

## DOE Issues New Title IX Regulations as Institutions Navigate a Global Pandemic



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On May 6, the U.S. Department of Education (Department) made public its long-anticipated regulations under Title IX of the Education Amendments Act of 1972 (available at <https://www2.ed.gov/about/offices/list/ocr/docs/titleix-regs-unofficial.pdf>), which prohibits sex discrimination in most education programs and activities.<sup>1</sup> The regulations take effect on August 14, 2020. On September 22, 2017, the Department officially announced that it would undertake this rulemaking process. The Department published its draft regulations 14 months later, on November 29, 2018. More than 17 months after that — on May 6 — the Department issued its final regulations. The regulations represent a seismic shift in process and culture, turning campus disciplinary processes into trials. And institutions have just 100 days to implement the new regulations.

While many colleges and universities use the term “sexual misconduct” to encompass multiple forms of prohibited sexual harassment, the regulations use an overarching

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definition of “sexual harassment.” “Sexual harassment” as defined in the regulations includes (1) the conditioning of an aid, benefit or service of the institution on an individual’s participation in unwelcome sexual conduct (*i.e.*, *quid pro quo*); (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 institution’s education program or activity; and (3) sexual assault, dating violence, domestic violence and stalking. 34 C.F.R. § 106.30(a).

Although the regulations are only 25 pages long, they are accompanied by 2,008 pages of discussion and other supplementary information from the Department. In this first alert, we highlight some of the most important aspects of the regulations, including what institutions of higher education (IHEs) should know now and what they should consider as they develop an implementation plan. We will delve more deeply into some of the more challenging implementation issues in follow-up alerts and our webinar.

Topic	What to Know	What to Consider
Employees	<p>The regulations apply to not only to students, but also to employees as complainants and/or respondents.</p> <p>The regulations provide the opportunity for IHEs to narrow their definition of “responsible employees” because IHEs are deemed to have “actual knowledge” of alleged sexual harassment only if it is reported to the Title IX Coordinator or an institutional official with authority to initiate corrective measures on behalf of the institution. (§ 106.30(a))</p>	<p>Whether staff policies, faculty handbooks and/or union contracts must be revised or renegotiated to meet the new requirements, and how to address those issues in advance of the August 14, 2020 implementation date.</p> <p>Whether to narrow the scope of employees required to report allegations of sexual misconduct to the Title IX Coordinator.</p>

<p>Scope of an IHE's Jurisdiction Under Title IX (i.e., "program or activity")</p>	<p>The regulations require that IHEs address sexual harassment in their programs or activities, which include "locations, events, or circumstances over which the [IHE] exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized" by the IHE. (§ 106.44(a))</p> <p>If the conduct alleged does not constitute "sexual harassment" or did not occur within the IHE's education "program or activity," as both terms are defined above, or did not occur against a person in the United States, the IHE <b>must</b> dismiss the complaint for purposes of Title IX. The matter still can be handled under another provision of the IHE's disciplinary code. (§ 106.45(b) (3))</p>	<p>Determine how to define the IHE's programs, activities and buildings owned or controlled by recognized student organizations. In doing so, consider the litigation, risk management and other implications of including certain programs, activities and buildings.</p> <p>Determine whether the IHE will investigate and adjudicate allegations of sexual misconduct broader than the definition of "sexual harassment" in the regulations (e.g., an alleged sexual assault of one student by another at a private off-campus apartment). If so, develop a process to dismiss allegations for purposes of Title IX while continuing to pursue disciplinary action, minimizing redundancy in the parallel processes.</p>
<p>Emergency Removal of Respondent from Campus</p>	<p>Respondent may be removed on an emergency basis (prior to adjudication) "provided that the [IHE] undertakes an individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following removal." (§ 106.44(c))</p>	<p>Ensure procedures are in place to properly evaluate and, if appropriate, impose an emergency removal. Consider what opportunity the respondent will have to challenge the removal.</p>

