

What Steps Do Schools Need to Take by August 14, 2020?

Steps to take by August 14, 2020

Assemble a cross-campus team of stakeholders to:

1. Revise your **Policies and Procedures** to comply with the new regulations
2. Have the Right **Organizational Structure** in Place
3. Address your **Campus Climate** through Training and Clear Communications

Requirements for Title IX Sexual Harassment Policies and Procedures

1. Apply Title IX policies to students and employees

- Umbrella or separate policies and procedures?
- State law requirements relating to standard of evidence
- CBA requirements relating to faculty or staff disciplinary action

Requirements for Title IX Sexual Harassment -- Policies and Procedures

2. Define what sexual misconduct is within the scope of Title IX

- 1. Actual notice**
- 2. Sexual harassment**
- 3. In an educational program or activity**
- 4. Against a person in the United States**

“Sexual harassment” as defined in the Final Title IX regulations

1. Quid Pro Quo -- An employee of the school conditioning the provision of an aid, benefit, or service of the school on an individual's participation in unwelcome sexual conduct;
2. Violence Against Women (VAWA) categories --
 - Sexual assault
 - Domestic violence
 - Dating violence
 - Stalking
3. Hostile Environment -- 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 school's education program or activity



Sexual Assault 34 C.F.R. § 106.30(a)	“Sexual assault”, as defined in the Clery Act at 20 U.S.C. 1092(f)(6)(A)(v), means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation (FBI). The FBI uniform crime reporting system defines “forcible rape” as “the penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.” The FBI uniform crime reporting system defines “forcible fondling” as “the touching of the private body parts of another person for the purpose of sexual gratification, forcibly and/or against that person’s will or not forcibly or against the person’s will in instances where the victim is incapable of giving consent because of his/her youth or because of his/her temporary or permanent mental or physical incapacity.”
Domestic Violence 34 C.F.R. § 106.30(a)	“Domestic violence,” as defined by VAWA at 34 U.S.C. §12291(a)(8), includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person’s acts under the domestic or family violence laws of the jurisdiction.
Dating Violence 34 C.F.R. § 106.30(a)	<p>“Dating violence,” as defined as defined by VAWA at 34 U.S.C. 12291(a)(10) , means violence committed by a person—</p> <p>(A)who is or has been in a social relationship of a romantic or intimate nature with the victim; and</p> <p>(B)where the existence of such a relationship shall be determined based on a consideration of the following factors:(i)the length of the relationship; (ii)the type of relationship; and (iii) the frequency of interaction between the persons involved in the relationship.</p>
Stalking 34 C.F.R. § 106.30(a)	<p>“Stalking,” as defined by VAWA at 34 U.S.C. §12291(a)(30), means engaging in a course of conduct directed at a specific person that would cause a reasonable person to—</p> <p>A. fear for his or her safety or the safety of others; or</p> <p>B. suffer substantial emotional distress.</p>

NEW TITLE IX REGULATIONS – DEFINITION OF SEXUAL HARASSMENT AND VAWA CATEGORIES



HOGAN MARREN
BABBO & ROSE, LTD

Requirements for Title IX Sexual Harassment -- Policies and Procedures

3. Provide supportive measures – without or without a formal complaint of sexual harassment

- Required when the sexual harassment is within the scope of Title IX
- Non-disciplinary, non-punitive individualized services
- Designed to restore or preserve equal access without unreasonably burdening the other party
- To be provided to both parties
- Use interactive process to determine supportive measures – consider “wishes” of the complainant
- Document decisions relating to supportive measures
- Offer internal grievance process for challenging adequacy or burden of supportive measures

Requirements for Title IX Sexual Harassment -- Policies and Procedures

4. Make clear what is considered a formal complaint of sexual harassment

- Formal complaints must be signed and filed by a complainant who is participating (or attempting to participate) in the educational or employment program or activity
- May also be filed by Title IX Coordinator
- Recipient may dismiss complaint against a respondent who is no enrolled or employed
- Make clear if and how sexual misconduct that occurs outside the scope of Title IX will be addressed (e.g., codes of conduct)

Requirements for Title IX Sexual Harassment

-- Policies and Procedures

5. Include "basic requirements" in grievance process

- Treat complainants and respondents equitably
- Objective evaluation of all relevant evidence
- No bias or conflict of interest
- Training for Title IX Coordinator(s), investigator(s), and decision-maker(s), and informal resolution facilitator(s)
- Presumption that the respondent is not responsible
- Reasonably prompt timeframes, extensions for good cause
- Standard of evidence: *Preponderance* (more likely than not) or *Clear and Convincing* (highly probable)
- Possible disciplinary sanctions and remedies
- Appeal procedures (newly mandatory)
- Supportive measures available to both parties
- Restrictions relating to privilege

