



The Title IX New Regulations: *What Higher Education Institutions Must Know Before August 14, 2020!*

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Meet Today's Team



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Agenda

- Effect of Title IX Final Rule/New Regulations
- “To Do” List Before August 14, 2020
- Overview of Requirements: Top 10 Issues
- Revisit “To Do” List



“To Do” List Before August 14, 2020

- Review existing compliance officer titles & include “Title IX Coordinator” where appropriate
- Prepare and Approve “Interim” Policy and Regulations
- Determine Title IX Team:
 - Title IX Coordinator, Investigators, Facilitator of Informal Resolution Process, Advisors, Hearing Officer/Decision Maker, Decision Maker for Appeals, etc.
- Train Administrators Listed Above
- Train Employees on Reporting Responsibilities
- Post Most Current Title IX Training Materials on Website
- Update District Website via Title IX and California Law

Effect of New Title IX Regulations

1. Focus on Regulations and Guidance

- Full force and effect of law
- OCR 2001, Prior OCR 2017 Guidance, Final 2020 Rule/Regulations

2. Overall Intent of Changes

- “strengthen Title IX protections for survivors of sexual misconduct” ... “also provide due process protections to students facing accusations of sexual misconduct”

3. Consider California Law

- Be wary of “national” advice, but watch for preemption of state law

4. K-12 vs. Post-Secondary Institutions

- Some overlap, but key differences (e.g. required/optional hearings)

5. Court Challenges

- Complaints challenging new regulations filed, but no injunction yet

Overview of Requirements

Top Ten Issues

1. Title IX Personnel
2. Sexual Harassment
3. Supportive Measures
4. Emergency Removal
5. Informal Process
6. Investigation
7. Hearings
8. Finding
9. Appeals
10. Retaliation

1. Title IX Team

1. Title IX Coordinator

- Oversees Title IX compliance, accepts initial complaint, implements remedies

2. Investigator(s)

- Investigates the complaint and provides written findings

3. Hearing Officer/Decision Maker

- Conducts hearing, facilitates “cross-examination” & renders decision

4. Appeal Decision Maker

- Addresses appeal requests & renders decision

5. Informal Process Facilitator

- If informal process is feasible, likely a separate facilitator

2. Sexual Harassment Defined

Conduct on the ***basis of sex*** under one of following:

1. Quid Pro Quo Harassment

- Employee conditioning any educational opportunity or benefit on the participation in unwelcome sexual conduct

2. Hostile Environment Sexual Harassment

- Unwelcome conduct that a reasonable person finds to be so severe, pervasive ***and*** objectively offensive that effectively denies equal educational access

3. “Sexual Acts”

- Sexual assault (Clery Act), dating violence, domestic violence, or stalking (VAWA)

3. Supportive Measures

1. Requirement to Offer

- Must be offered to anyone as soon as institution has notice of possible Title IX issue

2. Avoid Burden on Parties

- Non-punitive, non-disciplinary and not unreasonably burdensome to the other party

3. Individualized

- Ensure equal educational access, protect safety or deter sexual harassment

4. Examples

- Counseling, course-related adjustments, modify schedule, escort, increased security and monitoring, and mutual restrictions on contact between the parties

4. Emergency Removal

1. Institution may remove respondent
2. Undertake individualized safety and risk analysis
3. Analysis reveals immediate threat to the physical health or safety of individual
4. Notice to respondent
5. Opportunity to challenge decision immediately following the removal
6. Cannot modify rights under IDEA, Section 504, or ADA

5. Informal Resolution Process

1. Optional Process

- May use informal resolution process on a case-by-case basis

2. Informed, Mutual Consent

- Both parties must give voluntary, informed, and written consent but cannot be required as a condition of enrollment/employment

3. Right to Withdraw from Informal Process

- Either party can withdraw from informal process at any time and resume formal process

4. Not Suitable for Student vs. Employee Matters

- No informal process for allegations that employee harassed a student

6. Investigations

1. Written Notice to Both Parties

- Of investigation, potential policy violations, allegations, all interviews, changes in process, meetings, hearings, appeals, decisions, etc.

2. Trained Investigator

- Should not also be designated as a hearing officer or appeal officer

3. Equal Treatment

- Both parties equal opportunity for advisor, avoid credibility determinations based on role, provide same opportunity to present and consider evidence
- No orders to restrict discussing allegations or to gather evidence

4. Evidence Requirements

- Investigator has burden to gather evidence & provide evidence to both parties with 10 days to review and comment

6. Investigations, continued

5. Burden of Proof

- Preponderance of the Evidence or Clear & Convincing Evidence

6. Report Requirement

- Report provided to both parties with 10 days to review & respond

7. Presumption Like “Innocent Until Proven Guilty”

- Must presume respondent is *not responsible* for the alleged conduct

8. Dismissal Requirement

- Must dismiss if allegations do not meet the definition of sexual harassment, or conduct occurred outside of program or activity, or conduct did not occur against person in US
- May dismiss if **complainant** requests, respondent is not enrolled/employed or circumstance prohibit gathering of sufficient evidence

7. Hearings

Live Hearing with Cross-Examination Required For *Postsecondary Institutions*

1. Separate Room Virtual Option

- At request of either party, entire live hearing conducted with parties separate through technology

2. Cross-Examination

- Each party's advisor may ask other party and witnesses relevant, follow-up and credibility questions
- Failure to be at hearing for cross-exam eliminates certain evidence

3. Rape Shield Protections

- Evidence about complainant's prior sexual behavior irrelevant unless offered to prove someone else committed the conduct

8. Decision After Hearing

1. Decision Maker Determines Responsibility

- Cannot be the Title IX Coordinator or investigator
- Must be trained to rule on relevant questions and weigh evidence
- Understands the “preponderance of the evidence” or “clear and convincing evidence” standard

2. Written Decision

- Includes the findings of fact, conclusion, rationale, disciplinary sanction, remedies to the complainant, how to file an appeal

9. Appeals

1. Equal Opportunity

- Both parties must have opportunity to appeal the determination of responsibility or the dismissal of a formal complaint or allegations

2. Bases for Appeal

- Procedural irregularity that affected the outcome;
- New evidence that was not reasonably available & could have affected outcome; or
- Conflict of interest or bias generally or specifically by Title IX Coordinator, investigator, decision-maker
- May include other bases for appeal if both parties have equal right to use

10. Retaliation

1. Code of Conduct v. Title IX

- Retaliation includes pursuing “Code of Conduct” violation based on the same facts alleged in a formal complaint in order to interfere with a party’s Title IX rights; fact specific analysis

2. Confidentiality

- Keep complainant, respondent, and witness confidential unless required by law “or as necessary to carry out Title IX proceeding.”

3. First Amendment

- Parties exercising 1st Amendment rights is not retaliation

4. False Statement Charge

- Recipient charging individual with making a false statement in bad faith during Title IX process is not retaliation
- Responsibility not sufficient to conclude bad faith false statement

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Thank You

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