

# Department of Education Issues Final Regulations Governing Campus Sexual Misconduct Under Title IX

Alert

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On May 6, 2020, the [U.S. Department of Education](#) published its long-awaited [final regulations](#) governing campus sexual harassment and sexual assault under Title IX, the 1972 federal civil rights law that prohibits discrimination on the basis of sex in education programs and activities that receive federal funding. This is the first rule to govern how educational institutions nationwide must meet their Title IX obligations and replaces prior nonbinding guidance from the Obama administration that called for rigorous enforcement of the law. Secretary of Education Betsy DeVos rescinded that guidance in 2017.

The regulations were proposed November 16, 2018 and the Department of Education has since reviewed more than 124,000 public comments on the issue.

The final regulations materially change how cases of sexual misconduct must be handled at colleges and universities. They include the following significant and controversial changes:

- **New Definitions.** Adopts a more narrow definition of what constitutes actionable sexual harassment. "Sexual harassment" is defined as conduct on the basis of sex that satisfies one or more of the following: (1) 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, dating violence, domestic violence or stalking as defined by U.S. law. Previously, the Obama-era guidance defined sexual harassment more broadly, as "unwelcome conduct of a sexual nature."

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- **Formal Complaint Requirement.** Sets limitations on a college or university's legal obligation to respond. The college or university must investigate only cases where a formal complaint alleging sexual harassment is made, either filed by the complainant or signed by the Title IX coordinator, and the complainant is participating in or attempting to participate in the education program or activity of the college or university with which the formal complaint is filed.
- **Grievance Procedures.** Under the new regulations, grievance procedures must include:
  - Use of "live hearings," including the right of the party's advisor of choice (not the party personally) to cross-examine the other party and any witnesses. At the request of either party, the college or university must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions.
  - Application of rape shield laws, meaning questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.
  - A presumption of innocence throughout the grievance process.
  - Use of a neutral decision-maker separate from the Title IX coordinator or investigator and explicit provisions required in the written determination.
  - The option to use a higher standard of proof. A college or university may choose either the higher "clear and convincing evidence" standard or the lesser "preponderance of the evidence" standard.
  - Equal opportunity for parties to appeal, on three required bases: (1) procedural irregularity that affected the outcome of the matter; (2) new evidence that was not reasonably available at the time the determination was made; or (3) Title IX coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against a party.
- **Informal Resolution.** A college or university may not require the parties to participate in an informal resolution process and may not offer an informal resolution process unless a formal complaint is filed. However, at any time prior to reaching a determination regarding responsibility, the college or university may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that both parties voluntarily consent and the parties receive written notice of the allegations and requirements of the informal resolution process. Informal resolution is not permitted to resolve allegations that an employee sexually harassed a student.
- **Record Retention.** Colleges and universities must maintain records of each sexual harassment investigation, appeal and informal resolution for a period of seven years. In addition to maintaining all

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materials used to train Title IX coordinators, investigators, decision-makers and any person who facilitates an informal resolution process for a period of seven years, colleges and universities must make these training materials publicly available on their websites, or upon request for inspection by members of the public.

Colleges and universities receiving federal funding are required to be in compliance with the final regulations by August 14, 2020. Given the current COVID-19 pandemic, this date immediately sparked controversy. The American Council on Education, the umbrella membership group for higher education, said in a [statement](#) that the Department of Education “is not living in the real world,” and that the August 14 deadline “is as cruel as it is counter-productive,” referencing the many challenges that higher education institutions now face due to the pandemic. The American Council on Education, among others, has implored the Department of Education to postpone the effective date, so colleges and universities can implement the necessary changes when their campuses reopen. We will continue to monitor developments.

Colleges and universities should work closely with their counsel to revise their current policies and practices to comply with the new Title IX requirements. For more information on the final regulations, please contact Jenni Ives, Carroll Wright, Nicole Faulkner, [Pat Konopka](#), [Rick Pins](#), [Bernadette Sargeant](#), [Stephanie Scheck](#), [Sara Welch](#) or the Stinson LLP contact with whom you regularly work.

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