

# Overview of Title IX Regulations

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# Agenda

- Expectations for today
  - High-level overview
  - Focused discussion on critical issues
- How we got here - laws, regulations, and case law
- The implementation period
- Key changes to the regulations
- What does this mean for student conduct work?
- State-level considerations
- Next steps from ASCA
- Questions and answers
- Resources & references

# How did we get here?

- 2011 DCL
- 2014 Q&A
- 2017 DCL
- November 2018 – NPRM
- May 6, 2020 – Draft Regulations Released
- May 19, 2020 – Published in Federal Register

Governing Documents

Statutes

Regulations

Guidance

# Effective Date

- Regulation is effective August 14, 2020
- What could change that?
  - Litigation
    - ACLU (joined by others) filed suit on May 14th
    - More likely to follow
  - Congress
    - 30 days to act (from published rule)
- What about the 2020 election?

# Before we dive in...

- Title IX provides the floor for compliance
  - it is not the ceiling.
    - Clarity of language will become even more important
- Focus today is on impact to student conduct practice.
- “We make good policy out of bad law all the time.” - *Laura Bennett, former ASCA President*



# Key Changes - Scope of Title IX

- Definition of program or activity:
  - On Campus
  - Off Campus programs and activities
  - Houses owned or controlled by student organizations recognized by the institution
- No longer includes:
  - Off campus conduct
  - Conduct on private property
  - Settings that are not an educational program or activity
  - Conduct not occurring “against a person in the United States.”
- Institution can still address - just not under Title IX

# Key Changes - Institutional Responsibility to Act

- Institution must act when it has “actual knowledge” of sexual harassment
  - Notice to the Title IX Coordinator
  - Notice to any official “who has the authority to institute corrective measures”
- Employees may still be “mandatory reporters”
  - State law
  - Institutional decision
- K-12 - all employees are mandatory reporters
  - Important if you have a school on your campus
- Institutions “controlled by a religious organization” may seek an exemption from the Assistant Secretary of Education

# Key Changes - Definition of Sexual Harassment

- Conduct on the basis of sex that satisfies one or more of the following:
  - “An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct;” (Quid Pro Quo)
  - “Unwelcome conduct determined by a reasonable person to be so severe, pervasive, **and** objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity;” (Hostile Environment) or
  - Sexual assault, dating violence, domestic violence, or stalking as defined by Clery
- Preemptive Effect
  - In the instance of a conflict between state or local law and Title IX, institutions must still comply with Title IX

# Key Changes - Language

- The Final Rule defines “**respondent**” as an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.
- The Final Rule defines “**formal complaint**” as a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the school investigate the allegation of sexual harassment and states:
  - At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the school with which the formal complaint is filed.
  - The phrase “**document filed by a complainant**” means a document or electronic submission (such as by e-mail or through an online portal provided for this purpose by the school) that contains the complainant’s physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint.
- The Final Rule defines “**supportive measures**” as individualized services reasonably available that are non-punitive, non-disciplinary, and not unreasonably burdensome to the other party while designed to ensure equal educational access, protect safety, or deter sexual harassment.

# Key Changes - Complaint

- Requires a formal complaint, signed by a complainant or the Title IX Coordinator
- Standing to file complaint
  - Complainants must be participating in, or attempting to participate in, education programs or activities *at the time the complaint is made*.
  - Regulations recognize “legal rights of parents or guardians to act on behalf of any individual in the exercise of rights under Title IX, including filing a formal complaint on a complainant’s behalf.”
    - Not entirely clear what that means for higher education
    - “Nothing in the final regulations alters the legal right of parents or guardians to exercise rights on behalf of a party”
      - What rights to parents or guardians have when it comes to competent students over the age of 18?

