



Understanding the New Regulations Governing Title IX for Colleges and Universities

On May 6, 2020, the United States Department of Education released new regulations governing the application of Title IX, which prohibits discrimination based on sex in educational institutions. These regulations become effective on August 14, 2020. Although these regulations also govern the application of Title IX at elementary and secondary schools, this alert focuses on the impact in the college and university setting.

The new regulations, for the first time, provide a legally binding – and narrower – definition of sexual harassment under Title IX. Sexual harassment is now divided into three categories: (1) quid pro quo sexual harassment; (2) sexual assault (including dating violence, stalking, and domestic violence); and (3) unwelcome conduct that a reasonable person would determine is so “severe, pervasive, and objectively offensive” that it effectively denies a person equal educational access. The use of the word “and” is important since prior guidance defined sexual harassment broadly as conduct that was severe, persistent, or pervasive (note that instances of quid pro quo harassment or sexual assault need not satisfy the severe, pervasive, and objectively offensive standard).

As colleges and universities prepare for a new school year, in addition to preparing for the new challenges of operating during a pandemic, they also must change their Title IX procedures to conform to the new regulations.

Public and private institutions of higher education are now required to ensure due process protections in their Title IX grievance procedures. These due process protections include:

- **Notice of allegations and access to evidence.** Schools must provide written notice of the allegations to both the complainant and the respondent and both should be provided an equal opportunity to review and respond to any evidence.

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Mark Smith

Mark was elected Chair of the Court Management Advisory Board, where he will assist supreme judicial court justices, the trial court chief justice and the court administrator on judicial reform matters.



Jessica Conklin

Jessica presented a program for the BBA, “Representing Students in Title IX Proceedings.” She discussed considerations for representing complainants and respondents in sexual misconduct proceedings in high schools, colleges and universities.



Payal Salsburg

Payal was featured for her volunteerism at Mass General Hospital on Boston.com and Law360.

Payal presented a webinar for In-House Counsel through AALAM, “Force Majeure: What it Means for Your Company During the COVID-19 Crisis.” She discussed how companies may gain relief for non-performance under unforeseeable circumstances.

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- **Abandonment of “gag” rules.** Complainants and respondents must be allowed to discuss allegations and collect evidence.
- **No disciplinary sanctions until a finding of responsibility.** Educational institutions must presume the respondent is not responsible unless there has been a finding of responsibility through the school's Title IX process. The school should not impose any disciplinary sanctions on the respondent before a finding of responsibility. Institutions may still enact emergency measures, such as removing a respondent from campus, whether or not a grievance process is underway, so long as the institution has performed an individualized safety and risk assessment and provided the respondent an opportunity to contest the finding.
- **Access to an advisor.** The regulations specifically allow both complainants and respondents access to an advisor of their choice. This advisor often is (but need not be) an attorney.
- **The right to cross-examination.** The final determination in a Title IX proceeding must be made at a live hearing that allows for cross-examination of parties and witnesses. Parties cannot directly cross-examine each other but must do so through an advisor of their choosing.

Under the new regulations, educational institutions may adopt either a clear and convincing evidence standard or the lower preponderance of evidence (more likely than not) standard. The preponderance standard, however, may only be used if the institution uses the same standard when evaluating other disciplinary violations that carry the same maximum penalties and do not implicate Title IX. Furthermore, the institution must use the same standard of evidence it applies to student respondents when evaluating claims against its employees.

As colleges and universities prepare for a new school year, in addition to preparing for the new challenges of operating during a pandemic, they also must change their Title IX procedures to conform to the new regulations. The new regulations significantly alter the process for handling Title IX proceedings—providing both increased protections and challenges for complainants and respondents.

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