



# Client Alert

## Higher Education Law



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## U.S. Department of Education Issues Proposed Rules on Title IX

On November 16, 2018, the U.S. Department of Education's Office for Civil Rights ("OCR") published proposed rules, which "clarify and modify Title IX regulatory requirements" for colleges and universities that receive federal funding. Among others, the proposed rules address the ways in which institutions address and respond to allegations of sexual harassment (including sexual assault), remedies for violations, and the adoption of grievance procedures.

HRW's Higher Education Team issues this client alert describing the key terms and requirements of the proposed rules.

### Key Terms of OCR's New Proposed Rules on Title IX's Regulation Requirements

**Hearings are Required Across all Institutions... as is Live Cross-Examination by an Advisor.** The most significant change proposed by the new rules is the requirement that all institutions of higher education – public and private – **must provide for a live hearing** when the institution receives a formal complaint of sexual harassment, and **the hearing must provide for cross-examination by a party's advisor.** The proposed rules require as follows:

- At the hearing, the decision-maker must permit each party to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. **Such cross-examination at a hearing must be conducted by the party's advisor of choice**, notwithstanding the discretion of the [institution] ... to otherwise restrict the extent to which advisors may participate in the proceedings.

- **If a party does not have an advisor present at the hearing, the [institution] must provide that party an advisor aligned with that party to conduct cross-examination.**
- All cross-examination must exclude evidence of the complainant's sexual behavior or predisposition, unless such evidence about the complainant's sexual behavior is offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the evidence concerns specific incidents of the complainant's sexual behavior with respect to the respondent and is offered to prove consent.
- **At the request of either party, the [institution] must provide for cross-examination to occur with the parties located in separate rooms with technology enabling the decision-maker and parties to simultaneously see and hear the party answering questions.**
- The decision-maker must explain to the party's advisor asking cross-examination questions any decision to exclude questions as not relevant.
- **If a party or witness does not submit to cross-examination at the hearing, the decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility.**

**When A School Has "Actual Knowledge" of Sexual Harassment, It Must Respond in Way that is Not "Deliberately Indifferent."** Schools must respond to sexual harassment against a person *in the United States* that occurs *in an education program or activity* when the school has "*actual knowledge*" of harassment. When the school has such knowledge, it must *respond in a way that is not deliberately indifferent*, i.e., in a manner that is not "clearly unreasonable" under the "known circumstances."

*Actual knowledge* is defined as notice of actual or potential sexual harassment *provided to a school's Title IX coordinator or an "official" of the school "who has authority to institute corrective measures on behalf of the school."* Imputation of knowledge based solely on respondeat superior or constructive notice is insufficient to show actual knowledge. Further, an employee's mere ability or obligation to report sexual harassment, even if the employee is a school official, does not mean that the employee has the authority to institute corrective measures on behalf of the school. Additionally, the standard for actual knowledge is not met when the only official of the school with actual knowledge of harassment is also the person who has been accused of misconduct.

**The Definition of Sexual Harassment under Title IX has been Narrowed.** The new rules define sexual harassment as follows:

- A school employee conditioning the provision of an aid, benefit, or service of the school on an individual's participation in unwelcome sexual conduct (quid pro quo harassment);
- Unwelcome conduct by a school employee on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity (hostile environment harassment); or
- Sexual assault as defined in 34 CFR 668.46(a), implementing the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act

These definitions represent a narrowing of the Obama administration's 2011 and 2014 guidance, which broadly defined harassment as "unwelcome conduct of a sexual nature." The proposed rules state that while a school "remains free to respond to conduct that does not meet the Title IX definition of sexual harassment, or that did not occur within the recipient's program or activity... such decisions are left to the recipient's discretion in situations that do not involve conduct falling under Title IX's purview."

**... As has the Meaning of Responsible Employees.** Under the guidance previously issued by OCR in 2001, 2011, and 2014, an institution was deemed to have notice of harassment if a "responsible employee" knew, or in the exercise of reasonable care should have known, about the harassment. Under the prior guidance, a "responsible employee" was broadly defined to include any individual who a student could "reasonably believe" had the authority to institute corrective measures. In the proposed rules, however, the term "responsible employee" is not used in this context, and, as noted above, a school's responsibility to respond under Title IX is triggered only when an official with actual "authority to institute corrective measures" on behalf of the school learns of conduct regulated by Title IX.