# Key Changes - Supportive Measures

- Non-disciplinary in nature
  - No disciplinary measures until the investigation and grievance processes are complete
  - Holistic review - measures should be specific to situation
  - “Mutual no-contact restrictions”
  - Must not “unreasonably burden” either party
- Must be offered to both parties
  - “...as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed.”
  - Unclear what trigger there would be to offer supportive measures to a respondent prior to a formal complaint being initiated.

# Key Changes - Emergency Removal

- Interim removal/suspension of a respondent is still an option available in certain circumstances
- “Individualized safety and risk analysis” is required and must determine the following before a removal can be initiated:
  - The respondent poses an “immediate threat” to the health or safety of any student or other individual
  - That threat arises “from the allegations of sexual harassment”
- Respondent must receive notice and have an opportunity to challenge the decision “immediately following the removal.”

# Key Changes - Grievance Process

- Treat complainants and respondents equitably
- Provide remedies to a complainant after a determination of responsibility
- Objectively evaluate all relevant evidence (both inculpatory and exculpatory); appropriately assess credibility of parties
- Requires training on a number of specific areas
- Dismissal of a formal complaint if the definitions of sexual harassment are not met
  - Institutions may respond through other rules/procedures (such as code of conduct)
  - Requires “prompt written notice” of the dismissal along with rationale to both parties
- May include an informal process option
- Includes a presumption of innocence
- Include “reasonably prompt” time frames for resolution

# Key Changes - Grievance Process

- Formal complaints may be consolidated
  - Multiple complainants and/or respondents where the allegations “arise out of the same facts or circumstances.”
- Identification of the standard of evidence to be used in the process
  - May use preponderance or clear & convincing
  - Same standard must be used for students and employees (including faculty)
- Appeals must be offered to both parties
- Create and disseminate an investigative report and provide at least 10 days for both parties to review and respond

# Key Changes - Notice

- Upon receipt of a formal complaint, “the parties who are known” must be provided written notice that includes:
  - Notice of the allegations, including sufficient details known at the time, with sufficient time to prepare a response before any initial interview. “Sufficient details” include:
    - The identities of the parties involved in the incident (if known)
    - The conduct allegedly constituting sexual harassment under Title IX
    - Date and location of the alleged incident, if known
  - A statement that the respondent is presumed not responsible for the alleged conduct and that a determination on responsibility is only made at the conclusion of the process
  - Notice that both parties have a right to an advisor of their choice, who may be, but is not required to be an attorney

# Key Changes - Notice

- Notice that both parties may inspect and review all evidence
- Notice of any provision in the institution's Code of Conduct that prohibits knowingly making false statements or submitting false information
- If at any point in the investigation there is a decision to investigate additional allegations about the complainant or respondent that were not included in the original notice, the institution must provide notice of those allegations and that investigation to the parties

# Key Changes - Investigation

- Burden of proof and the burden of gathering evidence is on the institution
- Investigators may not “access, consider, disclose, or otherwise use” medical or mental health records without the party’s voluntary, written consent to do so.
- All parties have an equal opportunity to present evidence (inculpatory and exculpatory) and witnesses (including experts)
- Institution must “not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence.”
- Provide parties equal opportunities to have others present at any meeting related to the investigation, including an advisor of their choice.
  - Restrictions on advisor’s involvement can be placed, as long as they are in accordance with Title IX (e.g. advisor is allowed to cross examine) and restrictions apply equally to both parties.

# Key Changes - Investigation

- Must “provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate.”
- Provide both parties equal opportunity to inspect and review any evidence obtained as part of the investigation, including evidence the institution does not plan to use in reaching a determination
- Investigators must draft a report and send it to the parties, and their advisor (if any) to review.
  - The report must “fairly summarize relevant evidence”
  - The parties have at least 10 days to submit a response.
  - The investigator will consider the response prior to the completion of the report.

