

Final Regulations Implementing Title IX of the Education Amendments of 1972

On May 6, 2020, the Secretary of Education acted to amend 34 C.F.R. Part 106¹, which regulates the implementation of Title IX of the Education Amendments of 1972 (Title IX)². Title IX prohibits discrimination on the basis of sex in education programs that receive Federal financial assistance. The final regulations, which are effective August 14, 2020, specify how recipients of Federal financial aid covered by Title IX must respond to allegations of sexual harassment. Significantly, the new regulations adopt a new three-part definition of “sexual harassment” and revise recipients’ reporting obligations. Unlike decades of prior Federal guidelines, the newly implemented regulations are legally binding upon recipients of Federal financial assistance covered by Title IX.

New Terms under the Final Regulations

Significantly, the final regulations define or redefine the following terms, all of which are integral to understanding the new sexual harassment definition and reporting requirements: Actual Knowledge, Complainant, Elementary and Secondary Schools, Formal Complaint, Postsecondary Institution, Respondent, Sexual Harassment, and Supportive Measures.

A “complainant” is any individual who is an alleged victim of sexual harassment. A “respondent” is any individual who is the reported alleged perpetrator of sexual harassment. A “formal complaint” initiates a recipient’s grievance process. A “postsecondary institution,” otherwise referred to in the final regulations as a “recipient,” is any institution of undergraduate higher education, professional education, vocational education, or other higher education. A significant term not among those added or amended in the final regulations is “Title IX Coordinator.” The Title IX Coordinator is an employee designated by the recipient as having significant responsibility for Title IX compliance efforts. A recipient must designate at least one employee to serve as its Title IX coordinator.³

Sexual Harassment under the Final Regulations

The final regulations adopt a three-part definition of sexual harassment, which incorporates the United States Supreme Court's formulation of actionable sexual harassment with other recognized sexual harassment categories.⁴ The three-part definition consists of the following:

1. The sexual harassment definition phrasing observed by the United States Supreme Court in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999);
2. The definitions of sex-based violence set forth in the Clery Act⁵ and Violence Against Women Act ("VAWA");⁶ and
3. The definition of "quid pro quo," as recognized in previous Department guidance and Federal jurisdiction case law.

The Davis Court determined that because there is an implied private right to education under Title IX, private damage actions might lie against recipients that act with deliberate indifference to sexual harassment that prevents victims from enjoying educational opportunities. The Davis Court went on to define sexual harassment as unwelcome conduct that a reasonable person would determine is "so severe, pervasive, and objectively offensive" that it effectively denies a person equal access to education.⁷

Second, the Clery/VAWA scheme expands the definition of sexual harassment to include single instances of sexual assault, dating violence, domestic violence and stalking. The Department's inclusion of these four Clery Act offenses does not require those sex offenses to meet the aforementioned Davis elements of severity, pervasiveness, and objective offensiveness. The rationale for the final regulations' inclusion of the Clery/VAWA offenses is to capture incidences of sexual assault, dating violence or domestic violence that would not ordinarily meet the pervasiveness threshold outlined in Davis.

Third, the final regulations' sexual harassment definition also incorporates "quid pro quo" harassment. "Quid pro quo" harassment includes any claim that an alleged perpetrator of sexual harassment conditioned academic advancement upon submission to sexual demands.⁸

Notably, the Department stated that it “did not disagree”⁹ with commenters’ observations that the final regulations’ three-part definition of sexual harassment is “narrow” or even “stringent” relative to previous Department guidance. The Department, however, contends that “as a whole, the range of conduct prohibited under Title IX is adequate[.]”¹⁰

Conditions that Require a Recipient to Respond Under the Final Regulations

Current Title IX guidelines generally mandate that faculty, administrative personnel, athletic directors, coaches and other institutional personnel report any instance of sexual harassment to a recipient’s Title IX office or appropriate officials. A formal complaint is not presently necessary to trigger mandatory reporting. The final regulations, however, would only require an official with “authority to institute corrective measures” to report an instance of sexual harassment and only after a formal complaint of sexual harassment has been lodged.

