

# TITLE IX SEXUAL HARASSMENT FINAL RULE SUMMARY & ANALYSIS

This document provides a summary and analysis of the U.S. Department of Education’s Title IX sexual harassment Final Rule published May 19, 2020.

The Final Rule, when it becomes affective, will revised regulations by which all colleges receiving federal funds must comply under Title IX of the Civil Rights Code. It primarily deals with the elements of sexual harassment that fall under Title IX.

**Effective date:** The effective date for the new Final Rule is August 14, 2020 meaning colleges have until then to make necessary changes to their practices to be in compliance (unless legal action results in a delay or postponement, which is likely).

Note while this Final Rule applies to all education institutions falling under federal jurisdiction of the Civil Right Act, this summary will just focus on colleges.

## Previous SAHEC policy group actions:

- We asked for a delay of the effective date. Although this was acknowledged in the Final Rule posting, the delay was only for two weeks (August 1-14).
- We submitted an extensive comment to the Proposed Rule. A breakdown on those comments will be done in the summary section.

<b>GENERAL PRINCIPLES .....</b>	<b>3</b>
Relations to previous.....	3
College responsibilities, not civil or criminal avenues.....	3
College’s responsibility to respond .....	3
Title IX actions must be Constitutional .....	3
Big takeaway .....	4
<b>DEFINING RESPONSIBILITY .....</b>	<b>4</b>
Definition for sexual harassment under Title IX.....	4
Where colleges are responsible .....	4
College responsibility kicks in when the college has “actual knowledge” .....	4
<b>GRIEVANCE PROCESS FOR FORMAL COMPLAINTS .....</b>	<b>5</b>
<b>OTHER PROVISIONS.....</b>	<b>6</b>
Codes of conduct or other preventative actions.....	6
Supportive measures and disciplinary sanctions .....	7
Religious exemption .....	7
Emergency removal.....	7
Consolidation of cases.....	7
Retaliation .....	7
Confidentiality .....	8
Recordkeeping.....	8
Consequence of non-compliance – monetary damages.....	8

# TITLE IX SEXUAL HARASSMENT FINAL RULE SUMMARY & ANALYSIS

<b>KEY DIFFERENCES BETWEEN FINAL RULE AND PROPOSED RULE .....</b>	<b>8</b>
No “safe haven” provision.....	8
Refines definition of sexual harassment .....	8
College responsibility where and to whom.....	9
Clarifies college’s responsibility as to the Title IX Coordinator .....	9
Clarifying who can and how to report sexual discrimination.....	9
College’s response responsibilities .....	9
Privacy protections.....	10
Live hearing .....	10
Standard of evidence same as non-sexual discrimination cases .....	11
Appeal process clarifications.....	11
Informal resolution conditional approval .....	11
Retaliation protection .....	11
<b>SAHEC POLICY GROUP PROPOSED RULE COMMENTS .....</b>	<b>12</b>
Following standards of Supreme Court decisions in <i>Gebser</i> and <i>Davis</i> .....	12
Definition of covered sexual harassment.....	12
Within program or activity .....	12
Actual knowledge .....	12
Use of the term “trigger” .....	13
Non-victim filer/complaint – does not allow .....	13
Title IX Coordinator workload .....	13
Department’s investigatory authority.....	13
Action to prevent future harm .....	13
Number of individuals required .....	13
Duration.....	13
No identity shield provision .....	14
In-person cross examination, cross examination by a third person, and other court like provision.....	14
Standard of evidence.....	14
Informal resolution.....	14
Recordkeeping.....	14
Constitutional protections .....	14
FERPA.....	15
Title IX not infringed by Title VII protections .....	15
§ 106.8 Designation of coordinator, dissemination of policy, and adoption of grievance procedures.....	15
Other requests .....	15

# TITLE IX SEXUAL HARASSMENT FINAL RULE SUMMARY & ANALYSIS

## GENERAL PRINCIPLES

### Relations to previous

This new Final Rule updates the Department’s interpretation of the requirements of colleges and elementary and secondary schools under Title IX of the Civil Rights Act. They supplement what was posted in 2001 as Guidance and a 2011 Dear Colleague Letter that was withdrawn by the Trump Administration (although, in the posting for the Final Rule, it notes things not in conflict with this Final Rule in those documents remains “viable policies and procedures for recipients to adopt.”)