# Key Changes - Live Hearing

- Institutions must provide a “live hearing.”
- Decision maker(s) cannot be the Title IX coordinator or the investigator(s)
- At the request of either party, the institution must “provide for the live hearing to occur with the parties located in separate rooms with technology enabling the parties and the decision makers to simultaneously see and hear the party or witness answering questions.”
  - Institution can choose to use technology for some or all hearings
- During the hearing, each party’s advisor must be permitted to “ask the other party and any witnesses all relevant questions and follow up questions, including those challenging credibility.”
  - If a party does not have an advisor at the hearing, the institution must provide one, specifically for the purposes of conducting cross-examination on behalf of that party

# Key Changes - Live Hearing

- Before any party or witness answers a question, the decision-maker(s) must first determine if the question is relevant
  - If it is determined irrelevant, the decision-maker must explain that decision at that time
- If a party does not “submit to cross-examination” at the hearing, the decision maker must not rely on any previous statement of that individual in reaching a determination regarding responsibility
  - Unclear what “submit” means - refusal to answer all questions? Some?
  - Applies to others testifying to what the individual told them (p. 1172 of the commentary)
  - Applies to records that contain statements by the parties (police report, SANE report)
  - Applies to records that contain statements by both parties when only one has submitted to cross examination (text messages)
  - Does not apply to records that do “not contain a person’s statements” (surveillance video)
- An “audio or audiovisual recording, or transcript” of the hearing must be created and made available to the parties for inspection and review.

# Key Changes - Live Hearing

- Decision maker(s) must issue a written determination of responsibility, to include:
  - Identification of the specific sections of the violated policy/code
  - Description of procedural steps taken from receipt of complaint through determination
  - Findings of fact supporting the determination
  - Conclusions regarding the application of the Code of Conduct to the facts
  - Statement of, and rationale for, the result as to each allegation, including:
    - Determination regarding responsibility
    - Any sanctions imposed on the respondent
    - Remedies provided to the complainant
  - Procedures and “permissible bases” for both parties to appeal
- Written determination must be provided to both parties simultaneously

# Live Hearings

How many people will this process require?

- At least 5 per hearing
  - Title IX Coordinator (at least 1)
    - Oversees process, conducts outreach, and provides supportive measures
    - Can serve in an investigative role
    - Cannot serve in decision maker, advisor, or appellate roles
  - Investigator (at least 1)
  - Advisors (2)
  - Hearing officer/decision maker (at least 1)
  - Appeal officer (at least 1)
- Work to make sure you have an appropriately deep bench to avoid perceived or actual conflicts or bias

# Key Changes - Appeal

- Appeals must be offered to both parties related to determination of responsibility and dismissal of a formal complaint
  - Bases for appeal must include:
    - “Procedural irregularity that affected the outcome of the matter”
    - New evidence “that was not reasonably available at the time” and “that could affect the outcome of the matter
    - Bias or conflict of interest for or against complainants or respondent generally or the individual complainant or respondent, and that bias or conflict affected the outcome
  - May offer other bases for appeal, but must offer them equally to both parties

# Key Changes - Appeal

- Non-appealing party must be notified in writing when appeal is filed
- Both parties must have “reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome.”
- Decision-maker for the appeal needs to be someone other than the investigator(s), hearing officer(s), or the Title IX coordinator.
- Written decision must include the result of the appeal and the rationale for that result.
- Written decision must be provided simultaneously to both parties.

# Key Changes

## Final Decision

- Determination becomes final either upon notice of appeal result to the parties or, if no appeal, “the date on which appeal would no longer be considered timely.”

