

Bond

New Title IX Regulations
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TOP IX TAKEAWAYS FROM THE NEW TITLE IX REGULATIONS

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I. Effective Date and School Policy Changes

- Effective Date is August 14, 2020
- Schools' Actions Needed to Comply
 - Change in policy
 - Change in training materials
 - Change in communications –especially to complainants so they know what the new regulation requires
- Efforts to resolve inconsistencies with State laws including Enough is Enough in New York

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II. School's Duty to Respond and the Formal Complaint

- Complainant must be participating or attempting to participate in the institution's programs and activities at the time a complaint is filed (for purposes of Title IX regulations)
- School's duty arises where there is actual knowledge by someone who has the authority to institute corrective measures (for purposes of Title IX regulations)
- Formal complaint must be a document filed by the complainant
- Schools must respond to a complainant promptly in a manner that is not deliberately indifferent

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III. What's In, What's Out, and What Difference Does it Make?

- Definition of sexual harassment
- Inclusion of VAWA offenses – comes closer to mapping to EIE and current policies but still excludes
 - Sub-(new) harassment level behavior
 - Off-campus conduct (other than in context of institutional activity or at location controlled by recognized organization)
 - Study abroad
 - Other types of behavior historically addressed under Title IX policies
- Clarification of the “must dismiss” requirement
- Implications for institutional policy configuration

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IV. Supportive Measures

- Must be non-punitive, non-disciplinary and not unreasonably burdensome yet still designed to protect safety and ensure equal educational access
- Are one-way no-contact orders permissible? Yes, but significantly restricted
 - One example of tension with NY law
- Interim suspension must be based on “immediate threat” to “physical” safety
 - Implications for emotional/mental health-based concerns and fear of sighting on campus

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V. The Investigation

- Single investigator/decision-maker model no longer allowed under new regulation
- No gag orders (yet no retaliation)
- Successive 10-day access to evidence and the investigative report
 - Issues with confidential information and protected personal data
 - Can provide in hard-copy, electronically or through file-sharing

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VI. The Hearing

- Retains live hearing requirement with cross-examination by advisors
 - Advisors allowed or appointed at cost of school. Issue of comparability in experience and skills
 - Advisors only required to be appointed with respect to the hearing but is that enough
- Decision-maker must rule on whether questions are relevant or violate rape shield protections and provide an explanation for excluding a question (requires high degree of skill)

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VI. The Hearing, cont'd

- Implications for refusal to submit to cross-examination
 - Scope of preclusion – virtually all statements
 - Implications for complainants and respondents
- Standard of evidence
 - No longer requires parity with other student processes
 - Must be the same across all processes for adjudicating complaints of sexual harassment

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VII. The Appeal

- Schools must offer both parties an appeal from a determination
- Schools must offer an appeal from a decision to dismiss a formal complaint (or any allegation in it)
- Grounds:
 - Procedural irregularity
 - New evidence
 - Bias
 - Institutions may add others

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VIII. Informal Resolution

- Formal complaint must be filed and both parties must agree
- No informal resolution for employee-on-student harassment allegations
- Whole new territory that can be explored
- BUT skilled and trained personnel needed for this kind of resolution
- Right of either participant to withdraw “prior to agreeing to resolution” and return to grievance process must be considered

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IX. Training

- Required of Title IX personnel including Title IX staff, investigators, decision-makers in hearings and appeals and advisors
- If an informal resolution process is allowed – training needed on that too
- Training must include how to serve impartially, conflicts of interest and bias
- Frequency of training not specified
- All training materials must be posted on school's website

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QUESTIONS?



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