
- Mandatory Appeals
- Recordkeeping (7 years, including posting training materials on website)
- Recommendation: Build in regular review and revision process

Organizational Structure

- Lines of authority and responsibility
- Employees – Title IX requirements apply (even to at-will employees)
- Title IX Coordinator
 - Cannot be decision-maker
 - Responsible for coordinating overall Title IX compliance
 - Responsible for implementing “effective” supportive measures
- “Official with authority to take corrective action”
- “Responsible employees”
 - Investigator(s)
 - Decision-maker(s) – determinations of responsibility; appeals
- Hearing officers or hearing panels – must make determinations of relevancy and keep order over hearing
- Advisors for cross-examination at hearings

Campus Culture

- New training for:
 - Students
 - Employees, including “those with authority to take corrective action” and “responsible employees”
 - Mandatory training – to be posted on website – for:
 - Title IX Coordinator
 - Investigator(s)
 - Decision-maker(s), including hearing officers or panels
 - Informal Resolution Facilitator(s)
- Community expectations – be clear in communications about continued commitment to prevent and address sexual harassment

Title IX+

Addressing Sexual Misconduct Outside the Scope of Title IX

- Final regulations are a floor, not a ceiling
- Schools may go *beyond Title IX*
- If the alleged conduct in a formal complaint is outside the scope of Title IX (would not constitute sexual harassment *or* did not occur in an educational program *or* did not occur against a person in the United States), the school:
 - *Must dismiss* the formal Title IX complaint as a *Title IX matter*
 - *May address* the conduct with *non-Title IX procedures*

How Will the DOE-OCR Handle Title IX Complaints Going Forward?

Next Steps for DOE-OCR

Harassment Cases

No *retroactive enforcement* of final regulations.

- Open Cases
- Resolution Agreements
- New Complaints

Technical Assistance

- New OCR technical assistance office: Outreach, Prevention, Education and Non-discrimination Center
- Videos on Final Title IX regulations, by Secretary Betsy DeVos and OCR Assistant Secretary Kenneth Marcus, available at www.ed.gov

Q&A – Higher Education

To submit a question, click on the **Q&A** button on the bottom of your screen.

If your question is not answered during today's program, someone from Marsh will respond as soon as possible.

Special Considerations for Elementary and Secondary Institutions

ESE: Role of Parents and Legal Guardians

New Title IX regulations:

- Allow parents or legal guardians of K-12 students to file complaints on their behalf
- Require parental notification of complaints against their children

ESE: Actual Notice or Knowledge

- In ESE context, obligation to respond to alleged sexual harassment applies when *any employee* of an elementary or secondary schools has notice of sexual harassment or allegations of sexual harassment
- Compare to PSE context, where obligation is triggered only by notice to Title IX Coordinator or official with authority to take corrective actions

ESE: Live Hearings and Cross-Examination

Same procedural requirements as for PSE apply, except:

- Permitted by not required to provide live hearings
- After investigation report and prior to determination, decision-maker(s) must afford each party the opportunity to:
 1. Submit written, relevant questions that a party wants asked of any party or witness,
 2. Provide each party with the answers, and
 3. Allow for additional, limited follow-up questions from each party

HMBR Title IX Compliance

HMBR Services

- Title IX advice & consult
- External investigations
- Compliance audits
- Policies & procedures
- Independent consultants
- External Hearing Officer
- Advisors
- Mediators
- Training, including for hearing officers

HMBR Resources (www.hmbr.com)

- *New* HMBR Title IX Compliance website: <https://www.hmbr.com/news-insight/title-ix-compliance/>
- Summary of Final Title IX Regulations
- Desk Top Guide and Glossary on Final Title IX Regulations

Your Presenter

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Q&A

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A New Day on Campus: The Final Title IX Regulations Answering Your Questions



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