## Retaliation

- Defines retaliation
- Complaints alleging retaliation may be filed and resolved under Title IX grievance procedures
- Specifies that exercise of rights protected under the First Amendment does not constitute retaliation
- Specifies that charging someone for making a “materially false statement in bad faith” does not constitute retaliation

# Key Changes - Informal Resolution

- May be offered by the institution, except in instances of alleged employee sexual harassment against a student, however, may not be offered until a formal complaint is filed
- Informal resolution process can be entered into at any time prior to a determination regarding responsibility
- All parties must agree to participate in an informal resolution process
- Requires its own notice, including:
  - The allegations
  - The requirements of the informal process
  - Rights of parties to withdraw from the informal process at any time and return to the formal grievance process
  - Any consequences of participation in informal process, including records that may be maintained or could be shared

# Key Changes - Training

- Title IX coordinators, investigators, decision-makers, and “any person who facilitates an informal process” must receive training on:
  - The definition of sexual harassment in the regulations
  - The scope of the institution’s education program or activity
  - How to conduct an investigation and grievance process
  - How to serve impartially
  - Any technology to be used at a live hearing
  - “Issues of relevance” of questions, evidence, and creating an investigative report
- All training materials for coordinators, investigators, and decision makers “must not rely on sex stereotypes” and must be maintained for a period of seven (7) years.
- All materials must be made publicly available on its website, or, if no website, they must be made available upon request for review and inspection by the public.

# Key Changes - Record Keeping

- Institution must maintain for seven (7) years records of:
  - “Any action taken in response to a formal complaint of harassment”, including:
    - Records of any action taken, including supportive measures or reasons why supportive measures were not supplied
    - The basis for the institution’s “conclusion that its response was not deliberately indifferent”
  - Each sexual harassment investigation, including:
    - Determination of responsibility
    - Audio or audiovisual recording or transcript of any hearing
    - Any disciplinary sanctions imposed on the respondent
    - Any remedies provided to the complainant
  - Any appeal and results of the appeal
  - Any informal resolution and result of the informal resolution

# Key Changes - Administrative Oversight

- Department of Education Oversight
  - Assistant Secretary shall not consider the finding by the institution to be deliberate indifference if the Assistant Secretary would have come to a different decision based on the evidence
- Remedial action deemed necessary by the Assistant Secretary shall not include assessment of damages
- Obligations under these regulations are not obviated or alleviated by the requirements of FERPA
- Title IX does not apply to institutions controlled by a religious organization if the application of the items in this subsection would not be in line with the tenets of the religious organization

# Institutional Questions

- How will your policies be structured? Umbrella? Individual?
- Will you continue to address off-campus sexual misconduct? If so, what process will you use?
- Will you keep your existing reporting requirements for faculty & staff?
- How will you respond to allegations made by a complainant no longer affiliated with the institution?
- Do you need to adjust standards of proof to be consistent for students and employees?
- Do you need to recruit more folks to fulfill roles in your process? Where will you find them? Will you outsource?
- Do you have the physical space required to do an in-person hearing? Will you do all hearings facilitated by technology? Are there privacy concerns (roommates, family members, etc.)
- Do you have the technological resources necessary to meet these requirements?
- What provisions need to be made to make the process, but particularly hearings, accessible?

# State-level Considerations

## “Active Attorney” States

- Arkansas
- North Carolina
- North Dakota
- Tennessee
- Individual Systems or Institutions

## States Adopting Own Standards

- California
- Connecticut
- Illinois
- Massachusetts
- New York
- Texas

# What's next from ASCA?

- Comprehensive document regarding the new regulations is forthcoming.
- Series of webinars and trainings on specific pieces of the regulations are being developed and will roll out through the summer.
- Have specific topics you'd like us to get more in depth about or maybe some expertise you wish to share with your colleagues? Let us know!
  - E-mail Christine Simone - [christine@theasca.org](mailto:christine@theasca.org)

Questions?

# Helpful Resources that Already Exist

- 2018 ASCA webinar
  - Available online at the ASCA website: Resources; Best Practices
- 2014 ASCA “Gold Standard” Paper
  - Available online at the ASCA website: Publications
- Department of Education Initial Press Release
  - <https://www.ed.gov/news/press-releases/secretary-devos-proposed-title-ix-rule-provides-clarity-schools-support-survivors-and-due-process-rights-all>
- Proposed Regulations (Federal Register)
  - <https://www.regulations.gov/document?D=ED-2018-0004>

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