### College responsibilities, not civil or criminal avenues

The focus of this new Final Rule is on how colleges must respond to allegations of sexual harassment. This Final Rule does not infringe upon separate civil litigation or criminal charges being pressed, but rather sets out what the college’s responsibilities are when it comes to alleged student sexual harassment. As outlined in the posting of the Final Rule:

*These final regulations require recipients to offer supportive measures to every complainant, irrespective of whether the complainant files a formal complaint. Recipients may not treat a respondent as responsible for sexual harassment without providing due process protections. When a recipient determines a respondent to be responsible for sexual harassment after following a fair grievance process that gives clear procedural rights to both parties, the recipient must provide remedies to the complainant.*

### College’s responsibility to respond

Once there has been sexual harassment, as defined in the Final Rule, and once the college has “actual knowledge,” it is the responsibility of the college not to exhibit “deliberate indifference” by not proceeding despite it being clearly unreasonable in light of the known circumstances not to do so. The Final Rule then goes further to actually put into regulation what a reasonable college should do under the circumstances. By following the process as outlined in the Final Rule, a college is deemed to have acted proper and thus without “deliberate indifference.”

- A Title IX Coordinator sharing about supportive measures, the option of not filing a complaint, and discussing the complaint process does not factor into “deliberate indifference,” meaning that if after those actions are taken and a student does not file a complaint, the college is not responsible to take action.

### Title IX actions must be Constitutional

The Final Rule makes a point that any actions taken under Title IX can be challenged on the grounds that they violate a Constitutional protection, such as, for students at public institutions, those protections granted under First, Fifth, and Fourteenth Amendments, and Constitutional required Due Process for all students.

# TITLE IX SEXUAL HARASSMENT FINAL RULE

## SUMMARY & ANALYSIS

### Big takeaway

Title IX procedures and related responsibilities of colleges are only initiated if a college student files a complaint or if a Title IX Coordinator feels justified in moving ahead without consent of the alleged student victim and signs a formal complaint. If the student does not file the complaint or the Title IX Coordinator does not sign a complaint, no further action by the college is required.

## DEFINING RESPONSIBILITY

### Definition for sexual harassment under Title IX

- “Severe, pervasive, and objectively offensive conduct that effectively denies a person equal educational access.”
- It also adds to that “*quid pro quo* harassment and Clery Act/VAWA sex offenses” “without [emphasis added] needing to be evaluated for severity, pervasiveness, offensiveness, or denial of equal access.”
  - These offenses include sexual assault, dating violence, domestic violence, and stalking.
- The Department takes note that this definition is not equivalent to the workplace sexual harassment definition, noting that colleges require a different definition due to their purpose of facilitating the free and robust, and open exchange of ideas and the notion that “students enjoy personal freedom during their higher education experience and it is not common for an institution to prohibit or discourage students from engaging in romantic interactions in the college environment.”

### Where colleges are responsible

- Acts occurring “within the United States.”
- “[L]ocations, events, or circumstances over which the [college] exercised substantial control over both the [accused student] and the context in which the sexual harassment occurs.”
  - “[A]lso includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.”

### College responsibility kicks in when the college has “actual knowledge”

- Actual knowledge extends to include notice to any college Title IX Coordinator.
  - This is meant respecting the autonomy of students at postsecondary institutions to decide whether or when to report sexual harassment.
- The Final Rule denotes the responsibility of the college to its actions, thus it must be aware of its action for a violation. It is not the actions of “employees, students, or other third parties” that initiates Title IX responsibilities of the college.
- This dismisses the concepts of vicarious liability (*respondent superior*) and constructive notice as the basis of liability. It also does away with the principle of “should have known.”
- The Final Rule undoes the “responsible employees” definition from previous guidance, but in effect reduces that to only those who have “the authority to take action to redress the harassment,” but not extending to those who have “the duty to report to the appropriate school officials sexual

# TITLE IX SEXUAL HARASSMENT FINAL RULE

## SUMMARY & ANALYSIS

harassment or any other misconduct by students or employees” or those “who a student could reasonably believe has this authority or responsibility.”

- Authority to institute corrective measures on behalf of the college is not met by the “mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so.”
- It also separates out from elementary and secondary schools by, for colleges, requiring the extra step of an actual complaint being filed.
- The Final Rule aims to give colleges and victims a good bit of leeway.
  - For example, colleges can designate who are mandatory reporters (must report what they have heard or seen to Title IX Coordinator) and those that can be made aware of an incident and not have to report it or need the victim’s permission to so report.
  - College students have the leeway to have a report filed or not, and if not, NO Title IX obligations will initiate the Title IX formal process requirement of the college, unless the Title IX Coordinator reasonably, under the circumstances, goes forward by signing a formal complaint without agreement from the alleged victim.
    - The Title IX Coordinator must take into account the wishes of a complainant and only initiate a grievance process against the complainant’s wishes if doing so is not clearly unreasonable in light of the known circumstances.

