

The Education Department Tests its Schools: New Title IX Rule May Force Schools to Revamp How They Investigate and Resolve Sexual-Harassment Complaints

by Alex Hontos, John Marti, and Jillian Kornblatt

While COVID-19 has forced the closure of schools across the country, the United States Department of Education (“ED”) has issued much-anticipated rule that will impose significant new obligations for schools—in particular, colleges and universities. The ED’s May 6 final rule fundamentally alters the obligations under Title IX for recipients of federal financial assistance covered by Title IX (including elementary schools, secondary schools, and postsecondary schools) that receive complaints of sexual harassment. 34 C.F.R. 106 (not yet published).

Generally, the ED’s rule provides more due process to individuals accused of sexual harassment, including by (1) limiting the circumstances in which a school must take action; (2) requiring procedural safeguards to allow the accused to defend himself or herself; and (3) mandating that schools trifurcate the receipt, investigation, and adjudication of sexual-harassment complaints. Unlike Title IX “Dear Colleague” letters issued in recent years, this formal rule carries the force of law and will be interpreted and enforced by courts nationwide.

The ED’s rule may require schools to change their Title IX policies, processes, and personnel, even as many schools remain closed or in remote-learning status. Schools will have just over three months to comply before the August 14, 2020 effective date. Because COVID-19 will complicate schools’ ability to make significant policy, process, and personnel changes, schools will quickly need to begin analysis of changes necessary to comply. If a school fails to comply and violates Title IX, penalties can be severe, including regulatory actions and/or private litigation, monetary and injunctive relief, punitive damages, interest, and attorneys’ fees. The ultimate penalty for violation of Title IX is loss of federal funding.

What Does the Rule Require?

The May 6 Rule is 2,033 pages and contains a wide variety of changes to schools’ Title IX obligations. The changes generally fall into two categories: (1) when does a school

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have responsibility to take action when a report of sexual harassment is made; and (2) when a school takes action, what must it do?

1. When Does a School Have Responsibility to Take Action?

The May 6 Rule limits the definition of “sexual harassment” and the instances when a school must take action in response to a sexual-harassment complaint.

“Sexual harassment” is now defined as “any unwelcome conduct that a reasonable person would find so severe, pervasive and objectively offensive that it denies a person equal educational access.” This new definition parallels the United States Supreme Court’s decision in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), and narrows the conduct that would qualify as “sexual harassment” from the previous definition, which applied to “any unwelcome conduct of a sexual nature,” by both limiting the scope of covered conduct and requiring that the conduct have the effect of denying educational access. Stalking, domestic violence, and dating violence, however, are explicitly included as types of sexual harassment under Title IX and are exempted from the “severe, pervasive and objectively offensive” requirement applied to other conduct.

In general, a school must respond only to allegations of sexual harassment taking place in its “education program or activity,” which is defined to include locations, events, or circumstances over which the school exercised “substantial control” over *both* the accused party and the context in which the harassment occurred. If an alleged act of sexual harassment occurred off campus, a school need respond only if the location is in use by a school-sanctioned student or institution organization (for example, athletic facilities or Greek housing). As a practical consequence, although the effect will vary depending on schools’ individual circumstances, because COVID-19 will likely cause many campuses to fully or partially close during the 2020-2021 academic year, the volume of covered sexual harassment claims will likely decrease until campuses re-open. However, even schools that are fully or partially closed may still receive complaints related to any students still using school-sanctioned housing (e.g., dorms, college-sponsored apartments, or housing for international or exchange students already on campus), and related to conduct in public areas of campus (e.g., quads, commons, non-secured athletic facilities, and other gathering places) or private areas of campus that are fully or partially re-opened (e.g., libraries, academic buildings, and athletic facilities). Schools also need not handle complaints of sexual harassment outside the United States, even if the alleged conduct occurs as part of a study abroad program (though schools may apply misconduct policies if they choose).

2. When a School Takes Action, What Must it Do?

One of the most fundamental changes in the new rule is that schools themselves will now be required to choose whether a “preponderance of the evidence” standard will apply to the burden of proof for a Title IX complaint, or whether a higher “clear and convincing” standard will be applied. Whatever standard is selected must apply both to complaints against students and to complaints against faculty. 34 C.F.R. § 106.45(b)(1) (vii).

