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US Department of Education Makes Significant Updates to Title IX with “Final Rule”

Background

On May 6, 2020, the US Department of Education issued its long-awaited Final Rule of Title IX establishing regulations for how both K-12 and postsecondary schools must deal with allegations of sexual harassment. Title IX of the Education Amendments of 1972 prohibits discrimination based on sex in education programs or activities receiving financial assistance. The Final Rule was the first full rulemaking on a major Title IX issue since 1975, and the only one ever dedicated to sexual harassment.

Educational institutions that receive federal funds—which means all public elementary and secondary schools, and virtually all colleges and universities—will be expected to follow the new rules come August 14, 2020, giving these schools an extremely limited time frame to comply. An official “summary” of the Final Rule’s major provisions can be found [here](#), and you can read our recap of the summary below.

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Recap of Key Provisions

Our recap of the official summary covers the Title IX Final Rule's key provisions. All Title IX Final Rule requirements should be reviewed and implemented with the help of outside counsel. This recap is simply for informational purposes and to provide an outline of the Final Rule's many requirements.

Mandatory Reporting

- K-12 schools must respond whenever any employee receives notice of a sexual harassment allegation.
- Postsecondary institutions (i.e., colleges, universities, etc.) may choose whether to implement mandatory reporting for all employees or to designate specific employees as confidential resources who may discuss sexual harassment with students without automatically triggering reporting requirements.
- Title IX Coordinators must be considered mandatory reporters for all schools, K-12 or postsecondary, and the school is obligated to respond in full when the coordinator receives notice of a sexual harassment allegation.

Defining Sexual Harassment

Under the Final Rule, sexual harassment broadly includes:

- Any instance of *quid pro quo* harassment by a school employee (i.e., when an employee conditions an aid, benefit, or service of the institution on the individual's participation in unwelcome sexual conduct);
- Any unwelcome conduct that a reasonable person would find so severe, pervasive, and objectively offensive that it denies a person equal educational access; and
- Any instance of sexual assault, dating violence, domestic violence, or stalking as defined in the Violence Against Women Act (VAWA).

Covered Schools

Title IX requirements apply to all educational programs and activities that receive federal financial assistance, whether they occur on-campus or off-campus, including allegations that occur in buildings or facilities controlled by student organizations recognized by the school (such as fraternities or sororities). Although Title IX covers individuals within the United States, the new regulations allow institutions to apply misconduct policies to non-US settings, such as study-abroad programs or out-of-country spring break trips, if they so choose.

Reporting

- The school must ensure that all members of its educational community (including

students, employees, applicants for admission or employment, union representatives, and parents or guardians of primary or secondary school students) are notified regarding how to report sexual harassment allegations to their designated Title IX Coordinators.

- This person must be referred to as the Title IX Coordinator, so their role is clear.
- The Title IX Coordinator's name and contact information must be prominently displayed on the school's website.
- A report of sexual harassment can be made by anyone, not only the alleged victim, and can be made outside of normal business hours by phone, email, or mail.

Prompt Response

- The school must promptly respond to all sexual harassment allegations in a reasonable common-sense manner given the available information.
- This response must include reaching out to the complainant (i.e., the alleged victim) as soon as possible and offering supportive measures, such as class or dorm reassignments or no-contact orders.
- The school must fully investigate and follow a legally compliant grievance process before imposing any disciplinary measures on the respondent (i.e., the alleged perpetrator).
- The complainant's wishes as to whether or not the school should investigate the alleged sexual harassment should be respected unless the Title IX Coordinator finds that it is unreasonable to do so given the circumstances.

Definitions

This provision defines several terms used in the Final Rule, including "Complainant," "Respondent," "Formal Complaint," and "Supportive Measures."

Grievance Process

This provision describes the required grievance process in full, including the following conditions:

- The grievance process must treat both complainants and respondents equitably by providing remedies when (and only when) the respondent is found responsible.
- The process must involve objective evaluation of all relevant evidence provided by complainants, respondents, and witnesses, and make a judgment based on that evidence. Respondents should not be considered guilty until a judgment to that effect has been reached.
- All Title IX personnel, including coordinators, investigators, and decision makers must be free from conflicts of interest or bias and must be fully trained to fairly investigate allegations of sexual harassment. In the interest of transparency, all materials used to train Title IX personnel must be made available to the public on the school's website.
- The school's grievance process must be posted in full on its website, including:

- a description and expected timeline for the investigation, hearing, appeals process, etc.;
- a list of possible support measures, remedies, and disciplinary sanctions that the school may provide or impose; and
- the evidence standard that will be applied in all cases.

