

NEWS ALERT

EDUCATION



Department of Education Publishes New Title IX Regulations

By Patricia E. Reilly and Emily McDonough Souza | May 12, 2020

On May 6, 2020, the U.S. Department of Education issued long-awaited final regulations governing sexual misconduct in education under Title IX, the law prohibiting sex discrimination in programs that receive federal funding.

The new rules, which become effective on August 14, 2020, will impact the way in which schools and colleges must now carry out campus proceedings in response to claims of sexual assault, making key changes to former guidance and recommendations from the Department. These changes include narrowing the definition of “sexual harassment,” requiring colleges to hold live hearings during which the parties can be cross-examined, and limiting complaints that schools are responsible to investigate to those filed through a formal process and involving episodes that have occurred within their own programs and activities. In order for the Department’s Office for Civil Rights (OCR) to find a school legally culpable for mishandling these accusations, it would have to be proved “deliberately indifferent” in carrying out mandates to provide support to victims and investigate complaints fairly.

Schools must update their policies and procedures promptly to address the requirements of the final rules. In addition, Title IX Coordinators, investigators, and any other staff should be fully briefed on the changes and trained on how to implement them during the 2020-2021 school year.

The following is a summary of the aforementioned changes and other key provisions of the Department of Education’s new Title IX regulations:

- The definition of sexual harassment encompasses unwelcome conduct that a reasonable person would determine is so severe, pervasive, and objectively offensive that it effectively denies the person access to the program activity. Dating violence, domestic violence, and stalking are included as sexual harassment.
- Higher education institutions must now hold live hearings in all cases and allow cross-examination of the accusers and the accused through advisers and lawyers. Notably, a hearing officer must first decide if the questions are relevant.
- Higher education institutions are obligated to investigate only those complaints filed through a formal process and brought to the attention of officials with the authority to take corrective action; however, even if no formal complaint is filed, they are to comply with various mandatory response obligations such as offering and informing the complainant of supportive measures.
- Schools are responsible for investigating only sexual misconduct episodes against persons in the United States that have occurred within their own educational programs and activities. This extends to “locations, events or circumstances” over which the school exercised “substantial control” over students and activities. It also necessarily excludes incidents that happen to students studying abroad.

- Schools may choose to use a higher “clear and convincing evidence” standard, versus a “preponderance of evidence” standard, for purposes of finding students responsible for sexual misconduct. The school must apply the selected standard evenly to proceedings for all students and employees.
- Schools must offer both parties an appeal from a determination regarding responsibility, and from a school’s dismissal of a formal complaint, on the following bases: procedural irregularity that affected the outcome of the matter, newly discovered evidence that could affect the outcome of the matter, and/or conflict of interest or bias by Title IX personnel that affected the outcome of the matter.
- A “deliberate indifference” standard will now be used by the Department’s OCR to assess complaints of mishandling of sexual misconduct by schools.
- Notably, exceptions are made in the regulations for primary, secondary, and other specialized schools—e.g., with regard to the hearing and cross-examination requirements—amid concerns that the regulations would have subjected small children to the same treatment as young adults.

Murtha Cullina’s Education Group is available to advise you should you need assistance updating your policies or implementing these changes.

For more information, please contact:

Patricia E. Reilly at 203.772.7733 or preilly@murthalaw.com

Emily McDonough Souza at 203.772.7711 or esouza@murthalaw.com

Edward B. Whittemore, Chair
860.240.6075
ewhittemore@murthalaw.com

Melanie N. Aska
617.457.4131
maska@murthalaw.com

Dana R. Bucin
860.240.6081
dbucin@murthalaw.com

Matthew K. Curtin
860.240.6065
mcurtin@murthalaw.com

Jennifer Morgan DelMonico
203.772.7735
jdelmonico@murthalaw.com

Michael J. Donnelly
860.240.6058
mdonnelly@murthalaw.com

Jodie L. Driscoll
203.772.7748
jdriscoll@murthalaw.com

Anthony P. Gangemi
203.772.7759
agangemi@murthalaw.com

Patricia E. Reilly
203.772.7733
preilly@murthalaw.com

Martha M. Royston
203.772.7720
mroyston@murthalaw.com

Frank J. Saccomandi, III
860.240.6043
fsaccomandi@murthalaw.com

Emily McDonough Souza
203.772.7711
esouza@murthalaw.com

Edward B. Spinella
860.240.6059
espinella@murthalaw.com

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