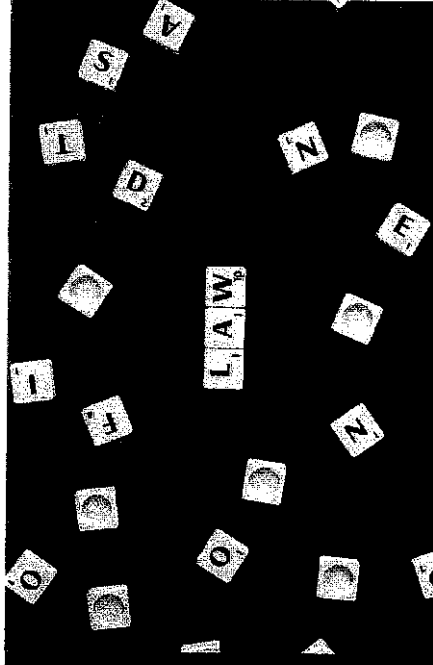


Preparing for Implementation of the New Title IX Regulations:

Recommendations for Higher Education Institutions

Background on Title IX Regulations



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- September 22, 2017 – U.S. Department of Education released Dear Colleague Letter formally withdrawing two key Obama-era guidance documents:
 - 2011 Dear Colleague Letter on Sexual Violence
 - 2014 Q&A on Title IX and Sexual Violence

Background

- Proposed Title IX Regulations released in November 2018
- 60-day public comment period
- Over 120,000 public comments received

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Current Status

- Final Rules released on May 6, 2020 and published in Federal Register on May 19, 2020
- Effective date: August 14, 2020



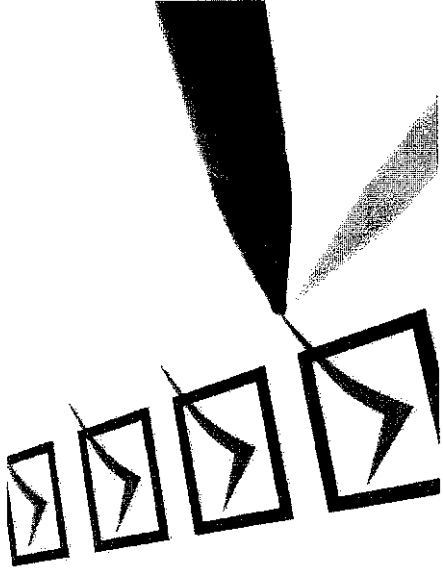
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Impact on Higher Education Institutions

- New Rules require:
 - Revisions to institutional policies and procedures
 - Staffing determinations
 - Training for all personnel involved in an institution's investigation and grievance process
 - Publishing of information and training materials on the institution's website

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Key Provisions and Changes



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Definition of Sexual Harassment

- Sexual harassment includes:
 1. Quid pro quo harassment by a college employee
 2. Unwelcome conduct that a reasonable person would find so severe, pervasive and objectively offensive that it denies a person equal educational access
 3. Any instance of sexual assault, dating violence, domestic violence or stalking (as defined in Clery Act/VAWA)

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Definition of Sexual Harassment

- The second type of sexual harassment must be severe and pervasive and objectively offensive.



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Jurisdiction

- Institutions must respond when sexual harassment occurs "in the institution's education program or activity, against a person in the United States."

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Jurisdiction

- "In the institution's education program or activity" includes:

- Locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurred; and
- Any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

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Definitions

- Complainant = individual alleged to be the victim of conduct that could constitute sexual harassment
- Respondent = individual reported to be the perpetrator of conduct that could constitute sexual harassment

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Definitions

- Formal complaint = written document filed by a complainant or signed by a TIX Coordinator alleging sexual harassment against a respondent and requesting that the institution investigate the alleged harassment.



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Definitions

- At the time of filing a formal complaint, the complainant must be participating in or attempting to participate in an education program or activity of the institution with which the formal complaint is filed.

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Definitions

- Supportive measures = individualized services reasonably available that are non-punitive, non-disciplinary, and not unreasonably burdensome to the other party while designed to ensure equal educational access, protect safety, or deter sexual harassment.



