

# What Colleges + Universities Should Do to Comply With Title IX Changes

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On May 6, the US Department of Education released its long anticipated, final Title IX regulations on sexual harassment. The new regulations amend the longstanding and limited regulations implementing Title IX of the Education Amendments of 1972 (Title IX) and supplant a series of sub-regulatory guidance published by the Obama administration that ED formally withdrew in 2017. Secretary of Education Betsy DeVos has framed these regulations as recalibrating the scope of Title IX to more closely align with case law and rebalancing the rights of the accused together with continuing to protect complainants.

The final regulations take effect on August 14, 2020, and are extensive and complex, requiring significant restructuring of Title IX-related policies and practices. With currently disrupted operations, implementation within the prescribed timeframe will be challenging for most institutions.

However, as widely anticipated, the new regulations have elicited significant pushback from student and consumer protection groups, including a legal challenge led by the ACLU.

While it is possible that the courts may delay the effective date, schools should consider implementation of changes required by the final regulations as soon as possible.

The following key changes, and the steps necessary to bring an institution into compliance, are described below.

## 1. Update your definition of harassment

The new regulations revise and narrow the definition of sexual harassment covered under Title IX. While “quid pro quo” harassment and sexual assault as defined by the Clery Act and domestic violence, dating violence, and stalking, as defined by the Violence Against Women Act, remain as core bases for action, there is a subtle but important change in harassment arising from “unwelcome conduct.”

Under prior Title IX guidance, harassment was defined as unwelcome conduct that is “severe, persistent, or pervasive” such that it denies a person equal educational access. The new regulation narrows the definition of “harassment” to conduct that is “severe, pervasive and objectively offensive.” In a change from the rule as originally proposed, the final regulations also require that these elements be assessed under an objective “reasonable person” standard. If the alleged harassment is not “severe, pervasive, and objectively offensive,” it does not trigger the institution’s formal Title IX process. However, conduct that does not meet the definition of sexual harassment for Title IX purposes can still be addressed through an institution’s own disciplinary processes.

## 2. Review interim support measures

Schools should review their policies around interim measures and update them as necessary to comply with the new regulations. The regulations require schools to offer supportive measures to the complainant or respondent(s) as appropriate, regardless of whether a complainant files a formal complaint. The requirements are similar to the “interim measures” under previous Title IX guidance, defined as non-punitive measures designed to preserve access to the individual’s education program, protect individual safety and deter sexual harassment, without unreasonably burdening the other party. The final regulations do expand on an institution’s obligations by requiring schools to notify both parties of supportive measures available to them, even if a formal investigation is not initiated.

## 3. Adopt a mandatory grievance (complaint and adjudication) process

ED now will require postsecondary institutions to use the specific grievance process outlined in the new regulations to investigate formal complaints of sexual harassment, as defined in the regulation. If there is no formal complaint, but an official with authority to implement corrective measures has received notice of an incident, the institution, through the

official who is notified of the incident, is still required to respond in a manner that is not “deliberately indifferent,” and provide supportive measures outlined above. However, only a “formal” complaint triggers the Title IX-specific grievance process.

Under the current regulations, institutions have broad discretion to establish a grievance process that it considers best suited to its particular circumstances. The new regulations eliminate this flexibility, instead requiring institutions to investigate and adjudicate formal complaints of sexual harassment using the specific grievance process outlined in the new regulations, including the following key elements:

**Written notices, timeframes and mandatory advisors:** Upon receipt of a formal complaint an institution must promptly send written notice to both the complainant and the respondent(s) of the allegations. New to these regulations, both the complainant and the respondent(s) *must* select an advisor to assist them in the proceeding and the notice must inform both parties of this right; parties are not allowed to represent themselves. Schools must provide the parties, and their advisors, all evidence directly related to the allegations, in electronic format or hard copy, and must also provide at least 10 days for the parties to inspect, review and respond to the evidence. At least 10 days before the hearing, schools must also send the parties, and their advisors, an investigative report that fairly summarizes relevant evidence, in electronic format or hard copy, to which the parties may respond. Schools must give the parties written notice of a dismissal and the reasons for the dismissal.

