

## What Schools Should Know About New Title IX Rules

By **Estela Diaz, Catherine Creely and Taylor Daly** (January 22, 2019, 12:52 PM EST)

The highly anticipated proposed Title IX regulations from the U.S. Department of Education were published on Nov. 16, 2018. The proposed rules have been lauded by critics of the Obama-era guidance who viewed previous guidance as biased in favor of complainants, and at the same time lambasted by those who view the proposed regulations as a rollback of the protections enacted by that guidance for sexual assault survivors.

Regardless of the perspective taken, the proposed regulations — open to public comment through Jan. 30, 2019 — will require most educational institutions to revise their Title IX policies and practices to comply with the new rules. The most significant changes are outlined below.

### **Circumstances Requiring Institutional Response**

The proposed regulations require an institution “with actual knowledge of sexual harassment in an education program or activity [... in the United States] to respond in a manner that is not deliberately indifferent.” An institution is “deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.”

### ***Sexual Harassment***

The definition of sexual harassment in the proposed regulations is widely considered to have been narrowed, and encompasses: (1) quid pro quo harassment by an employee of the institution (i.e., conditioning the provision of institutional aid, benefit or service on an individual’s participation in unwelcome sexual conduct); (2) unwelcome conduct on the basis of gender that is “so severe, pervasive, and objectively offensive that it effectively denies an individual equal access” to the institution’s education programs or activities; and (3) sexual assault, as defined in the Clery Act.

### ***Education Program or Activity***

Title IX requires an institution to respond to allegations of conduct that occurs within its educational programs or activities, which the statute defines to include all of the academic, extracurricular, research, or occupational training operations of the institution. The new regulations confirm that an institution’s



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response is not dependent on geographic location and may be triggered by conduct that occurred off-campus.

For example, conduct that occurs in a location over which the institution exercises supervision or oversight may be included (e.g., Greek housing). Similarly, if an institution endorses or sponsors an off-campus event, that may be sufficient to trigger an institutional response to allegations of sexual harassment that occur at the event.

### ***Actual Knowledge***

The proposed regulations would deem an institution to have actual knowledge of alleged misconduct only if the allegations are reported to the institution's Title IX coordinator, or another institution official with the authority to take corrective action (or to a teacher in the elementary and secondary school context with regard to student-on-student harassment). The stated purpose of requiring actual knowledge is to ensure that the institution is on "clear notice" of the conduct it is required to address.

Importantly, the mere ability or obligation to report sexual harassment *does not* qualify an employee, even if that employee is an official, as one who has authority to institute corrective measures on behalf of the institution. In the higher education context, this means that an institution would not have actual knowledge of alleged sexual harassment if a faculty member was told about a sexual assault but did not report it to the Title IX coordinator or other appropriate official.

### ***Deliberate Indifference***

Once the institution has actual knowledge of an allegation of sexual harassment, it would then be required to respond to the allegations in a manner that is not deliberately indifferent. The use of a deliberate indifference standard is a departure from past guidance, which required that an institution's response be reasonable. In the department's view, requiring an institution to engage in a reasonable response inappropriately limited the institution's flexibility in making disciplinary decisions. Under the new proposed regulations, a response would only be deemed deliberately indifferent if it was clearly unreasonable — a standard which is not otherwise defined in the proposed rules.

The department's proposed rules also provide "safe harbors" for institutions, i.e., situations in which it will not deem an institution to have responded with deliberate indifference, as long as the institution follows the procedures outlined in the proposed rules for adjudicating a formal complaint. These safe harbors apply where (1) a formal complaint is filed; or (2) the institution has actual knowledge of reports of sexual harassment by multiple complainants against the same individual and the Title IX coordinator files a formal complaint in response to the reports.

In addition, for institutions of higher education, the institution will not be considered to be deliberately indifferent where there is no formal complaint and the institution offers and implements supportive measures designed to preserve complainant's access to the institution's programs and activities. In these situations, the department will not find an institution's response deliberately indifferent even if the department would have evaluated the evidence differently or reached a different conclusion.

### **Procedural Requirements for Institutional Response**

In general, the proposed grievance procedures attempt to address one of Department of Education Secretary Betsy DeVos' most pronounced criticisms of the Obama era guidance: due process protections

for the respondent.