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Institutional Response Obligations

- Upon receipt of a report alleging sexual harassment, an institution must, at a minimum:
 - Promptly contact the complainant to discuss supportive measures and options for filing a formal complaint.
 - Investigate sexual harassment allegations in any formal complaint.
 - Follow a grievance process that complies with the Final Rules before imposing any disciplinary sanctions against a respondent.

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Mandatory Dismissal Requirement

- If the allegations in a formal complaint do not meet the Title IX definition of sexual harassment, or did not occur in the school's education program or activity against a person in the United States, the institution must dismiss such allegations for purposes of Title IX but may still address the allegations in any manner the institution deems appropriate under its own code of conduct.

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Informal Resolution

- An institution may (but is not required to) offer and facilitate an informal resolution process, within certain parameters to ensure such informal resolution occurs only with the voluntary, written consent of both parties.
- Informal resolution is not permitted to resolve allegations that an employee sexually harassed a student.

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Grievance Process

- Institution must send written notice to both parties (complainants and respondents) of the allegations upon receipt of a formal complaint.
- Must afford both parties an equal opportunity to present fact and expert witnesses and other inculpatory and exculpatory evidence.
- "Gag orders" not permitted.

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Grievance Process

- Must afford both parties same opportunity to select an advisor of the party's choice, who may or may not be an attorney.
 - Note: Limitations on role of advisor are permissible.
- Must send parties written notice of any investigative interview, meeting or hearing, and afford parties sufficient time to prepare.

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Grievance Process

- Must send parties, and their advisors, evidence directly related to allegations, in electronic format or hard copy, with at least 10 days for parties to inspect, review, and respond.
- Must send parties, and their advisors, an investigative report that fairly summarizes relevant evidence, in electronic format or hard copy, with at least 10 days for parties to respond in writing.
 - Must be sent at least 10 days prior to hearing.

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Hearings

- At request of either party, institution must provide for entire live hearing (including cross-examination) to occur with parties located in separate rooms with technology enabling them to see and hear each other.
- Virtual hearings permitted.
- Live hearings must be audio/video-recorded or transcribed.

Standard of Evidence and Written Determination

- Title IX allows preponderance of the evidence standard or clear and convincing evidence standard.
 - Illinois institutions must use preponderance standard, per the *Preventing Sexual Violence in Higher Education Act*.
- Decision-maker(s) must issue detailed written determination, to be sent simultaneously to the parties, with information about appeal rights.

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Hearings

- Cross-examination and other questions must be relevant, as determined by decision-maker(s).
 - Rape shield protections apply.
- If a party does not have an advisor present at the live hearing, the institution must provide, free of charge, an advisor of the institution's choice, for purposes of conducting cross-examination on behalf of that party.
 - May, but is not required to be an attorney.

Appeals

- Institution must offer both parties an appeal from a determination regarding responsibility, and from a dismissal of a formal complaint or any allegations therein, on the following bases:
 - Procedural irregularity
 - Newly discovered evidence
 - Conflict of interest or bias
- Institution may offer an appeal equally to both parties on additional bases.
 - i.e. the sanction is disproportionate with the violation (see 110 ILCS 155/25(b)(14)).

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Training Requirements

- Individuals who must receive training include, at a minimum:
 - Title IX Coordinators
 - Investigators
 - Decision-makers
 - Informal resolution facilitators

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Training Requirements

- Title IX personnel must receive training on:
 - Final Rules' definition of sexual harassment
 - Scope of institution's program or activity
 - How to conduct investigation and grievance process, including hearings, appeals and informal resolution processes (as applicable)
 - How to serve impartially
 - Any technology to be used at a live hearing
 - For decision-makers and investigators: Issues of relevance, including how to apply the rape shield protections provided for complainants

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Training Requirements

- Institutions must post "all materials" used to train Title IX personnel" on their websites, if any, or make materials available for members of the public to inspect.

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Interplay Between Title IX and Title VII

• The Department, however, states:

- There is no inherent conflict between the two statutes and students and employees, including faculty and student workers should not be treated differently.
- Employees are entitled to the same due process protection as students

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Administrative Actions Only with Regard to Employee Title IX Complaints

- The Department's Rules do not create a private right of action for employees.
- The Department recognizes that its authority is limited to administrative enforcement actions.
 - OCR investigations, findings and resolutions
 - Administrative action can include stopping federal funding to the educational institution.

