



May 14th Webinar: The Title IX Rules' Impact for New York State Colleges & Universities
Question and Answers

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Some questions non-substantively edited for form

More detail can be found at the Joint Guidance webpage: <https://system.suny.edu/sci/tix2020/>

Will the Student Conduct Institute offer training in August that will be available for board members, chairs and advisers that they can attend prior to the start of the fall semester?

Yes. We will include a suite of trainings for all Student Conduct Institute members that will cover the obligations. There will be no additional fees, upcharges, etc. to access this training content.

What are your thoughts on applicability for complaints or incidents that occur prior to 8/14? Does it depend on when the "hearing" takes place or will they be grandfathered in based on when the incident occurred.

This should be discussed with campus counsel or outside counsel to address the specific question. While not uniform, generally courts have blessed a system where the definitions of violations used in a conduct process are those that applied at the time of the violation, while the process used to investigate and adjudicate is the current process (even if a different process applied at the time of the violation).

What About FERPA and sharing of evidence, investigatory reports, and identities of witnesses?

The Department of Education asserts that nothing in the Final Rule should be read to take away any student FERPA rights, but that if there is a conflict, then the Final Rule would govern, as it implicates due process rights. The Final Rule indicates that the identities of witness, investigatory reports, and any evidence relevant to the allegations has to be shared among the parties. You can learn more about the rules of evidence sharing through the Joint Guidance on Federal Title IX Regulations: [Inspection and Review of Evidence](#) and [Investigative Report Required](#).

Is it true that only Employee Quid Pro Quo harassment is covered by the new rules? This includes employee to student, correct?

The Final Rule defines sexual harassment as including any quid pro quo sexual harassment by an employee, including employee to student quid pro quo sexual harassment. The Rule's definition of sexual harassment also includes any other sexual harassment that is severe, pervasive, and objectively offensive, which could include, among other possible scenarios (such as student-on-student harassment).

Could a respondent refuse to accept an advisor in an attempt to have complainant's entire testimony thrown out because they could not be cross examined?

No language in the Final Rules or Preamble suggests that a respondent can challenge the institution's choice of advisor.

Does the conflict between Title IX and Title VII definitions of sexual harassment for school employee-related cases suggest that the Title IX definition should be used?

The Department purports to argue that there is not necessarily a conflict, so long as the applicable definition is used for the correlating process/procedure. The Preamble indicates that it is possible for conduct to be actionable under a code of conduct but not actionable under Title IX. This extends to complaints of sexual harassment under Title VII (or state or local law where applicable). An institution may be required under Title IX to dismiss a formal complaint, while required by a different law to take responsive action.

How do we treat at-will employees - how are employee contracts and at-will employment concepts affected by these Title IX due process rights?

The new Title IX rules do not purport to change employment law or employment relationships outside of the specific procedural rights granted related to Title IX proceedings for covered conduct. The Department declines to address if or how it views granting these rights to be consistent with the larger employment relationship between institutions and at-will employees. This issue will be discussed further in the Joint Guidance.

If an alum reports that something happened to them two years ago while a student, there needn't be an investigation because that person does not meet the definition of complainant (participate in in or attempting to participate in education program or activity)?

The Final Rule defines several grounds upon which a Title IX complaint may be dismissed, including that the complainant was not participating in or attempting to participate in the institution's educational program or activity. For example, a graduated student who is attempting to participate in a university program, such as an alumni association, might fall within a university's Title IX jurisdiction. 85 Fed. Reg. 30026, 30138 (May 19, 2020). Institutions may have other obligations under other laws or their policies to so investigate.

If the school provided advisor is trained by the institution but the other party's advisor is not trained by the institution, would this indicate that the parties were not provided with equitable resources?

The Final Rule does not include a discussion of this question.

Can we make Title IX its own stand-alone policy and have a separate policy for broadly handling nondiscrimination?

The Student Conduct Institute will be developing a stand-alone Model Title IX grievance process for members. This Model Policy is meant to operate alongside any existing code of conduct procedures which would still be used for non-Title IX violations.

When will this recording be available and is there an ETA as to when we will receive templates, verbiage, etc. that we all need to start utilizing?

The webinar was recorded and is posted on the [SCitations blog](#). We anticipate releasing model documents, templates, etc. in July, if not earlier. They will be available to all SCI member institutions.

In regards to our union protected employees, how will due process change, if at all?