Investigation

This provision describes the investigation requirements under the Final Rule.

- The burden of gathering evidence and meeting the established evidentiary standard (either a preponderance of evidence or clear and convincing evidence) is on the school, not on either party.
- The school must provide equal opportunity for both parties to select an advisor to represent them; present facts, evidence, and expert witnesses; and discuss and gather evidence about the allegations without restrictions.
- The school must send written notice of any interviews, meetings, or hearings.
- The school must provide both parties and their advisors with any evidence as well as a summarizing investigative report with at least 10 days' notice for the parties to review and respond.
- The school must dismiss any allegations that fail to meet the definition of sexual harassment under Title IX, though it has the right to address the conduct in other ways that it deems appropriate.
- The school may dismiss a formal complaint or allegations at its discretion under the following circumstances:
 - The complainant informs the Title IX Coordinator in writing that they wish to withdraw the formal complaint or allegations;
 - The respondent is no longer enrolled or employed by the school; or
 - The school is unable to gather sufficient evidence to reach a determination based on specific circumstances.
- The school must give both parties written notice of any dismissal whether it is mandatory or discretionary, including the reasons for the dismissal.

Hearings

This provision states that a live hearing with cross-examination is required for postsecondary institutions but optional for K-12 schools. It also provides "rape shield" protections for all complainants, which bar questions and evidence about a complainant's past sexual behavior.

- Under the Final Rule, live hearings must include cross-examination by each party's representative (never by the parties themselves) and must be conducted directly, orally, and in real time.
- At the request of either party, the live hearing may be conducted with the parties and

their representatives in separate rooms, with technology allowing them to see and hear each other in real time.

- If any party or witness refuses to submit to cross-examination, their testimony cannot be used to reach a determination.
- An audio or audiovisual recording of any live hearing must be created and retained by the school.
- For K-12 schools that do not conduct live hearings, relevant questions and limited follow-up questions may be submitted in writing by both parties.

Decisions and Appeals

- The Final Rule requires each school to determine whether it will use one of two standards of evidence to make determinations: the “preponderance of evidence” or the “clear and convincing evidence” standard, which sets a higher burden of proof. The school must use the same standard of evidence for all cases.
- The decision maker (who must be a different person from the Title IX Coordinator and investigator) must issue a written determination to both parties stating whether or not they find the respondent responsible and why, describing all remedies and disciplinary sanctions to be imposed, and explaining how to file an appeal.
- The school must allow both parties the option to appeal the decision maker’s determination based on procedural irregularities that may have altered the outcome, newly discovered relevant evidence, or evidence that Title IX personnel involved in the grievance had a conflict of interest or bias.

Informal Resolutions

- The school may choose to offer informal resolutions such as mediation, on a case-by-case basis, but only if both parties provide voluntary, informed, and written consent to engage in these resolutions.
- Either party may withdraw from the informal resolution at any time and resume the normal grievance process.
- In cases where an employee is accused of sexually harassing a student, the school must not offer any kind of informal resolution.

Retaliation

And finally, the Final Rule expressly prohibits retaliation against parties involved in the sexual harassment investigations; this includes charging individuals with other code of conduct violations that arise from the same facts involved in the sexual harassment claim.

Employer Next Steps

- All schools covered under Title IX should review the Final Rule and work with outside counsel to ensure compliance with all its requirements by August 14, 2020.
- Begin identifying and training Title IX personnel, including Title IX Coordinators, investigators, and decision makers as soon as possible.
- Develop grievance policies and provide them to all members of your educational community as defined under Title IX including clear contact information for your Title IX Coordinators and details about how to file a sexual harassment complaint.
- HR Knowledge is preparing a Sexual Harassment Prevention Toolkit that will include best practices to comply with Title IX. If you are a Full-Service or Virtual HR client and you are interested in obtaining this toolkit, please email us [here](#).

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