

## The Department of Education Releases Significant Revisions to Title IX Regulations

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On April 19, 2024, the Department of Education released final Title IX regulations. The significant revisions expand the definition of sexual harassment, attempt to remove barriers to reporting sexual harassment and extend protections based on sexual orientation and gender identity. They also provide postsecondary schools the ability to revert to a single investigator model, choose whether to conduct live hearings and alter schools' responsibilities in responding to allegations of sexual misconduct. Here are five highlights from the final regulations:

First, the final regulations expand the scope of sex-based discrimination and harassment:

- Sex-based discrimination now includes discrimination based on sex stereotypes, sex characteristics, sexual orientation, gender identity, and parental and pregnancy status.
- Sex-based harassment covers all forms of sex-based conduct. Whereas prior regulations required conduct to be severe and pervasive, the conduct must now be "severe or pervasive."
- The regulations now require schools to confront off-campus behavior that "creates or contributes to a hostile environment," including behavior that occurs in study abroad programs.
- Schools must not separate or treat any person differently based on sex in a manner that subjects them to more than de minimis harm, such as preventing a person to participate in a program or activity based on their gender identity except in limited circumstances outlined in the statute.

Second, the final regulations address and clarify schools' administrative requirements, such as:

- The designation and responsibilities of a Title IX coordinator;
- The adoption and publication of nondiscrimination policies and grievance procedures,

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including a prohibition on peer retaliation for reporting a Title IX complaint or participating in the Title IX process; and

- The implementation of specific employee training, including when an employee must report conduct that constitutes sex discrimination and honor complainant's confidentiality and autonomy.

Third, the final regulations address the two types of grievance procedures for postsecondary institutions, one informal and the other formal, applicable to complaints of sex-based harassment or discrimination. Under both provisions:

- Postsecondary institutions now have more flexibility with respect to grievance procedures, including whether to use a single investigator model or live hearings. The regulations do not require a one-size-fits-all approach.
- If a school articulates consistent principles in writing for which procedure applies and what factors are considered in making such a determination, it has the discretion to choose between different procedures on a case-by-case basis.

Fourth, the final regulations set forth several requirements that institutions must adopt in writing if they elect to offer an informal resolution process, including that:

- Complainants and respondents be treated equitably, that the burden is on the institution to collect relevant evidence, and that all impermissible evidence and questions seeking such evidence be excluded;
- Title IX Coordinators, investigators, and decisionmakers must be conflict of interest and bias free to serve as the decisionmaker;
- Institutions use the preponderance of the evidence standard of proof, unless the institution uses the clear and convincing evidence standard in all other comparable proceedings, and there should be a presumption that the respondent is not responsible for the conduct until there is a determination of sex discrimination; and
- Schools provide an appeal process that is at least the same as the process offered in comparable proceedings.

Fifth, regarding the more stringent, formal grievance procedure for postsecondary schools, the final regulations no longer require live hearings but impose several requirements including:

- That there be an equal opportunity for each party to have the advisor of their choice;
- Equal opportunity to access and respond to relevant evidence;
- The institution take reasonable steps to prevent unauthorized disclosures; and
- Written determinations be simultaneously provided to all parties with the opportunity to appeal.

Overall, there are several significant changes to the Title IX regulations and while the above provides an overview of some key provisions, institutions must ensure that their procedures are compliant with the new regulations by August 1, 2024.

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