



SUMMARY OF FINAL TITLE IX REGULATION

This summary is based on the Department of Education's ("ED") Final Rule dated May 6, 2020, and is specifically targeted at those aspects of the regulation applicable to colleges and universities (often referred to in the regulation as "recipients").

The final regulation and attendant commentary exceeds 2,000 pages. This document may be revised or supplemented as time permits deeper analysis.

Key Conceptual Elements

- x The final regulation is largely consistent with the proposed regulation published in 2018. Core provisions such as the requirement for live hearings and cross-examination remain. The final regulation is heavily focused on elements of due process, including notice of allegations, access to evidence, the right to confront witnesses and accusers, and the right to appeal. It mandates that formal complaints of sexual harassment be resolved pursuant to elaborate processes that will necessitate greater expertise, training, documentation and investments by institutions of higher education. Note: As used throughout this summary, and consistent with the final regulation itself, the term "sexual harassment" includes quid pro quo harassment, hostile environment harassment, sexual assault, domestic violence, dating violence and stalking.
- x The starting point for the final regulation is the Supreme Court's "deliberate indifference" framework for Title IX civil liability as explained in the Gebser and Davis cases. Under the Gebser/Davis standard, an institution is liable in a civil suit under Title IX only if: (1) it has actual knowledge of sexual harassment occurring in a setting where the institution exercises substantial control over the alleged harasser and the context in which the alleged harassment occurs; (2) the institution's response is deliberately indifferent (i.e., clearly unreasonable); and (3) as a result of the institution's deliberate indifference, it subjects its students to sex discrimination in its education programs and activities. The standards in the regulation for triggering institutional response, assessing the adequacy of an institution's response, the programmatic reach of Title IX and the definition of sexual harassment are all derived from the civil liability standards articulated in Gebser/Davis.
- x The final regulation contains numerous provisions designed to incorporate constitutional protections into the Title IX framework, including constitutional protections for Free Speech, Due Process and Religious Liberty, all of which are specifically addressed in the final regulation.
- x The regulation permits formal complaints that initiate the grievance process to be filed only by an alleged victim or the Title IX Coordinator. However, it also

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preempted by the Title IX regulation.

- x The regulation makes clear that discriminatory treatment of a complainant or respondent as part of a grievance process may itself be a prohibited form of sex discrimination under Title IX.

Programmatic Application

- x The regulation clarifies that Title IX applies to an institution's "education program or activity," which includes physical locations and events over which the institution exercises "substantial control over both the respondent and the context



- x In defining hostile environment harassment, the regulation adopts the following definition: “conduct on the basis of sex” that is “unw



- x Upon receiving actual knowledge of sexual harassment, the Title IX Coordinator must promptly contact the alleged victim (defined as a “complainant”) to discuss the availability of supportive measures, consider the alleged victim’s wishes with respect to supportive measures, inform the alleged victim that supportive measures are available irrespective of whether the alleged victim files a formal complaint, and explain the process for filing a formal complaint.

Supportive Measures

- x The regulation explains that, upon receiving actual knowledge of sexual harassment, an institution must promptly contact the alleged victim and offer “supportive measures.” In the event a formal complaint is filed and an investigation is commenced, the supportive measures must also be offered to the respondent. The regulation is ambiguous as to whether an institution must offer and provide supportive measures to a respondent before a formal complaint is filed.
- x Supportive measures are “non-disciplinary” in nature, as are those that are “reasonably available” “without fee or charge” and are “designed to restore or preserve equal access” to the institution’s education programs and activities “without unreasonably burdening the other party.”

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- x Effectively, this sets a high bar for interim suspensions and precludes them as routine matters of course. The reference to “physical health or safety” also implies that interim removal may not be appropriate in cases involving non-physical misconduct, such as verbal harassment, and will instead be reserved for more serious cases involving actual or threatened physical contact (i.e., sexual assault, dating violence or domestic violence) or post-report threats or acts of physical violence.
- x The regulation clarifies that, in the case of a non-student employee respondent, an institution retains broad discretion to place the respondent on administrative leave pending the outcome of the grievance process.

