



Title IX New Regulations Overview

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Where are we now?

- The Final Rule is incredibly long and complicated. Released just 100 days before the effective date, the Final Rule is 2,033 pages and 636,609 words.
- Published in the Federal Register on May 19, 2020.
- Effective date August 14, 2020.
 - There is no grace period. OCR will start enforcement on August 14th
- Nationwide injunctions are possible, but we can't count on it.
 - They may have limited scope (only impact a portion of the regulations)
 - They may not have a long duration
 - Bottom line: We need to plan for implementation and not count on a nationwide injunction.

Institutional response expectations

- Must respond in a way that is not “deliberately indifferent” when the institution has actual knowledge
 - “clearly unreasonable in light of the known circumstances”
- How does the Institution have “actual knowledge”?
 - If one of these people know:
 - the Title IX Coordinator or
 - “any official...who has authority to institute corrective measures on behalf of the recipient”
 - May still require a broader set of employees to report, including all employees but OCR will determine you have “actual knowledge” only when the person reporting is an “official with authority”
- If an Institution receives a “report” it must:
 - Offer supportive measures
 - Provide an explanation of formal complaint process
- If an Institution receives a “formal complaint” it must:
 - Investigate
 - Provide a grievance process that is consistent with the regulations
 - Unless circumstances require (or permit) dismissal

Dismissal of formal complaints

- Dismissal is determined after you have a formal complaint
 - There is a big difference between what you must dismiss vs. what you may dismiss.
- Formal complaint **must** be dismissed (from the Title IX process) if conduct:
 - Would not constitute sexual harassment even if proved,
 - Did not occur in institution's program/activity, or
 - Locations, events, or circumstances in which an institution exercises substantial control over both the respondent and the context in which the sexual harassment occurs Locations include buildings owned or controlled by officially recognized student organizations. §106.44(a)
 - Did not occur against a person in the United States (study abroad).
- Formal complaint **may** be dismissed (from the Title IX process):
 - If complainant requests to withdraw their complaint
 - If respondent is no longer enrolled or employed
 - When specific circumstances prevent gathering evidence sufficient to reach a determination

Interim Suspensions now called Emergency Removals

- Section 106.44(c) of the Final Rule imposes a high threshold to justify the emergency removal of a respondent (whether a student or employee) from an education program or activity, but recognizes that, in certain instances, the removal action may be appropriate for the institution to avoid a deliberately indifferent response.
- Conduct a prompt individualized safety and risk analysis
 - The individualized safety and risk analysis must confirm that there is an “immediate threat” to the “physical health or safety” of one or more individuals, who may be the respondent, the complainant, or any other individual (such as a third-party witness).
- Evaluate the applicability of disability laws to the removal decision
- Consider the appropriateness of supportive measures in lieu of an emergency removal (is there something less restrictive you can do)
- Provide the respondent with notice and an “immediate” opportunity to challenge the emergency removal

Need help, review <https://system.suny.edu/media/suny/content-assets/documents/sci/tix2020/Emergency-Removal.pdf>

Pre-hearing evidence review process for both parties

- Before the investigator issues their report, the parties must have at least 10 days to review any relevant information directly related to the allegations raised in a formal complaint gathered by the investigators, including both inculpatory and exculpatory evidence.
- At the end of that ten day period, the parties have the right to submit a written response, which the investigator “will consider” before completing their investigative report.
- Apply the **same standard of evidence** for formal complaints against students as for formal complaints against employees, including faculty; and – Apply the same standard of evidence to all formal complaints of sexual harassment.
- The College/University must create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to a hearing (if a hearing is required) or other time of determination regarding responsibility, send to each party and the party’s advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response.

Need help, review <https://system.suny.edu/media/suny/content-assets/documents/sci/tix2020/Inspection-and-Review-of-Evidence.pdf>

Live hearing with cross-examination by an advisor.

- The College or university must provide an advisor “without fee or charge” to any party without an advisor in order to conduct cross-examination (can limit to only CX)
- A decision maker may not draw any inference from a party’s refusal to participate in cross-examination. If a party is not subject to cross-examination, then:
 - No reliance on their statement in determining responsibility.
 - No inference as to responsibility.
- Live hearings may be conducted with all parties present in the same location or virtually, as long as participants can simultaneously see and hear each other.
- A recording or transcript must be created and made available for the parties to review and inspect.

Need help, review <https://system.suny.edu/media/suny/content-assets/documents/sci/tix2020/Live-Hearings,-Cross-Examination-and-Advisors-of-Choice.pdf>

Practical challenges with the new hearing process

- Investment in accessible technology for virtual hearings and for the recording of hearings
 - Increased storage costs for those transcripts or recordings
- The provision of an advisor and setting rules regarding decorum
- Decision regarding engaging external resources to serve as investigators or decision makers or providing significant training for current staff who will need to understand relevance standards, technology, and rape shield considerations.
 - Decision makers must rule on relevance and disallow questions that violate rape shield laws.

Training for all involved

- On May 18, 2020, the OCR Blog clarified what must be included in training.
 - You will need to analyze this. Prior training for Investigators, Title IX Coordinators, and Decision Makers may not be sufficient.
- Notably, all materials used to train Title IX personnel:
 - Must not rely on sex stereotypes,
 - Must promote impartial investigations and adjudications of formal complaints of sexual harassment,
 - Must be maintained by the school for at least 7 years,
 - Must be publicly available on the school's website; if the school does not maintain a website the school must make the training materials available upon request for inspection by members of the public.

Need help, review

<https://www2.ed.gov/about/offices/list/ocr/blog/20200518.html>

Don't Forget Existing Clery Requirements

- Allegations of sexual assault, dating violence, domestic violence, and stalking, may also be Title IX investigations. As you revise Title IX policy & procedure, double-check that you are also following the requirements of the [Clery amendments](#). 34 CFR 668 contains training requirements and policy requirements.
- Examples:
 - Educational programming for new students & employees; simultaneous written notifications; specific list of sanctions and protective measures; must provide purported victim with written policy information & instructions to preserve evidence;
 - Institutional training on disciplinary proceedings must include training on “protecting safety of victims” and “promoting accountability”- mandates that are not repeated in the Title IX regulations.

Employment challenges

- This process applies to employees as well. This is a huge issue because the law does not read the same. Title VII and Title IX are not the same thing.
- Title VII defines sexual harassment as “severe or pervasive” not “severe and pervasive.”
- Title VII “knew or should have known” versus “actual knowledge”
- Title IX you now “must dismiss” a formal complaint if conduct is not against a person in the United States. Title VII applies to United States citizens working abroad.
- “The recipient must keep confidential the identity of...any individual who has been reported to be the perpetrator of sex discrimination, any respondent...except as may be permitted by...FERPA...or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.” §106.71 (a)
 - Job references?
 - NSF required notifications in grant terms and conditions.

Resources for compliance

- SUNY Conduct Institute (this is really helpful!)
 - <https://system.suny.edu/sci/tix2020/>
 - <https://system.suny.edu/sci/news/5-19-20-title-ix-regulations/index.html>
- DOE OCR Blog
 - <https://www2.ed.gov/about/offices/list/ocr/blog/index.html>
- NACUA Title IX Resources
- ATIXA

General closing observations

- This requires significant engagement with HR due to the process being used for faculty and staff as well as students.
- This may (likely will) require modifications to a Faculty Handbook, which may be very challenging over the summer.
- Both the Title IX process and Student Conduct processes will need to be reviewed and revised extensively.
- The Title IX Coordinator must be exceptionally adept.
- Training over the summer is challenging, particularly given the current environment.

Thank you!

