

# PUBLICATION

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## New Title IX Regulations – Key Changes and New Employer Obligations

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**On May 4, 2020, the Department of Education (DOE) issued new Title IX regulations, which direct how educational institutions must address incidents of sexual assault and harassment involving both students and employees.<sup>1</sup> By way of context, Title IX of the Higher Education Act was passed in 1972, and, by its language, prohibits sex discrimination by schools that receive federal funding. The DOE is the executive administrative agency that issues regulations and guidance letters interpreting the statute, including further defining what constitutes "sex discrimination" and what actions schools are required to take to comply with Title IX.**

Under the Obama Administration's 2011 Dear Colleague Letter, schools found themselves required to "take immediate action to eliminate the harassment, prevent its recurrence, and address its effect." A wave of new Title IX policies and procedures were instituted as a result. In the following years, these policies and procedures were met by lawsuits and other objections to the regulations' requirements, most significantly by students asserting that schools were imposing unfair disciplinary procedures that violated their due process and First Amendment rights.

The most recent regulations are guided by these due process and First Amendment concerns and have significantly changed schools' obligations with regard to incidents of sexual assault and harassment involving their students and employees. Understanding the key changes is vital to the process of revising existing Title IX policies and procedures. Below is a short list of key changes in the new regulations, each of which must be reviewed and analyzed in revisiting your institutions' policies and procedures:

- *Actual Knowledge*: Schools are not obligated to take action unless they receive actual knowledge of allegations of sexual harassment. A school will have actual knowledge if a report is made to the Title IX Coordinator or any official of the school who has authority to institute corrective measures on behalf of the school.
- *Jurisdiction*: Schools are only responsible for addressing sexual harassment that occurs under an education program or activity. The school can choose to address incidents outside its jurisdiction but does not have to do so. Title IX does not apply to incidents occurring outside the United States, such as during a study abroad trip.
- *Standard of Proof*: Schools can choose the burden of proof for Title IX adjudications: the lower burden of "preponderance of the evidence," or the higher burden of proof, "clear and convincing."
- *Live Hearing*: Institutions of higher education must provide for live hearings for formal complaints of sexual harassment. The school must create an audio or audiovisual recording or transcript of the live hearing and make it available to the parties for inspection.
- *Cross-Examination*: Cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor and never by a party personally.
- *Single-Investigator Model*: The investigator cannot be the same person who determines whether the respondent is guilty.
- *Students' Rights*: The investigator must provide all parties an equal opportunity to examine all evidence gathered during the investigation that is directly related to the allegations. A copy of the investigative report must be given to the parties at least ten days prior to the hearing.

- *Respondent's Right:* Schools must tell respondents in writing they are presumed innocent until determined to be guilty. A respondent cannot be summarily expelled from school unless the respondent poses an immediate threat to the physical health or safety of the complainant (or anyone else).
- *Informal Resolution:* Schools can offer informal resolution options, such as mediation, to the parties, but both parties must give voluntary, informed, written consent. Note that schools cannot offer informal resolution for allegations that an employee sexually harassed a student.
- *Recordkeeping Requirements:* Schools must maintain Title IX records for seven years.

Educational institutions must remember that Title IX not only applies to incidents involving students but to incidents involving employees as well. First, employees can be respondents in a student-initiated complaint. Under the new regulations, schools "must adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by [the Title IX regulations]...and a grievance process that complies with § 106.45 for formal complaints..." 34 C.F.R. § 106.8(c) (emphasis added). Second, both student and employee complainants can initiate a formal complaint and trigger the formal grievance process requirements. This means that employee complaints may be subject to the nuanced grievance process outlined in the regulations.

While the regulations impose formal hearing requirements on employee-only incidents in certain scenarios, there are several ways the regulations make it easier to take action with regard to the accused employee without the due-process hurdles provided to students. For example, the new regulations do not prohibit a school from placing a non-student employee on administrative leave pending the conclusion of the grievance process. This is merely an option, not a requirement. Additionally, the Title IX Coordinator may also dismiss a formal complaint if "the [employee]-respondent is no longer ... employed by" the school. 34 C.F.R. § 106.45(3)(ii).

Second, Title IX can apply to incidents only involving employees because Title IX also protects *employees* of educational institutions, programs, and activities against sex discrimination and harassment. While employers are aware of and typically operate under the framework of the anti-discrimination statute found at Title VII of the Civil Rights Act of 1964 (Title VII), Title IX must also be taken into consideration when a school is confronted with issues of employee-only workplace discrimination, harassment, and retaliation on the basis of sex. As perhaps the best evidence of this overlapping law, the new regulations draw from Title VII in their definition of "sexual harassment." In addition to employee-only incidents potentially triggering the formal grievance process, the new regulations require schools to "adopt and publish grievance procedures" to address sexual harassment complaints brought by employees. 34 C.F.R. § 106.8(c). This can be an alternative HR process, but there is likely be a publication requirement explaining that HR process.

Schools have until August 14, 2020 to adopt compliant policies and procedures. It is strongly recommended that schools begin reviewing and revising policies and procedures to comply with the new regulations prior to the start of the fall semester. Please contact the author or any member of Baker Donelson's [Labor and Employment Team](#) for advice on implementing these changes.

<sup>1</sup> The key concepts of the new regulations as applicable to student-involved incidents are covered in more detail in a Baker Donelson webinar which can be viewed [here](#).