



## ALERTS

### New Title IX Regulations Mean Big Changes For All Schools

May 11, 2020

#### Highlights

The Department has finalized its new Title IX regulations on sexual harassment and misconduct that take effect on Aug. 14, 2020.

The regulations impose new, materially different obligations on institutions for how hearings must be conducted, what procedures must be followed, how staff must be trained, and what legal standards should apply.

Notable requirements for hearings include a presumption of innocence, live proceedings, each student's right to an "advisor," and mutual and full opportunities for real-time cross-examination.

On May 6, the U.S. Department of Education released the final version of its [long-awaited Title IX regulations](#). The final regulations become effective on August 14, 2020, and bring to conclusion the process that began with proposed regulations in November 2017.

These final regulations, formally codified in 34 CFR Part 106, have been anticipated since the Department issued non-binding guidance documents in 2017 and launched this long process of negotiated rulemaking. The

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regulations formally establish the rules regarding “sexual harassment,” which includes different kinds of sexual misconduct and assault. The Department’s new rules change the regulatory landscape from the previous rules under the Obama administration’s 2011 “Dear Colleague Letter.”

Many industry commentators expected these regulations to loosen obligations on K-12 schools, colleges and universities and to favor those reported to have committed sexual misconduct, but this result is not so clear cut, and it in fact imposes on schools new and important legal obligations—to all parties involved.

The basics have not changed much. Schools still are responsible for addressing “sexual harassment,” which still includes sexual assault, dating violence, stalking, and the like, and which is still assessed by a liberal standard, without a requirement that conduct necessarily be severe and pervasive to qualify. Schools still must have a Title IX coordinator and must adjudicate reports of sexual harassment.

But the details of what schools must do in this process have changed significantly, and depart in some ways from the 2011 Dear Colleague Letter and 2017 guidance. This means that schools must take different measures in addressing sexual misconduct reports and vulnerabilities, and they will be held to those standards by the Department of Education’s Office of Civil Rights and by potentially aggrieved students, parents, or faculty who perceive any failure to meet these new rules. Some notable portions of these new regulations are:

- The final regulations define “sexual harassment” in Section 106.30 as follows: 1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct; 2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity; or 3) “Sexual assault” as defined in 20 U.S.C. 1092(f)(6)(A)(v), “dating violence” as defined in 34 U.S.C. 12291(a)(10), “domestic violence” as defined in 34 U.S.C. 12291(a)(8), or “stalking” as defined in 34 U.S.C. 12291(a)(30).
- Higher education institutions must hold a hearing to adjudicate any report of sexual harassment. Requirements of each hearing include:
  - A mandatory presumption of innocence of students accused of sexual harassment, which applies until the conclusion of the grievance process
  - Hearings must be live, whether in person or through remote or technological means
  - Each party will have the opportunity to select an “advisor” of his or her choice, which can be an attorney. If the student does not select his or her own advisor, the school must provide one for free.
  - Each party involved and each witness will be subject

to live, real-time cross-examination by the other party's advisor

- If an institution does not already do live hearings, it must now coordinate and train staff and personnel to develop and implement the new investigation and hearing requirements
- Schools now officially have the choice to use the lesser "preponderance of the evidence" standard or the higher "clear and convincing evidence" standard at all stages of investigations and proceedings
- Institutional obligations trigger once the institution has "knowledge" of sexual harassment. For K-12 schools, "knowledge" of sexual harassment includes when any employee (not just a teacher) has such knowledge.
- Schools are responsible for preventing sexual harassment in locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurred
- Schools must accept reports of sexual harassment in person, by mail, by email, or by any other means that results in the Title IX Coordinator's receiving the report
- Schools must implement a formal grievance process detailed by the regulations (rather than allowing such a grievance process to serve as a "safe harbor" as in the proposed regulations)
- Schools must permit parents or guardians to file a formal complaint on behalf of a student
- Schools may not use an informal resolution process, such as mediation, to resolve allegations that a school employee sexually harassed a student. This last item is a direct reversal from the Department's 2017 suggestion on this subject.

Schools of all levels should consider closely reviewing and updating their Title IX policies and procedures to ensure compliance with the new regulations before they take effect.

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