### GRIEVANCE PROCESS FOR FORMAL COMPLAINTS

The Final Rule aims to provide similar processes and rights for both the accused and the alleged victim. While it recognizes differences for elementary and secondary schools, all colleges are required to meet the full process requirements outlined in the Final Rule, whether it is a private, public, large, or small college. Requirements include (*italics outline new requirements*):

- “Any provisions, rules, or practices other than those required by this section that a recipient adopts as part of its grievance process for handling formal complaints of sexual harassment . . . must apply equally to both parties.”
- Written notice of allegations to both parties and when presence during the process is invited or expected, including any meeting, interview, or hearing conducted as part of the investigation or adjudication.
- Informing of all parties about the college’s procedures, including what level of evidence is being used.
  - *NOTE: College can set their own standard of evidence (what is required to make a finding) as either “clear and convincing” or “preponderance of the evidence,” but must use the same standard in all sexual harassment cases, whether involving a student or an employee, including faculty.*
- The college having the burden of proof and burden of gathering evidence.
- Providing both parties the opportunity to review and respond to the evidence.
- The right of consent for disclosure of one’s medical, psychological, and similar treatment records.
- The right and equal time to present expert witnesses and facts and similar relevant evidence.

# TITLE IX SEXUAL HARASSMENT FINAL RULE

## SUMMARY & ANALYSIS

- The ability of discussing the case or gathering evidence.
- A live hearing where each party has the right to question the other party.
  - Parties may not directly question the other, but rather any questioning of a party or witness must be done by the opposing party's advisor.
  - All relevant questions and follow-up questions must be permitted.
    - The decision-maker(s) determine relevance.
    - "Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent."
  - Questioning must be direct, oral, and in real time.
    - Allows, at the request of either part, for use of closed-circuit televisions with the parties in separate rooms during questioning.
- The right to have an agent take part in the proceedings on one's behalf.
- That if the grievance is dismissed, knowing the reason why.
- The Title IX Coordinator, investigators, decision-makers, and informal resolution facilitators lack bias and conflicts of interest, and have been trained to serve impartially.
- A reasonable timeframe for completion.
  - *NOTE: Under this Final Rule, colleges may designate their own "reasonably prompt time frames."*
- Protecting legally recognized privileges.
- The final determination may not be made by the Title IX Coordinator or investigators.
- The right of appeal.
- Allowing for a facilitated informal resolution process as an option, except in cases of employee sexual harassment of a student, when both parties voluntarily agree.
- Maintaining of records.
- Publishing or making otherwise available to the public training materials for those involved in the formal Title IX process.

## OTHER PROVISIONS

### Codes of conduct or other preventative actions

The Final Rule notes that even if something does not fit within the definition in this Final Rule for sexual harassment or the knowledge is not met, it does not prevent the college from handling issues within their own codes of conduct or through their own preventative actions.

# TITLE IX SEXUAL HARASSMENT FINAL RULE

## SUMMARY & ANALYSIS

### Supportive measures and disciplinary sanctions

Supportive measures under this Final Rule cannot be punitive or disciplinary against any party, and disciplinary sanctions cannot be imposed against a respondent unless the college follows a grievance process as prescribed. The Final Rule lists actions that can be considered supportive: “counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus.”

- The college must maintain confidentiality about supportive measures to the extent possible.
- The Title IX Coordinator is responsible for coordinating and effective implementation.

### Religious exemption

Despite our objections, colleges run by religious institutions may continue to claim exemption from any provision of Title IX regulations before or even after a complaint has been filed.

### Emergency removal

The Final Rule allows for a college to remove a student from its “education program or activity on an emergency basis, provided that the [college] undertakes an individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal.”

- “This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act.”

### Consolidation of cases

The Final Rule allows for colleges to “consolidate formal complaints as to allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the allegations of sexual harassment arise out of the same facts or circumstances.”

### Retaliation

The Final Rule prohibits actions by the college or other person to “intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX . . . , or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing . . .”

- This includes: “charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by title IX . . .”
- The Final Rule notes retaliation is not constituted through:
  - “The exercise of rights protected under the First Amendment . . .”

# TITLE IX SEXUAL HARASSMENT FINAL RULE

## SUMMARY & ANALYSIS

- “Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding . . . provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.”

### Confidentiality

Colleges “must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.”

### Recordkeeping

Colleges must maintain certain materials for a period of seven years as outlined in § 106.45(b)(10) of the regulations as updated by this Final Rule.