### ***Notice of Allegations***

Under the proposed rules, respondents are entitled to more detailed notice of the allegations, including details about the alleged incident(s) such as the names of the people involved, the specific policy violation at issue, the conduct that is alleged to have violated the policy, and the date and location of the incident(s). The notice would also be required to inform all parties that they have the ability to request and inspect evidence, and would prohibit limiting the ability of either party to discuss the allegations or to gather their own evidence.

By allowing the parties to discuss the allegations, the department is attempting to resolve prior concerns about chilling free speech. While many institutions already comply with similar notice provisions under current practices or based on state law, the proposed regulations make the detailed notice mandatory and require that it be kept for three years along with the remainder of the investigatory record.

### ***Advisers and Cross-Examination***

Significantly, the institution would also be required to allow both sides to have an adviser present during any hearing or other proceeding, including attorneys. If a party does not have a representative for the hearing, the institution would be required to provide one who is “aligned with that party.” For institutions of higher education, live hearings would be mandatory under the proposed rules, and institutions would be required to permit cross-examination of both parties, including questions about credibility (though questions about a complainant’s past sexual conduct would be subject to similar rape shield-type safeguards that exist under the federal rules of evidence).

The live cross-examination requirement is, by far, one of the most controversial aspects of the proposed regulations from the perspective of survivor advocates; it is also deemed one of the most essential by those who viewed previous practices as violative of respondents’ due process rights. While the regulations envision a live hearing in which the complainant and respondent are not in the same room, live cross-examination introduces an adversarial component to Title IX hearings to which many institutions will need to adapt. Another practical difficulty for institutions is the requirement that the institution provide for an adviser who is “aligned” with the party at the hearing.

### ***Mediation***

The proposed regulations would permit an institution to offer the parties an informal process such as mediation at any time prior to reaching a final determination about responsibility. The proposed mediation option would now apply to sexual harassment allegations without limitation, including allegations of sexual assault that were previously required to be adjudicated under a formal resolution process only.

### ***Written Determination***

Once the institution reaches a decision about responsibility, it would be required to provide the parties with a written determination detailing the specific violation, the procedural steps the institution took to reach its determination, all findings of fact supporting the determination, conclusions reached after applying the institution’s policy to the found facts along with the rationale for those conclusions, and the procedures for appealing the institution’s decision if the institution provides for an appeal.

Again, while many institutions already comply with similar procedures under existing processes, these processes will be required under the proposed regulations if they are enacted as written. Under the proposed regulations, institutions would not be required to offer an appeal — this is in contrast to state laws like New York’s, which require at least one level of appeal of a determination by a panel.

### **Evidentiary Standard**

Surprisingly, the department’s proposed rules provide institutions with a choice between two possible evidentiary standards: the “preponderance of the evidence” standard or the more demanding “clear and convincing evidence” standard. That choice has the potential to create significant confusion and inconsistency.

As a practical matter, institutions who already apply a preponderance of the evidence standard based on previous guidance will find it difficult to move to the higher clear and convincing evidentiary standard. At the same time, some institutions may be constrained in their use of the preponderance of the evidence standard under the proposed regulations if that lower standard does not already apply to other violations that carry the same penalty (e.g., permanent or temporary removal or expulsion).

Under the proposed rules, different institutions within the same state could adopt different evidentiary standards. Additionally, some states have passed their own laws concerning the applicable evidentiary standard, and an almost certain conflict would arise as individual states seek to navigate different standards of proof. California, for example, has a statute that requires use of the preponderance of the evidence standard.

The proposed regulations, however, contemplate that institutions could impose a clear and convincing standard in conflict with state law. Conversely, if institutions imposed the preponderance of the evidence standard across the board in accordance with existing state law, the removal of institutional choice would conflict with the new Title IX regulations. This contradiction requires clarification and the department is specifically seeking further comment from the public on its proposal regarding the applicable evidentiary standards.

### **Conclusion**

The department’s proposed Title IX regulations narrow the circumstances under which institutions would be required to investigate and adjudicate sexual harassment complaints, but also impose stringent procedural requirements and create ambiguity about important issues such as the applicable standard of proof.

Institutions with experience adjudicating Title IX complaints informally or formally are uniquely positioned to comment on the department’s proposals to achieve a workable and fair system for institutions, complainants and respondents alike. Once new regulations take effect, institutions will need to carefully review their existing policies and procedures to ensure compliance with both the federal regulations and state law.

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