Another fundamental change, which will likely require personnel and process changes for many schools, is that schools may no longer utilize a “single investigator” model in which one official investigates, adjudicates, and issues disciplinary sanctions against students or faculty. Instead, the new regulations require three *separate* officials to work in coordination: (1) a Title IX coordinator will receive reports of sexual misconduct; (2) an investigator will gather facts and interview parties and witnesses; and (3) a decision-maker will determine sanctions and remedies. *Id.* § 106.45(b)(7)(i).

Prior to any formal interview related to a sexual-harassment complaint, schools must send the parties written notice of allegations including “the identities of the parties involved in the incident, if known, the conduct allegedly constituting sexual harassment..., and the date and location of the alleged incident, if known,” and a statement that the accused is presumed not responsible and notice that the parties may have an advisor of their choice (who may be an attorney) to inspect and review this evidence. *Id.* § 106.45(b)(2)(i)(B).

Schools will also now be required to conduct a live hearing led by institution officials with cross-examination of the complaining and responding parties, and any witnesses. The parties’ counsel or advisers will conduct the questioning, not the parties themselves. *Id.* § 106.45(b)(6)(i). If a party or witness refuses to submit to cross-examination at the live hearing, the decision-maker(s) cannot rely on *any* statement of that party or witness in reaching a determination regarding responsibility. *Id.*

3. Other Miscellaneous Changes.

Other key changes required by the ED’s rule include:

- Most schools do not have to follow any specific time frame for responding to reports of sexual misconduct. They need only have “reasonably prompt” periods for carrying out each step in the Title IX complaint process.
 - Elementary and secondary schools, however, must respond “promptly” when *any* school employee receives notice of sexual harassment.
- Schools must provide evidence related to allegations to the accused individual at least ten days before any required response.
- The ED has eliminated “gag orders” in which parties are prohibited from talking about the allegations.
- If a party does not have an advisor present at the live hearing, the school must provide an advisor (who may be, but is not required to be, an attorney) to conduct cross-examination on behalf of that party, free of cost or charge. Parties are not permitted to conduct cross-examination themselves.
- Both parties must have an equal right of appeal following a Title IX proceeding, including because procedural deficiencies, newly discovered evidence, or bias or conflict of interest affected the outcome.
- The ED is imposing new training requirements, including on the new definition of “sexual harassment,” and training on conducting a Title IX process without prejudice or bias.
- Title IX processes may be conducted virtually (if staff are properly trained), and live hearings must be recorded by transcript or audiovisual means, and records must be

maintained for at least seven years.

Practical Advice For Schools

First, schools must choose what burden of proof will apply to sexual-harassment proceedings. This decision carries potential legal consequences, including opening the door to legal challenges based on the school's choice, so it is advised to make this decision with the assistance of counsel. A school should also be mindful of how this choice will affect existing contracts with faculty, including tenure-track faculty or employees working under a collective-bargaining agreement that contains provisions related to discipline.

Second, Title IX hearings will resemble mini-trials with pre-hearing notice requirements, right to counsel, and live hearings. Schools must plan for more complex hearings, including establishing procedures for how hearings will be conducted. Additionally, schools must prepare to conduct training for all employees and persons with Title IX responsibilities, as hearings must be free of bias and conflicts of interest.

Third, schools will also likely see an uptick in challenges to their established Title IX processes by accused students and staff, and appeals to sexual-harassment determinations will increase in frequency and complexity. Schools should generally prepare for an increase in litigation costs in 2020-2021 and beyond.

Finally, with many schools closed and in remote status due to COVID-19, the best thing schools can do is to think today about how they will comply with these new requirements, both on-campus and in a remote environment. Developing these processes will take time and is likely to involve institution-specific considerations.

Dorsey's higher education and Title IX attorneys are available to help review and revise your Title IX processes, conduct or participate in Title IX hearings, and handle any disputes that may arise over this new rule.