

Proposed Title IX Regulations: 10 Changes That Colleges and Universities Need to Know

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On November 16, 2018, after more than a year of anticipation, the Department of Education issued its proposed regulations under Title IX. The proposed rules address and significantly expand upon the "areas of concern" previously identified by the department in 2017, when it rescinded Obama-era Title IX guidance and issued its own interim guidance. Once final, the new Title IX rules will require colleges and universities to make substantial changes to their existing policies and grievance procedures, including its definitions, investigation requirements and hearing processes.

As it would be impossible for the purposes of this post to discuss all of these changes, the following chart provides an overview of ten key differences between the Obama-era guidance and the proposed regulations, that you need to know:

1. DEFINITION OF SEXUAL HARASSMENT

Obama-Era Title IX Guidance: Broadly defined as "unwelcome conduct of a sexual nature."

Proposed Title IX Regulations: More narrowly defined as "unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity."

2. OFF-CAMPUS CONDUCT

Obama-Era Title IX Guidance: Obligation to process complaints involving off-campus conduct, including conduct outside of the U.S., even if the conduct occurred outside of the context of an education program or activity, if the conduct had "continuing effects" on campus or in an off-campus education program or activity.

Proposed Title IX Regulations: No obligation to process complaints involving off-campus conduct, unless the conduct occurred in the context of the school's education program or activity.

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3. PRESUMPTION OF NON-RESPONSIBILITY

Obama-Era Title IX Guidance: No requirement or reference to presumption of non-responsibility.

Proposed Title IX Regulations: Grievance procedures must include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.

4. REMOVAL OF RESPONDENT FROM CAMPUS OR EDUCATIONAL ACTIVITY PENDING INVESTIGATION

Obama-Era Title IX Guidance: Removal of a respondent as an interim measure was permitted depending on the facts of the case, including the severity or pervasiveness of the allegations; and any continuing effects on the complainant.

Proposed Title IX Regulations: A respondent may only be removed on an "emergency basis," provided that the school undertakes an individualized safety and risk analysis, determines that an immediate threat to the health or safety of students or employees justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal.

5. SINGLE INVESTIGATOR MODEL

Obama-Era Title IX Guidance: No prohibition on single investigator model.

Proposed Title IX Regulations: Single investigator model prohibited: decision-makers "cannot be the same person(s) as the Title IX Coordinator or the investigator(s)."

6. RIGHT TO INSPECT AND REVIEW EVIDENCE AND TO PROVIDE WRITTEN RESPONSE TO INVESTIGATION FINDINGS AND REPORT

Obama-Era Title IX Guidance: No specific requirement other than that any such rights that a college may offer be provided to both parties equally.

Proposed Title IX Regulations: Both parties must be given an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in the complaint (even that which the school does not intend to rely in reaching a determination regarding responsibility) prior to the conclusion of the investigation and during the hearing; and the opportunity to provide a written response to preliminary investigatory findings and investigation report.

7. HEARING REQUIREMENT AND CROSS EXAMINATION

Obama-Era Title IX Guidance: No hearing required, but if hearing was part of the policy, direct cross-examination by respondents was discouraged because of its potential to re-traumatize victims.

Proposed Title IX Regulations: A school's grievance procedure must provide for a live hearing and afford respondents the right to cross-examine their accuser by a lawyer or other adviser; the parties may be in separate rooms, using technology if needed.

8. STANDARD OF PROOF

Obama-Era Title IX Guidance: Required "preponderance of the evidence" (more likely than not) standard in adjudicating complaints of sexual misconduct.

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Proposed Title IX Regulations: Permits use of either the preponderance of the evidence standard, or the higher "clear and convincing evidence" threshold.

9. GAG ORDERS

Obama-Era Title IX Guidance: No restriction on school's ability to discourage parties from discussing allegations.

Proposed Title IX Regulations: Prohibits schools from restricting "the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence."

10. INFORMAL RESOLUTION OF COMPLAINT

Obama-Era Title IX Guidance: Mediation in lieu of formal investigation and adjudication process not appropriate in cases involving alleged sexual assault.

Proposed Title IX Regulations: Allows for an informal resolution at any time, provided that both parties voluntarily agree to it.

Client Tip: *While purporting to provide more due process protections for respondents and reduced regulatory burdens on colleges, the proposed regulations actually impose highly prescriptive requirements with regard to investigations and hearings that will be time-consuming and costly to implement. It is therefore incumbent upon colleges to contribute their comments individually, or through the associations of which they are members, to the Department of Education before the notice period expires on January 28, 2019, in an effort to reduce the burdens and clarify their obligations. Once the rules are finalized, colleges must be prepared to amend their policies to comply with the new law.*

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