Grievance Process (generally)

- x Whereas the proposed regulation created a “safe harbor” grievance process, compliance with which would have ensured an institution that it would not be deemed deliberately indifferent by ED, the final regulation does not include a safe harbor. Instead, it contains mandatory elements to a grievance process that each institution must follow. These elements are conceptualized in three phases: investigation, hearing and appeal.
- x All three phases of the grievance process must meet certain qualitative elements, including:
 - o Complainants (i.e., alleged victims) and respondents (i.e., alleged perpetrators) must be treated equitably.
 - o There must be an objective evaluation of all relevant evidence, including both inculpatory and exculpatory evidence.
 - o There can be no presumptions of credibility based on a party’s status as complainant, respondent or witness.
 - o All institutional participants (e.g., Title IX Coordinator, investigator(s) and decision-maker(s)) in the process must



alleged victim did not wish to do so, the new regulation provides no guidance other than requiring that the Title IX Coordinator's decision must not be "clearly unreasonable." Presumably, Title IX Coordinators will continue to rely on factors articulated in prior guidance and caselaw, such as the severity of the conduct at issue, the risk the conduct may be repeated, the availability of evidence, etc. For example, where a Title IX Coordinator has received multiple reports of serious misconduct against the same respondent, it is likely not clearly unreasonable for the Title IX Coordinator to sign a formal complaint even though no particular alleged victim wishes to do so.

- x Once a formal complaint is made, the institution must provide written notice to the parties of the investigation, describe the process to be utilized and disclose "sufficient details" regarding the complaint, including, if known, the identities of the parties, the conduct at issue and the date and location of the alleged incident. This written notice must include a statement that the respondent is presumed not responsible and that a determination will not be made until the conclusion of the grievance process. The notice must also advise the parties of their right to an advisor of their choice, who may be an attorney. The institution must also apprise them of any prohibitions on making false statements.
- x If the scope of the investigation expands, the institution must issue a supplemental written notice providing additional details that also meet this standard.
- x At any point in the investigation, if the institution determines that the conduct alleged in the formal complaint, if assumed true:
 - o Does not constitute sexual harassment;
 - o Did not occur in the institution's education program or activity; or
 - o Did not occur against a person in the United States

then the institution must dismiss the complaint for purposes of its Title IX grievance procedure. The institution has discretion to address such conduct under another policy, such as a student code of conduct, if it wishes to.

- x Apart from these mandatory dismissal provisions, the regulation states that an institution may dismiss a formal complaint at any time if:
 - o The complainant would like to withdraw the complaint;
 - o The respondent is no longer enrolled or employed by the institution; or
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- x The institution must give the parties equal opportunity to inspect and review any evidence gathered during the investigation directly related to the allegations raised in the formal complaint, including inculpatory and exculpatory evidence and evidence the institution does not intend to rely upon in the hearing. Access must be given so that each party “can meaningfully respond to the evidence prior to the conclusion of the investigation.” At a minimum, the institution must send the evidence to the party and the party’s advisor in electronic form and give them at least 10 days to submit a written response, which the investigator must consider before finalizing the investigation. The institution must make the evidence available again at any hearing, including for use in cross-examination.
- x The investigation must result in an investigation report that “fairly summarizes” the investigation that must be completed at least 10 days prior to the hearing and sent to each party and their advisor.

Hearing

- x For all colleges and universities, the investigation must be followed by a live hearing during which a “decision-maker” must permit each party’s advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those bearing on credibility.
- x Cross-examination must be conducted “directly, orally and in real time” by the party’s advisor of choice and “never by a party personally.” This precludes institutions from requiring that cross-examination be conducted by pre-submitted written questions or that questions be posed by a hearing panel chair.
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allowed to appeal the determination, or any dismissal of the complaint, on the following grounds:

- o Procedural irregularity that affected the outcome (this effectively incorporates the concept of “prejudicial error” versus “harmless error”);
- o New evidence not reasonably available “that could affect the outcome”; and
- o Conflict of interest or bias by the institutional participants that affected the outcome.

Although the regulation does not specify that an appeal may be based on a challenge to the weight of the evidence, the regulation does not foreclose other permitted grounds for appeal as long as they are equally available to both parties. So, presumably, an institution could choose to add this or other grounds in addition to the three mandatory grounds for appeal.

- x The non-appealing party must be notified of the appeal and allowed to submit a written statement in response.
- x The appeal decision-maker(s) cannot be the same as the hearing decision-maker(s). Nor can the appeal decision-maker(s) be the Title IX Coordinator or the investigator who worked on the case.
- x The appeal must conclude with a written decision describing the appeal and the rationale for the result that is provided to the parties simultaneously.