Time Frames	While there is no longer a requirement that investigations and determinations be completed within 60 days, IHEs must have “reasonably prompt time frames for conclusion of the grievance process.” (§ 106.45(b)(1)(v))	Develop a realistic master time frame, taking into consideration all phases of the investigation. Ensure policy language allows for the time frame to be extended for appropriate cause, with notice and an explanation to the parties.
Notice of Allegations	IHEs must provide both parties with written notice of the allegations (including the identities of the parties involved, the conduct allegedly constituting sexual harassment, and the date and location of the alleged incident). The notice must include a statement “that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process.” (§ 106.45(b)(2))	Develop templates to be used for providing notice.
Informal Resolution	Informal resolution is permitted <i>if</i> a formal complaint is filed. It is not permitted for employee-on-student harassment. (§ 106.45(b)(9))	Develop (or revisit) internal understandings of the circumstances, if any, under which informal resolution will be available, as well as the process of informal resolution. Ensure those responsible for informal resolution receive proper training (discussed below).
Advisor	<p>Parties may have an advisor of choice—who can be an attorney—at meetings and other proceedings throughout the grievance process. (§ 106.45(b)(5)(iv))</p> <p>If a party does not have an advisor at the hearing, <b>the IHE must provide one</b> solely for the purpose of conducting cross-examination (discussed below). The advisor may be an attorney, but does not have to be. (§ 106.45(b)(6))</p> <p>The regulations acknowledge that parties may be without an advisor in earlier meetings, such that the IHE’s duty to provide one arises only in connection with the hearing. (§ 106.45(b)(5)(vi))</p>	Determine who the IHE will make available as advisors, using internal or external resources. Avoid real or perceived conflicts of interest in light of an advisor’s cross-examination responsibilities. Ensure advisors receive proper training (discussed below).

<p>Providing Evidence to the Parties</p>	<p>Before finalizing the investigative report, IHEs must provide parties and their advisors with all evidence gathered during an investigation that “is directly related to the allegations raised in a formal complaint,” even if the IHE will not rely on the evidence in reaching a determination. (§ 106.45(b)(5)(vi))</p>	<p>Consider the manner in which the evidence will be provided and how individuals’ privacy will be protected.</p>
<p>Live Hearing</p>	<p>IHEs must hold hearings to adjudicate formal complaints.</p> <p>Advisors — not parties — must perform cross-examination.</p> <p>Decision-makers must make and articulate relevance decisions, including with respect to prior sexual history.</p> <p>If a party will not submit to cross-examination, the decision-maker must not rely on its statements.</p> <p>IHEs must allow expert witnesses.</p> <p>(§ 106.45(b)(6))</p>	<p>Consider how to implement the live hearing requirements. Identify those appropriate to serve as decision-makers, whether internal or external resources, and ensure they receive appropriate training (discussed below).</p>
<p>Standard of Evidence</p>	<p>IHEs may use a preponderance of the evidence standard or clear and convincing evidence standard, but must use the same standard for complaints against students and employees. (§ 106.45(b)(1)(vii))</p>	<p>Evaluate existing standards of evidence for complaints against students and employees — including faculty — to identify inconsistencies and determine the appropriate collective standard.</p>
<p>Appeals</p>	<p>Parties must be able to appeal both the dismissal of formal complaints and final determinations on responsibility based on (1) procedural irregularities that affected the outcome, (2) new evidence not reasonably available at the time of determination or dismissal that could affect the outcome, (3) and the bias of the Title IX Coordinator, investigator or decision-maker. (§ 106.45(b)(8))</p>	<p>Reevaluate appeals processes. Discuss how bias will be assessed on appeal. Ensure those who conduct appeals have proper training (discussed below).</p>

<p>Training</p>	<p>IHEs must ensure that Title IX Coordinators, investigators and decision-makers receive training on a number of topics, including not only policies and procedures, but also how to serve impartially. Training materials must “not rely on sex stereotypes.” (§ 106.45(b)(1)(iii))</p> <p>IHEs must post all training materials on their publicly accessible websites. (§ 106.45(b)(10)(D))</p>	<p>Develop (1) training that is consistent with the IHE’s revised policies and appropriate for public access and (2) a training schedule, plan and roster. Carefully consider the written content of training materials because they will be subject to intense scrutiny by any party dissatisfied with a particular investigation or hearing outcome.</p>
<p>Recording and recordkeeping</p>	<p>IHEs must record or transcribe hearings, making the recordings available to the parties for review. (§ 106.45(b)(6))</p> <p>IHEs must maintain records of supportive measures provided, investigations, hearings (including recordings), appeals, informal resolutions, and supportive measures, as well as training materials, for seven years. (§ 106.45(b)(10))</p>	<p>Determine the method to be used by the IHE for recording/transcribing hearings.</p> <p>Revise applicable records retention policies and schedules.</p>

Colleges and universities are completing their spring 2020 semesters in myriad remote learning environments and planning for fall 2020 in the midst of uncertainty. Pepper Hamilton’s higher education attorneys stand ready to assist institutions with their development of policies, procedures and training materials consistent with the new Title IX regulations. We will continue to provide updates on issues related to the regulations, including with respect to potential litigation challenging their implementation.

**Endnote**

1 The regulations are not considered final until published in the *Federal Register*, likely in the coming days.