



## E-ALERT

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### ALERT: THE TITLE IX FINAL RULE: EFFECTIVE AUGUST 14, 2020

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This past Spring, the U.S. Department of Education issued the [Final Rule on Title IX](#) of the Education Amendments of 1972 regulations (the “Title IX Final Rule” or “Final Rule”). These are the first comprehensive regulations issued pursuant to Title IX since 1975, and change how educational institutions are required to handle sexual assault and harassment complaints. The deadline for schools to ensure their policies and protocols are compliant with these changes in the law is fast approaching, as the Final Rule takes effect on August 14, 2020. Significantly, the Title IX Final Rule requires colleges to hold live hearings and permits cross-examination when adjudicating sexual misconduct complaints. Other key changes made by the Final Rule are summarized below:

- **Notice to the School, College, or University/Mandatory Reporters.** Postsecondary institutions are required to investigate every formal complaint directed to the Title IX Coordinator or other official with authority to act on the complaint. Previously, all postsecondary institution employees were required to report sexual misconduct to the Title IX Coordinator or an appropriate school official. K-12 institutions must still respond to complaints of sexual misconduct whenever any school employee is notified of sexual misconduct. Accordingly, K-12 schools should impose mandatory reporting requirements on all of their employees, but postsecondary institutions may limit which employees are designated as mandatory reporters.
- **Definition of Sexual Harassment for Title IX Purposes.** Under the Final Rule, sexual harassment is defined as unlawful sex discrimination, and includes any instance of quid pro quo harassment by an employee, any unwanted conduct that a reasonable person believes is so severe, pervasive and objectively offensive as to deny a person equal educational access, any instance of sexual assault (as defined by the Clery Act), dating violence, domestic violence or stalking (as defined in the Violence Against Women Act).
- **Sexual Harassment Occurring in a School’s “Education Program or Activity” and “in the United States.”** The Final Rule applies to persons in the United States with respect to education programs or activities. Institutions must respond when sexual harassment occurs in an education program or activity. The Department of Education will continue to look to the statute’s definitions for the scope of an institution’s program or activity. Education programs or activities include locations, events, or circumstances in which the institution has exercised substantial control. Title IX applies to all on-campus and off-campus activities. An institution may address sexual harassment outside of the statute’s jurisdiction in any manner of its choosing. Complaints made in a study abroad activity or program are now outside the scope of an institution’s Title IX obligations.
- **Accessible Reporting to Title IX Coordinator.** The Final Rule expands institutional obligations to ensure individuals know how to report to the Title IX Coordinator. The designated employee to coordinate efforts for Title IX responsibilities must be referred to as the Title IX Coordinator. All applicants for admission and employment, parents/legal guardians of secondary students, and unions must be notified of the Title IX Coordinator’s contact information. The information must also be displayed on institutional websites. Any individual may report sex discrimination in person, by mail, telephone, email, or any other means in which

the Title IX Coordinator receives the person's verbal or written report. The report can be made at any time.