The Department purports to state that the Title IX regulations do not allow for a current process - including a collectively bargained process - that conflicts with the procedural requirements of the regulations for Title IX-covered conduct. In fact, while the preamble to the Final Rule does acknowledge areas of potential overlap and conflict, when the conflict is unavoidable, the Department states “However, we wish to clarify that in the event of an actual conflict between a union contract or practice and the final regulations, then the final regulations would have preemptive effect.” See 85 Fed. Reg. 30026, 30298 (May 19, 2020). This issue will be discussed further in the Joint Guidance.

Are there any due process requirements for informal resolution?

The new Title IX regulations state that an informal resolution may never be offered to resolve allegations that an employee sexually harassed a student, and may not be offered in other cases unless a formal complaint has been filed. The regulations require that at any time prior to agreeing to a resolution under such a process, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint. Additionally, if an informal resolution process is offered, the institution must:

- provide the parties a written notice disclosing the allegations, 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, and any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared; and
- Obtain the parties’ voluntary, written consent to the informal resolution process.

Can we get a copy of that chart comparison [referenced on the webinar]?

Training requirement documents and charts will be made available to all SCI member institutions.

Preemption question: there's lots of regulatory commentary that schools are free to pursue conduct under their own codes of conduct, and yet there is federal preemption as to definition of sexual harassment and the investigatory/grievance process. Do you believe the preemption language has any practical effect on school's ability to: (1) address conduct that falls outside the *Davis* definition of sexual harassment; (2) address gender-based misconduct that is not sexual harassment; (3) address off-campus or private or overseas behavior; or (4) address online behavior that isn't necessarily in a context where the school has control over parties (as in a classroom)

The Preamble seems to indicate that institutions are free to address conduct *not* specifically covered under the Final Rule's definitions using the Code of Conduct (or other relevant policy).

I'm always confused by the domestic violence component. How does the institution address a domestic violence situation that takes place OFF campus? Especially if the violator is not a student or staff member?

Off-campus conduct outside of an institution's programs and activities is generally not covered by the new Title IX regulations. However, under the VAWA amendments to Clery, when an institution knows that someone has been the victim of domestic violence, the institution has certain response obligations. These obligations are separate from the Title IX response obligations.

From what I understand, an informal resolution cannot occur until a formal complaint is filed. Then, once it is downgraded to an informal resolution, it can no longer be elevated to a formal complaint grievance process again, correct? Once the parties sign and elect the informal resolution, it cannot be brought back up to formal or the same charges refiled. Correct?

No. The Preamble discussed informal resolutions and requires that either party be able to leave the informal process and return to the formal process. The Regulations do not use the terms upgrade or downgrade, but all parties must consent to move to informal resolution and any party's withdrawal moves the process back to formal.

You pointed out the conflicts between the new Regs and VAWA/129B, but what do we do about them in our policies and in practice?

People are still hashing out the challenges here. For SUNY SCI members, we will be developing and issuing a Model Policy that will attempt to address these conflicts. There are other model policies in development from other groups.

Will we receive clear guidance on what the new role of hearing officers will be if advisors ask questions?

It is unclear whether the Department will issue additional guidance. We are working on training materials to assist hearing officers based on what we know from the Preamble to the Final Rule.

Do you have any insight into anticipated challenges and whether they might delay the implementation of the regs?

We will be tracking litigation and posting updates on the Joint Guidance website. As of the time of writing, there are four lawsuits (in Maryland, Washington, D.C., Massachusetts, and New York) and all complaints are posted on the [Joint Guidance](#) Litigation Tracker.

Since NYS has been hit so hard by virus, is there a legal or political response that NYS campuses should be given an extension of time to address new regulations?

There could be litigation or political pressure, but it would be difficult to rely on a delay occurring because the timeline is so short. Campuses need to start working on revising policies and procedures to be in compliance by the middle of August. We are working on resources and trainings to assist campuses, but we agree that this is an *exceptionally* short timeline.

Do we believe that NYS will have to make changes to Enough is Enough and, if so, is there a sense of how long before that might happen?

There's no indication that revisions to Education Law 129B ("Enough is Enough") are currently under consideration. In the Preamble to the Final Rule, the Department purports to say that there does not appear to be a conflict between Title IX and Enough is Enough (Education Law 129-B). Instead, if there is a complaint that requires dismissal under Title IX but requires action under EIE, the Preamble states that the recipient can take such action as required. "Such a dismissal is only for Title IX purposes and does not preclude the recipient from action under another provision of the recipient's code of conduct." 85 Fed. Reg. 30026, 30383 (May 19, 2020). We have identified some conflicts between Title IX and Education Law 129-B.

Do the new TIX regulations trump Enough is Enough requirements, given the discretion afforded postsecondary institutions to designate mandatory & discretionary reporters (and elsewhere)

The Department asserts in the Preamble that its Regulations preempt any State law or Regulation. Courts may be asked to rule on this question.

