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# Final Title IX Regulations and Their Effect on Your Campus

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## What happened?

- Culmination of rulemaking process began in November 2018
- Final rule issued that is effective August 14, 2020
- Final rule has the force of a federal regulation
- Compliance with the rule is mandatory, not advisory, as with Dear Colleague Letters

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# What will the regulation do?

- Set the standard for administrative enforcement of Title IX
- Will not alter standards for lawsuits seeking money damages for violation of Title IX
- Will necessitate changes in institutional Title IX policy and practices
- Will not alter institutional policies governing other forms of protected-status harassment

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# When do we need to comply?

- As of now, regulation is effective August 14, 2020
- As of now, non-compliance as of August 14, 2020 could result in an administrative finding of non-compliance
- Litigation challenging the regulation is imminent
- Potential that federal court injunctions may alter the effective date for all or portions of the regulation

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# Programmatic Scope

- Title IX obligations apply to "sexual harassment" in an education program or activity
  - Includes on campus
  - Includes education program or activity off-campus
  - Includes houses owned or controlled by university-recognized student organizations
  - Does not apply to off-campus, private settings, that are not an education program or activity
- Decision points

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# Example

Student A reports that Student B sexually assaulted Student A three weeks ago, off-campus in a private apartment complex in an adjacent town. No university student-organizations or employees are involved. There is no claim of any additional misconduct occurring on campus or in university programs or activities.

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# Temporal Scope

- "Formal complaint" can be filed by an alleged victim (i.e., a "complainant") or the Title IX Coordinator
- An alleged victim can file a formal complaint only if:
  - The complainant is participating in education programs or activities; or
  - Is attempting to participate in education programs or activities
- May close a case if the respondent is permanently separated from the institution
- Decision points

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# Example

Title IX Coordinator receives a complaint from Alumnus A who graduated in 2019. Alumnus A reports that Student B, who is currently a junior, groped Alumnus A's genitals without consent at a party hosted at a fraternity house in the fall of 2018. The fraternity is recognized by the university. Alumnus A is in a graduate program at a different university located several states away.

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# Application to Employees

- The regulation's mandatory requirements for investigation and grievance procedures apply to cases involving students and employees
  - Regulation does not distinguish between at-will employees or those under an employment contract
  - Regulation does not distinguish between classes of faculty
  - Regulation does not supplant other institutional obligations under Title VII or other employment laws
- Decision points

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# Example

At-will custodial worker is accused of sexually harassing a female student in the hallway. The custodial worker was placed on an improvement plan a month ago for being late to work. He has complied with the improvement plan. But for the accusation of sexual harassment, the institution would have continued to employ the custodial worker. Now it is considering terminating his employment.

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# Actual Knowledge

- An institution's response obligations are triggered when it has "actual knowledge"
  - Defined as notice to an official with authority to take corrective action
  - Once actual knowledge is triggered, Title IX Coordinator must promptly reach out to alleged victim and offer support services
  - Actual knowledge does not necessarily trigger obligation to conduct formal investigation and hearing process
- Decision points

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# Example

A clerk in the college's library overhears Student A tell Student B that Student A was raped in the dormitory last weekend. The clerk observes Student A crying, telling Student B that she hasn't been able to attend class, and that she's planning to file a "Title IX Complaint."

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# Supportive Measures

- Must be offered to an alleged victim once an institution has actual knowledge of potential harassment
  - Must be offered also to respondent once a formal complaint is filed
  - Ambiguity as to whether support services must be offered to respondent before formal complaint is filed
  - Non-disciplinary in nature; no-disciplinary measures until end of investigation and grievance process
  - Title IX Coordinator has responsibility to oversee offering and implementation
- Decision points

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# Interim Removals

- Permissible for students only when individualized assessment finds
  - Immediate threat
  - To the physical health or safety of any student or other individual arising from the allegations of sexual harassment
- Must be given opportunity to challenge immediately after the removal
- Employees can be placed on administrative leave
- Decision points

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# Example

Formal complaint is filed against Student A accusing Student A of repeatedly contacting Student A's former girlfriend, Student B, trolling her on social media, trying to communicate with her via friends, and texting her cell phone. Student B indicates she is suffering extreme emotional distress as a result of Student A's actions and wants Student A removed from campus pending an investigation.