**Due process:** Schools must provide both the complainant and respondent(s) the same opportunity to present fact and expert witnesses and other supporting and exculpatory evidence. However, the burden of gathering evidence and carrying the burden of proof is solely on the institution. Respondents are presumed not responsible until the school proves otherwise in accordance with one of the below standards.

**Standards of evidence:** Schools must elect to use either a “preponderance of the evidence” standard *or* a “clear and convincing” standard for the investigation and adjudication of formal complaints of sexual harassment. While institutions must still use the same evidentiary standard for all sexual harassment proceedings, whether involving students or employees, ED abandoned its earlier proposal, which would have required schools to use the same evidentiary standard for all disciplinary proceedings, regardless of purpose.

**Live hearings, cross examination, no single investigator:** The new regulations include new provisions that preclude the use of the “single investigator model” (where one individual both investigates the claim and determines fault) and requires that institutions provide both complainants and respondent(s) with access to evidence during the investigation; advisors if a party does not select one; live hearings; and oral cross-examination by the parties’ advisors, although not by the complainant or the respondent(s).

**Appeals:** The new regulations require that the grievance procedures include an appeals process for complainants and respondents to challenge the outcome of a proceeding. The appeal must be decided by an individual not previously involved in the investigation or hearing process. At a minimum, the appeal process must allow challenges on the basis of procedural irregularities, new evidence or conflict of interest or bias on the part of any school official taking part in the grievance proceeding.

#### 4. New training and recordkeeping

Schools should make sure they have processes in place to maintain complete and accurate records relating to the investigation and adjudication of formal complaints of sexual harassment, as well as informal resolutions, and the availability and utilization of supportive measures. Such records must be retained for seven years.

Like prior Title IX guidance, the new regulations mandate that Title IX personnel, including coordinators, investigators and decision-makers (individuals who evaluate claims and assign fault) receive training specific to their role. That should include training on the following:

- The new definition of sexual harassment in the final regulation, and the scope of the school’s education program or activity (e.g., the locations and activities over which the school has exercised substantial control over the respondent and the context in which the sexual harassment occurred)
- Decision-makers and investigators must receive training so that they understand the concept of relevance, the proper conduct of an investigation and the grievance process generally, including hearings, appeals, the drafting factual reports, as well as the conduct of informal resolution processes. Also important to include is training on how to serve impartially, including by avoiding prejudgment of the facts at issue and how to avoid both actual and the appearance of conflicts of interest, and bias

Materials used to train Title IX personnel should either be posted on an institution's website, or made available to the public on request.

## 5. Title IX notices must now include prospective students and employees

Under prior Title IX guidance schools must notify all students and employees of the name or title, office address, e-mail address, and telephone number of the Title IX coordinator. Under the new Title IX regulations, schools now must also inform applicants for admission and employment of the relevant contact information.

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In addition to these important first steps toward compliance with the new Title IX requirements, colleges and universities should start to consider other adjustments to their policies to comply with the new Title IX regulations. This post does not discuss some of the more complex issues such as interaction of the new Title IX regulations with state requirements and employment law, but we plan to address some of those issues in future posts.

[ED's information page](#) features the final regulations, related documents and an informational video explaining the new regulations. Please do not hesitate to reach out to us if we can assist your institution in considering how to comply with these new Title IX requirements.

**Caitlyn Shelby** advises postsecondary institutions, K-12 schools and education companies on matters involving accreditation, state authorization and the provision of online education, and monitors legislative and regulatory developments in these areas.

**Paul Thompson** counsels schools and technology companies that provide services to schools on regulatory challenges in the education sector.

**Nancy Anderson** focuses on regulatory issues affecting higher education institutions, including compliance with federal, state and accrediting agency requirements.

**Naomi Harralson May** works with educational institutions and the companies that support them to develop effective, compliant practices – and then translate them to accreditors, state educational agencies and the US Department of Education.

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