In contrast to guidance under the Obama administration, the regulations will not hold an institution responsible for responding to a Title IX complaint if the school did not have "actual knowledge." Actual knowledge under Section 106.30 means knowledge by "any official who has the authority to institute corrective measures on behalf of the recipient." Please note that the regulations do not prohibit schools from designating employees as mandatory reporters to the Title IX Coordinator under school policy. And if the institution fails to follow its policy, it may

be subject to challenge (in New York, through an Article 78 lawsuit which may be brought against a public or private institution). Under the rescinded guidance, all “responsible employees” were required to report known or observed complaints of sex discrimination to the Title IX Coordinator, and a responsible employee could include anyone who a student could reasonably believe has the authority to address complaints; many interpreted that part of the definition as meaning nearly any employee on campus.

Can private colleges utilize a process that omits live hearings and cross-examination for sexual assault, IPV, and stalking cases that do not fall within the definition/jurisdiction of sexual harassment under Title IX?

Generally, yes, under current case law and as allowed under their Code of Conduct and other policies (institutions may wish to check with counsel for specific advice).

If the college is providing supportive measures to the complainant, doesn't this assume that something happened to the complainant, as alleged?

The regulations do not presume that providing supportive measures assumes responsibility of the respondent. Supportive measures can be provided even without a formal complaint.

Would VAWA violations off-campus follow a TIX process or follow an alternate conduct process?

Off-campus conduct that is not within a program or activity of the institution (or certain housing owned or controlled by recognized student organizations) is not subject to college response under these regulations, but the VAWA amendments to Clery response obligations and state law may apply.

Does the advisor need to meet a certain criteria? Are schools required to train these advisors?

There are no stated criteria for the party-selected advisors. The institution is not required to train party-selected advisors of choice. The institution may offer training, and the Student Conduct Institute will create trainings for advisors. Institutions may require that institution-provided advisors of choice receive training, including on matters such as the proper “decorum” for participating in the hearing.

Does the advisor requirement apply for employee v. employee Title IX matters?

Yes.

What if a complainant chooses not to participate in hearing? Are they required to? If they don't can the board not consider statements provided?

If, in a Title IX process under these rules, a complainant does not “submit” to cross-examination in a live hearing, their statements cannot be considered by the decision-maker. Completely

independent evidence (such as a video recording that does not include statements by the complainant) could be considered. Practically, it is less likely that a process with anything less than full participation of a complainant will result in a finding of responsibility.

Is it correct that an "advisor" does not have to actually be an attorney? If so, could you provide an example of who might be appointed to be an "advisor"?

It is correct that the advisor does not need to be an attorney. The advisor could be a parent, a friend, a faculty member, the Secretary of Health and Human Services, a top 50 contestant on American Idol, or really any living person. Note that a witness can also serve as an advisor of choice.

Can a parent be an advisor?

Yes. The regulations do not permit an institution to “limit the choice or presence of advisor.”

With regards to transcripts, the college must create a formal transcript of the hearing or is the summary of statement meeting that standard?

The college must create an audio or audiovisual recording or transcript or any live hearing, and such recording or transcript must be available to the parties for inspection and review. 34 CFR § 106.45(b)(6)(i). Recording the hearing on audio, and preserving that recording, would appear to meet this obligation.

Do the Title IX regulations apply to Transgender persons?

The regulations apply to recipients of federal funds, and are meant to address sexual harassment complaints by all members of the campus community, including LGBTQIA+ (note the Regulations use the acronym LGBTQ but we understand that usage to be inclusive) members of the community. The preamble to the regulations discusses how sexual harassment against LGBTQIA+ students involving unwelcome conduct based on sex or sex-stereotyping may meet the definition of sexual harassment under Title IX. The Department of Education did not identify Transgender complainants specifically in the regulations. The preamble insists that the regulations focus on prohibited conduct, and anyone may experience sexual harassment under the applicable definition. Concurrent with finalizing this Q&A, the Supreme Court decided three cases under Title VII that may have future implications for application of Title IX to sexual orientation and gender identity. Further, there may be specific aspects of the Final Rule that fall inequitably on Transgender members of the community.

When describing the "range of possible disciplinary sanctions..." can we use a range or do we still need to be specific to say 1, 2, 3, 4, ...semesters...?

Title IX continues to permit including a range of possible sanctions, but under the VAWA Amendments to Clery institutions are required to list all possible sanctions for sexual assault, domestic violence, dating violence, and stalking. No change. Department guidance under Clery has been specific about wanting to see all sanctions spelled out clearly, not a range. The

Preamble to the Title IX Regulations says that meeting the list requirement under Clery would appear to meet the range requirement under Title IX.