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# Investigation Process

- Preliminary investigation required to identify alleged victim if not apparent from report
- Formal investigation triggered by "formal complaint"
  - Detailed written notice
  - Equal opportunity to present evidence and witnesses (including experts)
  - Access to the evidence
  - Opportunity to view written report pre-hearing
- Decision points

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# Example

During investigation, respondent hires an expert who will opine that complainant was not incapacitated at the time of an alleged sexual assault. The complainant does not have an expert and cannot afford one. The investigator is dubious about the purported expert's credentials and the reliability of his claimed methodology.

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# Hearing Process

- Formal hearing administered by "decision-maker(s)"
  - Each party's advisor has the right to ask relevant questions and cross-examine witnesses and parties
  - Institution must provide advisor (does not have to be a lawyer) to a party who does not have one
  - "Decision-maker(s)" must make contemporaneous rulings on relevancy and objections and explain their rationale
  - Testimony of persons who refuse to submit to cross-examination is excluded
  - "Decision-maker(s)" must issue written decision with rationale
- Decision points

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# Standard of Evidence

- May use preponderance or clear and convincing
  - Standard must be used uniformly for all cases regardless of respondent
  - There is a presumption that the respondent did not violate the policy
  - The institution bears the burden of proof and of collecting relevant information
- Decision points

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# Appeals

- Must be offered to both parties on the following grounds
  - Procedural irregularity that affected the outcome
  - New evidence not reasonably available that could affect the outcome
  - Conflict of interest by institutional participants that affected the outcome
- Non-appealing party must be given a chance to respond
- Decision points

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# Informal Resolution

- Permissible only after a formal complaint is filed
  - Parties must provide voluntary, written consent after receiving detailed notice of allegations and explanation of informal resolution process
  - Cannot compel students to agree to informal resolution as a condition of enrollment
  - Never permitted where accusation is that employee sexually harassed a student
- Decision points

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# Example

Student A makes a verbal report to Title IX Coordinator that Student B is sexually harassing Student A by repeatedly and persistently pursuing a romantic relationship with Student A despite being told "no." Title IX Coordinator contacts Student B and suggests this could be informally resolved by Student B apologizing to Student A, leaving her alone, and participating in personal coaching.

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# Training

- Training required for all institutional participants in the process
  - Training must be non-biased and not rely on stereotypes
  - Training for institutional participants in a given case must be retained for seven years
  - Training documents must be posted on institution's website
- Decision points

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# Records Preservation

- Complete records of every case kept for a period of seven years
  - Formal cases
  - Informal resolutions
  - Cases where only supportive measures are provided (must include rationale for not proceeding formally)
- Parties have right to access the records
- Decision points

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# Religious Exemption

- Religious exemption is now fully self-executing
  - Not-necessary to seek pre-approval from ED although that is still an option for schools that want assurance
  - Exemption can be claimed by institution "controlled by" a religious organization where aspect of the regulation conflicts with religious tenants of the organization
- Decision points

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# Example

College controlled by a church denomination believes that sexual harassment is a grave sin and that utmost sensitivity and grace should be shown to alleged victims. Church denomination has developed its own protocols for investigating reports of sexual harassment that do not permit cross-examination. Church believes cross-examination is inconsistent with its Biblical obligations in responding to reports of abuse.

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# FERPA

- Regulation indicates that Title IX explicitly pre-empts FERPA to the extent of any conflict between the two
- Eliminates need to seek FERPA waivers to the extent information is being shared for a reason mandated by the regulation
- Decision points

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# Preemption of State Law

- Regulation preempts state and local laws to the extent those laws are inconsistent with the regulation's definition of sexual harassment and its mandates for the investigation and grievance process
- Decision points

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# Example

College is located in a state that passed a law defining sexual harassment for purposes of institutional Title IX policy as "Any unwelcome conduct of a sexual nature." State law also precludes any direct cross-examination of complainant by the respondent or the respondent's representatives.

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# Questions

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