To that end, the final regulations adapt reasoning discussed in two Supreme Court cases, i.e., the aforementioned Davis case and *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998), into a three-prong reporting framework. The Davis/Gebser framework consists of the two conditions that must exist to trigger a recipient’s response obligations (actionable sexual harassment, the recipient’s actual knowledge) and the deliberate indifference liability standard, which evaluates the sufficiency of a school’s response. The first prong requires the occurrence of an act of actionable sexual harassment as newly defined by the final regulations.

The second prong or condition is actual knowledge, which the final regulations state is any notice to a recipient’s Title IX Coordinator. Distinct from previous guidance is the abandonment of the “reasonable employees” rubric. Previous Department guidance stated that a responsible employee is any employee who:

1. had the authority to take action to redress harassment;

2. had a duty to report harassment to appropriate school officials; or
3. an individual who a student could reasonably believe has the authority to redress or report harassment.

Under the final regulations, the latter two categories of so-called “mandatory reporters” are no longer recognized.

With respect to postsecondary education, only notice to the Title IX Coordinator or any official with authority to redress sexual harassment conveys actual knowledge to the recipient. The final regulations refer to such officials as “officials with authority” and provides postsecondary institutions autonomy to decide which of its employees must, may, or must only with a student’s consent, report sexual harassment to the recipient’s Title IX Coordinator. All reports to the Title IX Coordinator trigger the recipient’s response obligations, regardless of who makes the report. In other words, the only officials with an obligation to report sexual harassment to the Title IX Coordinator are those with authority to institute corrective measures on behalf of the recipient.

The third and final prong is the deliberate indifference or liability standard. The deliberate indifference standard ensures that recipients respond to sexual harassment by offering specific supportive measures designed to restore or preserve a complainant’s equal educational access but without treating a respondent as responsible until after a fair grievance process.

The final regulations may ultimately have the effect of substantially curtailing the number of so-called mandatory reporters. Significantly, the final regulations indicate, without explicitly stating, that the Department no longer recognizes athletics coaches as per se “officials with authority” with a duty to report sexual harassment. Many commenters expressed concern regarding this change in light of the plethora of high-profile instances of severe Title IX violations that have occurred within nationally recognized collegiate athletic programs.¹¹

Key Developments and Changes to the Title IX Framework

New Sexual Harassment Definition: The final regulations define sexual harassment as (1) any unwelcome conduct on the basis of sex that is severe, pervasive, and objectively offensive, (2) sexual violence or stalking recognized by Clery/VAWA, or (3) “quid pro quo” sexual harassment.

Fewer Mandatory Reporters: Only individuals with actual authority to redress sexual harassment must report such conduct to a recipients’ Title IX coordinator. Individuals who a student could reasonably believe have the authority to redress or report harassment (e.g., athletics coaches, faculty, etc.) are no longer mandatory reporters.

Comment: Educational institutions covered by Title IX need to review the Education Department’s newly promulgated final regulations effective August 14, 2020, and implement the legal structure necessary to comply with the final regulations.

1. 83 F.R. 61462.
2. 20 U.S.C. § 1681 (“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance[.]”).
3. See 65 Fed Reg. 52867 § .135(a) Designation of responsible employee and adoption of grievance procedures.
4. The Department’s stated goal in promulgating this new definition is to meet Title IX’s broad non-discrimination mandate. 83 F.R. 61462.
5. 20 U.S.C. § 1092(f).
6. 42 U.S.C. § 13701, et al.
7. Davis, 526 U.S. at 650.
8. See *Alexander v. Yale University*, 459 F.Supp. 1, 4 (D. Conn. 1977), aff’d 631 F.2d 178 (2d Cir. 1980).
9. 83 F.R. 61462, at 430.

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10. Id.

11. [1] Negley, Cassandra, MSU fined record \$4.5 million in Larry Nassar scandal; provost resigns in aftermath, Yahoo! Sports, September 5, 2019; Kenny Jacoby, NCAA looks the other way as college athletes punished for sex offenses play on, USA Today Network, December 16, 2019.

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