- **School's Mandatory Response Obligations.** The Final Rule requires all institutions to respond to Title IX harassment promptly in a manner that is not clearly unreasonable in light of the known circumstances. Institutions must offer supportive measures to a complainant and consider a complainant's wishes. Institutions must follow a grievance process that complies with the Final Rule before any disciplinary action is taken against a respondent. The institution should investigate all sexual harassment allegations. If the allegations in a complaint do not meet the definition of sexual harassment stated in the Final Rule or did not occur in an institution's program or activity, the institution must dismiss it for the purposes of Title IX but can still investigate the matter. Institutions must provide written notice and reasons for dismissal.
- **School's Mandatory Response Obligations: Defining "Complainant," "Respondent," "Formal Complaint," and "Supportive Measures."** The Final Rule provides definitions of complainant, respondent, formal complaint, and supportive measures. A complainant is an individual who is alleged to be the victim of conduct that could constitute sexual harassment. Parents and guardians are not complainants but can act on behalf of parties. A respondent is an individual who has been reported to have been the perpetrator of the alleged conduct. A formal complaint is defined as a document filed by complainant or signed by the Title IX Coordinator alleging sexual harassment against the respondent. A complainant must be participating or attempting to participate in an institutional program or activity of the school when the complaint is filed. The complaint may be filed in person, by mail, email, or any additional method designated by the institution. Supportive Measures are defined as individualized services reasonably available that are non-punitive to the other party.
- **Grievance Process, General Requirements.** The grievance process applies to all institutions. Disciplinary sanctions cannot be imposed without following the grievance process stated in the Final Rule. Remedies must be designed to sustain the complainant's equal access to education. Training of personnel must include instruction on the definition of sexual harassment as defined in the Final Rule, on how to conduct an investigation and grievance process, and on how to "serve impartially". The appeal procedures and supportive measures must also be made available to parties.
- **Investigations.** The Final Rule states institutions must investigate allegations in a formal complaint and then send written notice to both parties. The burden of gathering evidence and the burden of proof remains on institutions. Parties must have equal opportunity to present facts, expert witnesses, and other evidence. Institutions must send written notice of interviews, meetings, hearings, and evidence related to the investigation. Complaints can be consolidated if they arise out of the same facts. Institutions cannot use health records unless the school obtains a party's voluntary written consent.
- **Live Hearings & Cross-Examination (for Postsecondary Institutions).** Postsecondary institutions must provide a live hearing where the decision-maker permits each party's advisor to question the other party and any witness. Cross-examination must be conducted directly and orally by a party's advisor, but never by a party personally. If requested, hearings can occur at the same location with all parties, in separate rooms, or virtually.

- **Hearings are Optional, Written Questions Required (for K-12 Schools).** K-12 institutions may provide a grievance process with or without a hearing after the institution has sent an investigative report to both parties and before reaching a formal decision regarding responsibility. The decision-maker must allow each party to submit written questions for any party or witness, provide each party with answers, and ask follow-up questions.
- **Rape Shield Protections for Complainants.** The Final Rule retains rape shield protections for complainants, barring evidence regarding prior sexual history, unless offered to prove someone other than the respondent committed the alleged misconduct or to prove consent.
- **Standard of Evidence and Written Determination.** Institutions are now required to state the standard of evidence used in the grievance process. The Final Rule makes each grievance process uniform by requiring each institution to apply the same standard of evidence to all formal complaints. A written determination by the decision-maker must be issued, which includes findings of facts, conclusions about whether the conduct occurred, the rationale for the conclusions reached on each allegation, any imposed disciplinary sanctions, and whether remedies will be provided to the complainant.
- **Appeals.** Under the Final Rule, institutions must offer both parties an appeal from a formal determination or dismissal of a complaint or allegation. An appeal can be premised on the following bases: new evidence, procedural irregularity, and/or conflict of interest or bias by Title IX personnel.
- **Informal Resolution.** Under the Final Rule, institutions are still allowed to decide whether to offer and facilitate informal resolution options if both parties give voluntary informed written consent. However, schools cannot offer or facilitate an informal resolution process to resolve sexual misconduct allegations between an employee and a student.

**Retaliation.** The Final Rule maintains that retaliation is explicitly prohibited, but now clarifies that the exercise of first amendment rights does not constitute retaliation. If an individual is charged with a code of conduct violation that does not involve sexual harassment but stems from the same circumstances as a report or complaint of sexual harassment, this constitutes retaliation. Institutions must keep the identity of complainants, respondents, and witnesses confidential except as permitted by the Family Educational and Right to Privacy Act (FERPA), required by law, or necessary to carry out a Title IX proceeding.

For more information on this or any related topic, please contact [Katharine Hartman](#) or [Marjorie Obod](#) any member of Dilworth's [Labor & Employment Group](#).