

TITLE IX FINAL RULE

OUTLINE OF KEY PROVISIONS

May 14, 2020

Note: This outline of key provisions in the Title IX final regulations released May 6 by the Department of Education was prepared by the Division of Government Relations at the American Council on Education (ACE) and is subject to revision.

Effective Date

- Requires campuses to be in compliance by August 14, 2020.

Scope and Jurisdiction Issues

- Defines sexual harassment for Title IX purposes as:
 - › Quid pro quo harassment;
 - › Unwelcome conduct determined “by a reasonable person to be so severe, pervasive, and objectively offensive” as to deny a person equal access to the institution’s education program or activity; or
 - › Sexual assault, dating violence, domestic violence or stalking as defined in the Clery Act and the Violence Against Woman Act.
- Clarifies that sexual harassment occurring on property owned or controlled by an officially recognized student group (e.g., a fraternity house) is within an institution’s education “program or activity” and therefore covered by Title IX.
- Clarifies that Title IX applies only to sexual harassment against persons in the United States.
- Explicitly permits institutions to pursue sexual misconduct violations that fall outside of Title IX’s scope under their own codes of conduct.
 - › Removes language in the proposed rule suggesting an institution “must dismiss” a complaint falling outside the scope of Title IX.
- Requires an institution to have “actual knowledge” of the alleged misconduct before it is obligated to respond under Title IX.
 - › “Actual knowledge” is defined as notice to the Title IX coordinator or any other official with the “authority to institute corrective measures.”

Live Hearing with Cross-examination

- Mandates that all campuses provide a “live” hearing—either in person or virtually.
 - › Hearing must be done in “real-time” and must allow both parties to see and hear questioning of the parties and witnesses.
 - › Institution must provide a virtual hearing, if requested by either party.
 - › Must provide an equal opportunity for the parties to present witnesses including fact and expert witnesses.
 - › A recording of the live hearing must be made available for the parties’ inspection and review.

- Institutions must permit cross-examination of the parties (and any witnesses) by the parties' advisor of choice.
 - › Unlike the proposed rule, the parties are now prohibited from directly conducting cross-examination themselves—it must be done through an advisor.
 - › Requires the decision-maker at the hearing to determine whether each question asked during cross-examination is “relevant” and whether it violates rape shield law protections—*before* it is answered. Decision-maker also must provide on-the-spot explanation for any decision to disallow a question.
 - › Decision-makers are barred from considering any statements of a party who refuses to sit for cross-examination in reaching a determination of responsibility.
- If a party does not have an advisor, the institution must provide one free of charge.
 - › Removes the requirement from proposed rule that the advisor be “aligned with” the party.
 - › Clarifies that when an institution provides an advisor, the advisor need not be an attorney.

Evidence “Directly Related”

- Requires institutions to provide the parties an equal opportunity to inspect and review “any evidence... directly related” to the allegations, including both inculpatory and exculpatory evidence, and regardless of whether the institution intends to rely on the evidence in making a determination of responsibility.
 - › Evidence must be provided and sent in electronic form or hard copy to the parties and their advisors.
 - › Prohibits institutions from considering, disclosing, or otherwise using medical treatment records without written consent from the party.
- Grievance process may not require, allow, rely upon, or otherwise use questions or evidence that constitute or seek disclosure of information protected by a legally recognized privilege, unless the holder of the privilege waives it.

Appeals

- Mandates that the parties be given an equal opportunity to appeal a final decision on three specified grounds:
 - › Procedural irregularity that affected the outcome;
 - › New evidence not reasonably available at the time; and
 - › Title IX coordinator, investigator, or decision-maker had a bias or conflict of interest.

Training

- Requires extensive training for Title IX coordinators, investigators, decision-makers, and those involved in any informal resolution process on topics including:
 - › The definition of sexual harassment for Title IX purposes;
 - › The scope of the institution’s education “program or activity” under Title IX;
 - › How to conduct an investigation and grievance process including hearings, appeals, and informal resolution process, as applicable;
 - › How to serve impartially including avoiding prejudgment of facts at issue, conflicts of interest, and bias;
 - › Technology to be used at a live hearing;
 - › Issues of relevance of questions and evidence, including rape-shield limitations; and

- › Issues of relevance to create an investigative report that fairly summarizes relevant evidence.
- All training materials must be posted on the institution's website.

Standard of Evidence

- Allows institutions to choose either the “clear and convincing” or “preponderance of the evidence” standard for determining responsibility in Title IX proceeding *provided that* the same standard is used regardless of whether the respondent is a student or employee.
- › Removed requirement in the proposed rule that in order to choose preponderance of evidence, the institution would have to apply that same standard across all disciplinary processes that carry the same maximum penalty.

Additional Grievance Process Requirements

- Permits the use of informal resolution process, such as mediation, provided that both parties voluntarily consent in writing. However, informal resolution is prohibited for student complaints against employees.
- Requires campuses to provide supportive measures to the complainant, regardless of whether a formal complaint is filed.
- Requires an institution to state in its notice of a formal complaint that the respondent is “presumed not responsible.”
- Prohibits the use of a “single-investigator” model, where the investigator and decision-maker roles are held by the same person.
- Removes provision from the proposed rule that would have required Title IX coordinators to file a formal complaint in cases where there were reports of multiple complaints against the same respondent.
- Prohibits institutions from imposing “gag orders” that restrict the ability of either party to discuss the allegations or to gather relevant evidence.

Other Issues

- Makes clear that the formal Title IX procedures outlined in the final rule apply to complaints brought *by or against employees*, and are not limited to complaints involving students or student-respondents.
- › Clarifies that nothing in the rule diminishes rights available to any individual under Title VII, which prohibits sex discrimination in an employment context.
- Includes a non-retaliation provision that prohibits institutions from retaliating against any individual for exercising Title IX rights.
- › Explicitly states that the exercise of rights protected under the First Amendment does not constitute retaliation.
- States that the obligation to comply with Title IX is “not obviated or alleviated by any state or local law.”
- Requires institutions to maintain all records of Title IX proceedings for seven years—up from three years in the proposed rule.