Requirements for Title IX Sexual Harassment -- Policies and Procedures

6. Comply with specific requirements relating to investigation and adjudication, including:

- Initial and continuing written notice to parties
- Burdens of proof and of gathering evidence rest on school
- Equal opportunity for parties to present witnesses, including fact and expert witnesses
- No gag orders
- No single-investigator model
- Advisor of choice
- Live hearing and cross-examination
- Decision-maker cannot be the same as the Title IX Coordinator(s) or investigator(s)
- Access to evidence
- Draft investigation report given to the parties for review and response
- Written determination of responsibility regarding responsibility

Requirements for Title IX Sexual Harassment

-- Policies and Procedures

6. Comply with specific requirements relating to investigation and adjudication, including:

Live hearing with opportunity for cross-examination required

- To be conducted by the Decision-maker, who is either the hearing officer or multiple hearing officers (a hearing panel)
- May be held in the same geographic location or virtually
- Location to be determined by recipient
- Technology must allow the parties (and their advisors) to see and hear one another and any witnesses
- Recording or transcript of hearing required

Requirements for Title IX Sexual Harassment -- Policies and Procedures

6. Comply with specific requirements relating to investigation and adjudication, including:

Live hearing with opportunity for cross-examination required

- Advisors must be allowed to cross-examine parties and witnesses
- Must be conducted directly, orally, and in real time
- School must provide free advisor for a party at a hearing if the party does not have an advisor for the hearing – just for cross-examination?
- If a party or witness does not submit to cross examination at the live hearing, the hearing officer or panel must not rely upon any statement in reaching a determination regarding responsibility

Requirements for Title IX Sexual Harassment

-- Policies and Procedures

7. Comply with additional procedural requirements

- Informal resolution opportunities (New: may not be used to resolve allegations that an employee sexually harassed a student)
- Mandatory Training
- Mandatory Appeals
- Recordkeeping (7 years, including posting training materials on website)
- Recommendation: Build in regular review and revision process

Requirements for Title IX Sexual Harassment

-- Organizational Structure

- Lines of authority and responsibility
- Employees - Title IX requirements apply (even to at-will employees)
- Title IX Coordinator
 - Cannot be decision-maker
 - Responsible for coordinating overall Title IX compliance
 - Responsible for implementing "effective" supportive measures
- "Official with authority to take corrective action"
- "Responsible employees"
- Investigator(s)
- Decision-maker(s) - determinations of responsibility; appeals
- Hearing officers or hearing panels - must make determinations of relevancy and keep order over hearing
- Advisors for cross-examination at hearings

Requirements for Title IX Sexual Harassment

-- Campus Culture

- New training for:
 - Students
 - Employees, including “those with authority to take corrective action” and “responsible employees”
 - Mandatory training -- to be posted on website -- for:
 - Title IX Coordinator
 - Investigator(s)
 - Decision-maker(s), including hearing officers or panels
 - Informal Resolution Facilitator(s)
- Community expectations – be clear in communications about continued commitment to prevent and address sexual harassment

Title IX+ Addressing Sexual Misconduct Outside the Scope of Title IX

Final regulations are a floor, not a ceiling

Schools may go *beyond Title IX*

If the alleged conduct in a formal complaint is outside the scope of Title IX (would not constitute sexual harassment or did not occur in an educational program or did not occur against a person in the United States), the school:

Must dismiss the formal Title IX complaint as a Title IX matter

May address the conduct with non-Title IX procedures

How Will the DOE-OCR Handle Title IX Complaints Going Forward?

Next Steps for DOE-OCR

Harassment Cases

No *retroactive enforcement* of final regulations.

- Open Cases
- Resolution Agreements
- New Complaints

Technical Assistance

- New OCR technical assistance office: Outreach, Prevention, Education and Non-discrimination Center
- Videos on Final Title IX regulations, by Secretary Betsy DeVos (link above) and OCR Assistant Secretary Kenneth Marcus (<https://www.youtube.com/watch?v=i-BCnhUsJ4s>)

Questions for Discussion

Follow-up Questions



- o Title IX and Illinois state law (Preventing Sexual Violence in Higher Education Act)
- o Title IX and Title VII
- o Title IX Coordinator same as Investigator or Informal Resolution Facilitator
- o Staffing new roles: hearing officers, advisors, appeal decision makers; informal resolution facilitators
- o Access to evidence
- o Sexual misconduct outside the scope of Title IX
- o Minors on campus

External Services and Resources

SERVICES

- Model sexual harassment policies and procedures
- External Hearing Officer
- Training, including for hearing officers
- External investigations
- Advisors
- Title IX advice & consult
- Compliance audits
- Independent consultants
- Mediators



RESOURCES

- *HMBR Title IX Compliance website:*
<https://www.hmbr.com/news-insight/title-ix-compliance/>
- *HMBR Summary of Final Title IX Regulations*
- *HMBR Desk Top Guide and Glossary on Final Title IX Regulations*
- *HMBR A New Day on Campus for Title IX, Law 360*
- *See also: Joint Guidance on the Title IX Regulations, at*
<https://system.suny.edu/sci/tix2020/>.