

NEWS & INSIGHTS

Department of Education issues final Title IX regulations; schools to comply by August 14

INSIGHTSLEGAL UPDATE

MAY 13, 2020



Late last year, the U.S. Department of Education (DOE) withdrew the Obama Administration's Title IX guidance, published its own proposed regulations, and implemented a lengthy comment period during which stakeholders in the higher education community submitted an estimated 124,000 comments. The DOE [issued the final regulations](#) on May 6 – the first of their kind since 1997. The directives issued by the Obama administration in 2011 and 2014 were in the form of guidelines, which, while recommended, did not carry the force of law. As expected, the [new](#)

[regulations](#) make sweeping changes to Title IX's due process requirements and to the Title IX definition of sexual harassment.

Despite the uncertain impact of COVID-19 on the ability of schools to open in time for the 2020-2021 academic year, the DOE mandates compliance with the new regulations by August 14. The American Council on Education, together with attorneys general from 18 states, previously asked the DOE to delay rollout and enforcement of the regulations because of the pandemic. The request was denied. "Know Your IX," a victim's rights group and the National Women's Law Center have vowed to challenge the regulations and sue the DOE. While the result of those opposition efforts remains uncertain, schools need to immediately plan to implement a number of important changes by August 14.

Narrow definition of sexual harassment

Under the new regulations, sexual harassment is defined as: (1) quid pro quo (which refers to a school employee conditioning an aid, benefit or service of the institution on an individual's participation in unwelcome sexual conduct); (2) unwelcome conduct on the basis of sex that a reasonable person would find "so severe, pervasive and objectively offensive," it denies a person equal access to educational programs or activities; or (3) sexual assault as defined under [The Clery Act](#). The new definition requires conduct to be severe and pervasive, which is a departure from the **severe or pervasive** standard.

Grievance procedures triggered by formal complaint only

The new regulations require institution of grievance procedures only where a formal complaint is submitted. A formal complaint is defined as "a document filed by a complainant or signed by the Title IX coordinator alleging sexual harassment against a respondent" and requesting that the school investigate the allegation. It must also state that at the time of filing, the complainant was participating in or attempting to participate in the education program or activity of the school with which the formal complaint is filed. The complaint must also include the complainant's physical or digital signature.

After a formal complaint is filed, however, initiation of the grievance process is not automatic. A school must make a number of preliminary determinations regarding the nature and location of the complaint; if certain requirements are not met, the new regulations mandate dismissal. At their discretion, schools may dismiss a formal complaint or allegations therein if: (1) the complainant informs the Title IX coordinator in writing that he or she desires to withdraw the formal complaint or allegations; (2) the respondent is no longer enrolled or employed by the school; or (3) specific circumstances prevent the school from gathering sufficient evidence to reach a determination as to the allegations contained in the complaint.

Investigation requirements

Institutions must provide written notice of all allegations to both parties. The burden of gathering evidence and

burden of proof must remain on schools, not on the parties, and the school must provide each party equal opportunity to present fact and expert witnesses in addition to inculpatory and exculpatory evidence.

Schools must refrain from instituting requirements for complete confidentiality of allegations and their substance, which would amount to a “gag order.” The regulations further explain the theory that school-imposed gag orders sometimes result in disciplinary actions against students for “merely talking about” their assault or allegations with other students. Confidentiality requirements should thus be narrowly tailored to protect the interests of the victim and accused while balancing the need for discussion and advocacy. Schools are still expected to keep the identity of complainants and respondents confidential.

Ten days prior to any hearing, the parties and their advisors must be sent: (1) an investigative report summarizing evidence; and (2) evidence directly related to the allegations, in electronic format or hard copy. At their discretion, schools may consolidate formal complaints where the allegations arise out of the same facts. Schools cannot access or use medical, psychological or similar records without obtaining the party’s voluntary, written consent.

Hearing requirements

Institutions must implement a live hearing with cross-examination of parties and witnesses before a neutral decision-maker who was not involved in the investigation. The neutral adjudicator must produce a detailed written decision at the conclusion of the hearing, setting forth factual findings, conclusions and an explanation of the reasoning for the determination of responsibility and any sanction.

Each school’s grievance process must state whether the standard of evidence to determine responsibility is the **preponderance of the evidence** standard **or** the **clear and convincing evidence** standard.

Each party must have the same opportunity to select an advisor of that party’s choice, which can be an attorney but does not have to be. The role of the advisor includes conducting cross-examination on behalf of the party, including the complainant/respondent and witnesses. If a party does not have an advisor present at a hearing to conduct cross-examination, the institution must provide one for that purpose.

Training and recordkeeping

The new regulations require institutions to ensure that Title IX coordinators, investigators, decision-makers and anyone who facilitates an informal resolution process receives training on matters including the definition of sexual harassment, how to act impartially and, as applicable, how to conduct an investigation, what facts are relevant for an investigative report, how to conduct hearings and how to facilitate an informal resolution process. The stated goal of the DOE is to ensure that training promotes an impartial investigation process.

Institutions are also required to make training materials available on their websites or otherwise available for inspection by members of the public.

In addition, institutions are now required to create and maintain, for seven years, records of any actions taken in response to a report or formal complaint of sexual harassment. This requirement is substantial – the institution

essentially must have a written record of its basis for all decision-making following a report: Were supportive measures offered? If not, why not? If so, which ones, and were they adequate to restore the complainant's access to the education program or activity? Was a formal investigation initiated? If not, why not? If so, records pertaining to that investigation must be maintained. Was a formal hearing conducted? If so, the same recordkeeping duties apply.

Informal resolution process

The new regulations also allow institutions to offer an informal process, such as mediation, to resolve complaints, but only after a formal complaint is filed and after both parties have received written notice of: (1) the allegations; (2) limitations on pursuing the grievance process should a resolution be reached; and (3) any consequences of informal resolution. Both parties must provide written consent to the process.

Either party must be permitted to withdraw from informal mediation before a resolution is reached, without losing the right to pursue the grievance process.

The preamble to the new regulations makes clear that institutions are afforded significant discretion in formulating their informal resolution processes. Issues that institutions should consider now, before offering their first informal resolution process, include: (1) whether the parties will be expected to interact directly during the process; (2) whether any questioning of the parties will be allowed; (3) whether any version of the process will include restorative justice principles; and (4) whether and to what extent disciplinary sanctions will be part of the process.

Of note, the addition of mediators to the list of individuals required to receive training under the new regulations was the result of concerns, raised by commentators to the proposed rules, that without such training, mediators could ask inappropriate questions and subject participants to re-traumatization. The importance of selecting well-trained and sensitive mediators is paramount to the success of the informal resolution process.

Impact on Pennsylvania schools

The key changes highlighted above are just a few of many updates and clarifications to the regulations. Schools will need to revise their complaint and resolutions process accordingly and put an appellate process into place. They will also need to establish training programs and ensure that their policies and recordkeeping practices are within compliance.

Saxton & Stump's [Title IX team](#) led by [Hon. Lawrence F. Stengel \(Ret.\)](#) is available to further discuss the new regulations and assist with policy and procedure revisions to comply by the August 14 deadline. Our team of [internal investigators](#), adjudicators and appellate attorneys are well equipped to support Pennsylvania schools as they navigate Title IX complaint and hearing process requirements. Our attorneys can help develop an action plan and risk mitigation strategies tailored to your organization's needs to ensure that you are well-positioned to appropriately handle these sensitive matters.

Related People

[Hon. Lawrence F. Stengel \(Ret.\)](#)

Related Services and Industries

[Title IX](#)