We always used to say that Title IX doesn't care where, it cares who. For example: If a student is at an independent party (not in student housing) and is sexually assaulted (either by another student or someone unaffiliated with the college), would this no longer be covered under Title IX?

Correct (we used to say that too!). Under these Title IX regulations, the school must dismiss this complaint under its Title IX policy. But the school may address the complaint under a non-Title IX policy, and may indeed have response obligations under the VAWA Amendments to Clery and State law such as Education Law 129-B.

Should we be changing our non-TIX processes to match the TIX process so we are consistent?

The regulations do not require changing non-Title IX processes to match the Title IX process, nor do they prohibit it. Please note that it may be difficult to remain in compliance with State and local law if non-Title IX processes are changed to match the Title IX process. The Student Conduct Institute will develop a model standalone policy for relevant violations, and other conduct would go through the standard Code of Conduct.

What is the required standard of evidence?

The regulations allow institutions to use clear and convincing or preponderance of the evidence, so long as the same standard of evidence is used for all incidents of sexual harassment regardless of whether the parties are students, staff, or faculty.

I think that, since the Title IX regulations also apply to employees, it would be helpful to compare the Title IX regulations not only with Article 129-b requirements, but also New York State's sexual harassment policy and training requirements.

Absolutely - both New York State and New York City have laws about sexual harassment prevention and response in the workplace that have been recently updated. The [Joint Guidance](#) will include discussions about these and also Title VII.

For clarification: if a student reports they were sexually assaulted off campus in their apartment by another college student at the same institution, we are not permitted to pursue an investigation if a reporting individual wants to proceed? What happens to the cases where the respondent is from another college in the same city/town?

Under these regulations, the College would be required to dismiss the formal complaint under its Title IX grievance process. However, the College could respond under a different applicable procedure. New York colleges are still bound by Education Law 129-B, and you should look at the relevant language in your Code of Conduct. A dismissal under Title IX is not a dismissal under all processes.

What does employee vs. employee even look like under the new regs. By definition, employee sexual harassment has nothing to do with the educational experience or access to the educational experience so, by the very definition an employee vs. employee allegation does not fit/work.

The regulations are clear that even incidents between employees may fall under Title IX if the conduct meets the applicable definitions. The Preamble repeatedly reminds readers that “[i]f recipients do not wish to become subject to these final regulations, then recipients may choose not to receive Federal financial assistance.” 85 Fed. Reg. 30026, 30445 (May 19, 2020). Many institutions share your concerns about the workability of such a process.

Are there no longer mandated reporters in higher ed? Also does this mean if a student discloses to a mandated reporter, does that reporter still report to Title IX and does Title IX have to move forward with an investigation?

These regulations do not have the broad obligation that “employee knowledge is college knowledge” when it comes to Title IX compliance and complaints of sex discrimination. Rather, these regulations limit when a college is *required* to take action to where the college has “actual knowledge,” meaning knowledge by “any official who has the authority to institute corrective measures on behalf of the recipient.” Note there are significantly different standards for K-12 schools.

The regulations do not prevent your institution from having a policy requiring employees to report sex discrimination to the Title IX Coordinator. And once someone does, then the Title IX Coordinator has actual knowledge, and the Title IX obligations kick in. The incident must be assessed to determine whether it falls within the bounds of the Title IX definitions of sexual harassment.

In regards to cross examination, my college allows cross examination via the hearing officer who asks each party's submitted questions. Would the advisor now be the one asking the questions? Would the hearing officer be allowed to ask the questions instead of the advisor or does the regulation say it must be the advisor? My concern is if one party has an attorney, that attorney asking questions would be completely intimidating and turn people away from participating in the hearing.

The advisors would now be the ones asking the questions. Both parties must have an advisor in order to conduct cross-examination. Parties who do not submit to cross-examination cannot have their statements relied upon, but only advisors may conduct cross-examination. If a party does not have an advisor, the institution must provide an advisor. The hearing officer is not permitted to ask the cross examination questions under the regulations (though they may certainly ask their own questions to parties and witnesses). Many institutions share your concern.

The Title IX regs require that the conduct be severe AND pervasive?

The Final Rule's definition of sexual harassment includes three prongs: (1) quid pro quo sexual harassment committed by an employee, (2) other sexual harassment that is **severe, pervasive, and objectively offensive**, and (3) sexual assault, dating violence, domestic violence, and stalking as defined in the Clery Act.

August 14 implementation? Surely you can't be serious?

We are serious. [And don't call us Shirley!](#)