**Emergency Removal of Students is Appropriate Following an Independent Assessment...as is Placing Employee Respondent's on Administrative Leave.** The proposed regulations do not preclude a school from removing a student accused of misconduct from the school on an emergency basis, but such removal may only occur if the school performs *an individualized safety and risk analysis and the student is given the opportunity to challenge the removal*. Non-student respondents who are employed by an institution may be placed on administrative leave during the pendency of an investigation. With respect to employee respondents or complainants, the proposed rules state that the rules are not intended to diminish, restrict, or lessen any rights that those parties may have under Title VII.

**Interim Measures are Still on the Table (For all Parties).** The proposed regulations discuss the provision of supportive measures for both complainant and respondent, which are intended to restore or preserve access to the school's education program or activity (without unreasonably burdening the other party), to protect the safety of all parties and the school's educational environment, and to deter sexual harassment. Such measures are defined as "non-disciplinary, non-punitive individualized services offered as appropriate, reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed."

Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of campus, and other similar measures.

The school must treat any supportive measures provided to the parties as confidential, to the extent that maintaining such confidentiality would not impair the school's ability to provide the supportive measures.

**Respondents are Granted a Presumption of Non-Responsibility.** Respondents are presumed non-responsible until a finding is made. *This presumption must be included in the notice to parties of a potential violation.*

**Schools Cannot Impose a Confidentiality Obligation on any Party.** Schools may not restrict the ability of either party to discuss the allegations under investigation.

**Parties Continue to Have Full Choice of Advisors...and Other Support Persons.** Schools *must* provide the opportunity to have “others” present during any grievance procedure, including the opportunity to be accompanied by an advisor of their choice. It is not clear from the proposed rules whether persons other than the student’s advisor of choice (who may be an attorney) must be allowed to attend such grievance procedures.

**Each Party must be Afforded the Opportunity to Review ALL Evidence... in an Electronic Format.** All parties must be provided an equal opportunity to inspect and review all evidence obtained as part of the investigation, both inculpatory and exculpatory, that is directly related to the allegations raised in a formal complaint, *including evidence upon which the school does not intend to rely in reaching a determination regarding responsibility.*

*The evidence must be provided for inspection and review in an electronic format, which restricts the parties and advisors ability to download or copy the evidence, at least ten (10) days prior to completion of investigative report.*

**The Investigative Report must be Provided to the Parties for Review Prior to the Hearing.** A school must “create an investigative report that fairly summarizes relevant evidence.” The report *must* be provided to the parties at least ten (10) days prior to a hearing or other time of determination, so the parties have an opportunity to review and respond to the evidence in writing prior to determination.

**The Preponderance Standard Remains...But Only if it is Also Used in Conduct Violations that Carry the Same Maximum Disciplinary Standard.** A school may use either a preponderance of the evidence standard or a clear and convincing standard. *However, the school may only use the preponderance standard if the school uses that standard for code of conduct violations that do not involve sexual harassment but carry the same maximum disciplinary standard.* The school must apply the same standard in addressing complaints against students and complaints against employees, including faculty.

**Appeals Remain Optional, but if Offered must be Offered to Both Parties.** Schools need not provide for an appeal. However, if a school does permit appeals, they may only be offered to both parties, each of whom will be afforded the opportunity to make written submissions. The person deciding the appeal cannot be the Title IX coordinator, or the persons who served as investigator and decision-maker in the matter.

**Mediation and other Informal Resolution Procedures May Be Offered.** Informal resolution procedures are allowed, subject to the informed, written consent by all parties. In addition to the

consent requirement, schools must also provide to students a notice prior to any such informal resolution procedure disclosing (1) the allegations; (2) the requirements of the informal resolution process *including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, if any*, and (3) any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.

**Schools are Required to Maintain and Make Available Title IX Records for Three Years.** Schools must create, *make available for the parties*, and maintain for a period of *3 years* records of: (1) the investigation, including any determination of responsibility, disciplinary sanctions imposed, and remedies provided to a complainant; (2) any appeal and the result therefrom; (3) informal resolutions, if any; (4) supportive measures; and (5) all materials used to train investigators, decision-makers, and coordinators with regards to sexual harassment. *The school must document the basis for its conclusion that its response was not clearly unreasonable, and document that it has taken measures designed to restore or preserve access to the school's educational program or activity.* During the record retention period, these records would continue to be subject to the applicable provisions of FERPA.

**Members of the public are free to provide comment on the proposed rules for a period of 60 days. Comments may be sent electronically to:**

eRulemaking Portal at [www.regulations.gov](http://www.regulations.gov)

**Comments may also be sent by mail to:**

Candice Jackson  
U.S. Department of Education  
400 Maryland Avenue, Room 6E309  
Washington, D.C. 20202

## Questions or concerns?

If you have any questions or concerns about these proposed rules, or the manner in which you can provide comment, please contact one of the following members of the HRW Higher Education Team:

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