Informal Resolution

- x Only after a formal complaint is filed, the regulation permits the voluntary use of an informal resolution process at any time prior to a final determination. The parties must provide their voluntary consent in writing to participate in such a process.
- x Prior to commencing an informal resolution process, the institution must have provided the parties with the required written notice of the allegations and also describing the parameters of the informal resolution process. The notice must include a statement that a party is permitted to withdraw from the informal resolution process and resume the formal process at any time prior to a resolution being reached. This implies that the institution may explicitly foreclose a party’s ability to re-initiate the formal process after he or she has agreed to an informal resolution of the formal complaint.

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Title IX Coordinator

- x The person designated by an institution to serve as Title IX Coordinator must carry the actual title “Title IX Coordinator.”
- x The regulation expands an institution’s notification obligations, such that the institution must notify applicants for admission and employment, students, parents, legal guardians, employees and unions of the Title IX Coordinator’s name and contact information.
- x Any person may make a report to the Title IX Coordinator by person, by mail, by telephone, by email or by other specified means. A complaint “may be made at any time” by email or telephone. To comply with this requirement, Title IX Coordinators will need to either carry cell phones or ensure their phone systems have voicemail capability to capture reports made after hours.

Training

- x The regulation requires that all Title IX Coordinators, investigators, decision-makers and informal resolution facilitators receive training on various relevant aspects of the institution’s Title IX policy and grievance process, including definitions of sexual harassment; the scope of the institution’s education programs and activities; how to conduct investigations, hearings, appeals and informal resolutions (as applicable); and how to serve “impartially, including by avoiding prejudice of the facts at issue, conflicts of interest and bias.”
- x The training for decision-makers must include training on relevant technology to be used at any live hearing, relevance and the permissible use of sexual history.
- x The training provided to various institutional actors must be free of “sex stereotypes” and must promote “impartial investigations.”

FERPA

- x The regulation clarifies that an institution’s obligations under FERPA do not “obviate[]” or “alleviate[]” any of the obligations in the Title IX regulation.
- x Effectively, this means that to the extent there is a conflict between FERPA and the Title IX regulation, an institution must comply with the Title IX regulation.



Religious Exemption

- x The new regulation makes clear that the statutory exemption for religious institutions contained in 20 U.S.C. § 1681(a)(3) is self-executing and a school need not notify OCR in advance of its claimed exemption, although it may do so in order to seek assurance of its exemption. The proposed regulation would permit an institution to assert a religious objection during the pendency of an OCR investigation.
- x The existing Title IX regulation contained at 34 C.F.R. § 106.12(a) states that “this part does not apply to an educational institution which is controlled by a religious organization to the extent application of this part would not be consistent with the religious tenets of such organization.” This religious exemption’s reference to “this part” refers to the entirety of 34 C.F.R. § 106, which includes all the directives and mandates issued by ED in the new final regulation.

Constitutional Protections

- x The regulation explicitly states that nothing in the regulation requires a private or public college to restrict any rights that would be protect



misconduct. It is not immediately clear how this regulation will impact an institution's ability to immediately terminate an at-will employee.

- x While the regulation purports to prohibit an institution from conditioning employment on a waiver by an employee of their rights under the regulation, it is unclear whether the regulation would prohibit an institution from requiring employees to arbitrate their claims pursuant to the Federal Arbitration Act. Litigation on this point seems likely.

Recordkeeping

- x The regulation requires an institution to maintain the complete records of each phase relating to the resolution of a formal complaint for a period of seven years, including any records of informal resolution.
- x The institution must also retain "all" materials used to train institutional participants in the various phases of the resolution process, including the Title IX Coordinator, investigators and decision-makers.
- x Institutions must make all such training materials available on their website or, if they do not maintain a website, must make them available subject to inspection. It is not clear whether this requirement applies to training that occurs after the effective date of the regulation (August 14, 2020), or whether it encompasses prior trainings.
- x For each instance where an institution receives a report of sexual harassment but where a formal complaint is not filed, the institution must maintain, for a period of seven years, a record of all actions taken, including all supportive measures provided.
- x For each such case, the institution must include documentation of its rationale for why the actions it took were not deliberately indifferent. This means that, if an alleged victim decides not to file a formal complaint, and the Title IX Coordinator decides not to file a formal complaint, the documentation must explain why the Title IX Coordinator's decision was not clearly unreasonable.

Preemption of State Law

- x The regulation specifies that to the extent of a conflict between state or local law and Title IX, "the obligation to comply with §§ 106.30, 106.44, and 106.45 is not obviated or alleviated by state or local law."