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Employee Title IX Complaints Now Must Provide Increased Due Process Protections

• **WARNING:** Employees pursuing formal complaints of sexual harassment are entitled to all of the grievance processes provided students:

- Notice and Inspection of Evidence
- A Live Hearing
- Cross-Examination Rights
- Right to submit written questions to the other party and witnesses
- Written Decision which includes a rationale for each conclusion reached; and
- Appeal Rights

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Specific Title IX Language Regarding Employees

- Language Specific to Employees
 - The Final Rules allow an educational institution to place employees accused of sexual harassment on administrative leave, paid or unpaid, during the formal complaint grievance process.
 - This administrative provision may have to be squared up with current policy, procedure, and applicable collective bargaining agreement language.
- Informal resolution of a sexual harassment allegation is not an option when it involves employee-to-student claims.

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Preparation Tips

Prepare for Success

Tip #1

• Designate administrator(s) to oversee your institution's preparation and compliance efforts.



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Tip #2

• Determine any required changes to your institution's grievance process.

• Consider issues such as:

• "Reasonable timeframe" that will apply to grievance process.

• Remember Preventing Sexual Violence in Higher Education Act timelines.

• Whether to use the college's own employees as investigators and decision-makers or outsource those functions to contractors (or a combination of both);

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Tip #2

• Consider issues such as (continued):

• Whether, and the degree to which a party's advisor of choice may actively participate in the grievance process;

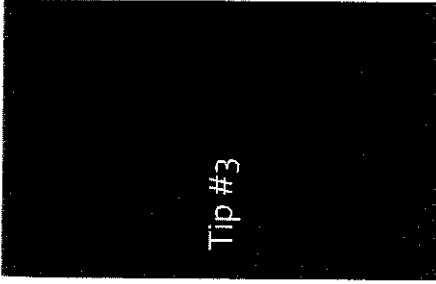
• Whether to use an individual decision-maker or a panel of decision-makers;

• Whether to offer informal resolution options; and

• Procedures for appeals.

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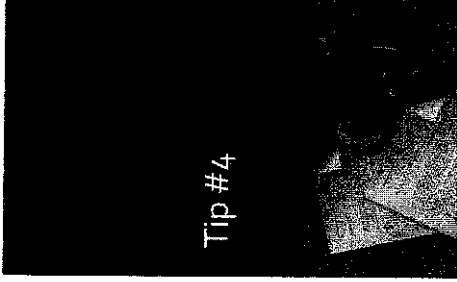




• Designate key players:

- Title IX Coordinator
- Investigator(s), if separate from Title IX Coordinator
- Decision-maker(s) and appellate decision-maker(s)
 - May not be the Title IX Coordinator.
- Informal resolution facilitator(s), if offering informal resolution option
- Appointed advisors

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• Revise institutional policies and procedures.

- Title IX/sexual misconduct policy and procedures.
 - Remember: Preventing Sexual Violence in Higher Education Act's policy/grievance procedure requirements still apply.
- Student code of conduct and disciplinary procedures?
- Employee harassment policy and procedures?

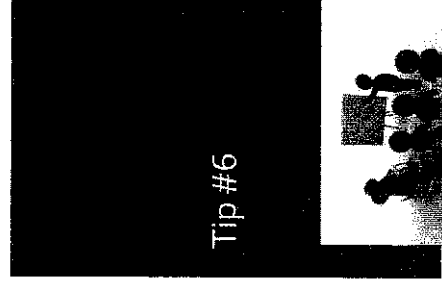
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• Coordinate training of Title IX personnel.

- Remember: Preventing Sexual Violence in Higher Education Act training requirements still apply.
- Post training materials on college website.

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• Employee Sexual Harassment Policies and Procedures will likely have to be revised to comply with the Department's Final Rules on Title IX.

- Educational Institutions should also review collective bargaining agreement language regarding sexual harassment process and procedure.
- Employees charged with investigating sexual harassment complaints involving employees must be trained.

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Questions?