### Consequence of non-compliance – monetary damages

While the Proposed Rule talked about removing the ability for the Department to impose monetary damages for violations, while allowing that monetary damages could still be levied for refusal to come into compliance, the Final Rule does not use the term “monetary damages.” Rather it states that the Department must take such remedial action as the Assistant Secretary deems necessary to remedy the violation, consistent with 20 U.S.C. 1682, which allows for the withholding of federal grants, loans, and contracts.

## KEY DIFFERENCES BETWEEN FINAL RULE AND PROPOSED RULE

### No “safe haven” provision

The Final Rule eliminates the provision that would have set out that if the college follows what the Rule prescribes for a response to a formal complaint, the college shall be deemed to have met the standard for an adequate response and thus is not subject to administrative action.

### Refines definition of sexual harassment

The Final Rule includes an expanded definition of sexual harassment by:

- Clarifying that the covered unwelcomed conduct is as “a reasonable person would determine.”
- Clarifying that the definition overlaps with the Clery Act and not just the Clery Act regulations
- Expanding to include “dating violence, domestic violence, or stalking as defined in the Violence Against Women Act (VAWA).”

# TITLE IX SEXUAL HARASSMENT FINAL RULE

## SUMMARY & ANALYSIS

### College responsibility where and to whom

The Final Rule:

- Makes clear that colleges are responsible for “[e]ducation programs or activities including locations, events, or circumstances over which the school exercises substantial control over both the [accused] and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is official recognized by a postsecondary institution.”
- States that the one making the complaint, at the time of the complaint, must be participating in or attempting to participate in the education program or activity of the school with which the formal complaint is filed.

### Clarifies college’s responsibility as to the Title IX Coordinator

Requires colleges:

- Not only designate, but also authorize at least one employee to serve as Title IX Coordinator and that employee must be referred to as such;
- Not only notify student employees, but also applicants for admission and employment and unions with the name and contact info for the Title IX Coordinator (again referred to by such title).

### Clarifying who can and how to report sexual discrimination

The Final Rule:

- Makes it clear that any person may report sexual discrimination, including sexual harassment, whether or not the person reporting is the alleged victim. The reporting can be done in person, by mail, by telephone, by electronic mail, or other means that results in the Title IX Coordinator receiving the person’s verbal or written report. The Final Rule also clarifies that the report does not have to come in during regular business hours and that the college must prominently display on their website the required contact information for the Title IX Coordinator.
- Also clarifies the complaint must be “filed” or “signed” by the Title IX Coordinator.
  - “A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator under the Final Rule, and by any additional method the school designates.
  - The phrase “document filed by a complainant” means a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the school) that contains the complainant’s physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint.
- Denotes that “[w] here the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party during a grievance process, and must comply with requirements for all Title IX personnel to be free from conflicts and bias.”

### College’s response responsibilities

The Final Rule:

- Adds the word “promptly” to describe how a school must respond.
- Also denotes that a school’s mandatory response must include:

# TITLE IX SEXUAL HARASSMENT FINAL RULE

## SUMMARY & ANALYSIS

- Offering supportive measures to the complainant (i.e., the person alleged to be the victim).
- The Title IX Coordinator promptly contacting the complainant to discuss the availability of supportive measures, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint.
- Following a grievance process that complies with the Final Rule before the imposition of any disciplinary sanctions or other actions that are not supportive measures, against a respondent.
- Must not restrict rights protected under the U.S. Constitution, including the First Amendment, Fifth Amendment, and Fourteenth Amendment, as a way of responding in a non-deliberately indifferent manner.

### Privacy protections

The Final Rule adds the following privacy protection for parties during a Title IX sexual harassment investigation: "The Final Rule states that the school cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the school obtains that party's voluntary, written consent to do so."

### Live hearing

The Final Rule clarifies that:

- The hearing, including such features as cross-examination, must be "live" and conducted "directly, orally, and in real time."
- Cross-examination is done by an advisor of the party's choosing and "never by a party personally."
- "Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker must first determine whether the question is relevant and explain any decision to exclude a question as not relevant."
- "If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the school's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party."
- "The decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions."
- "Live hearings pursuant to this paragraph may be conducted with all parties physically present in the same geographic location or, at the school's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other."
- Schools must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.

# TITLE IX SEXUAL HARASSMENT FINAL RULE

## SUMMARY & ANALYSIS

### **Standard of evidence same as non-sexual discrimination cases**

The Final Rule removes the requirement that a school “may employ the preponderance of the evidence standard only if the school uses that standard for conduct of code violations that do not involve sexual harassment but carry the same maximum sanction.” Rather a school’s grievance process must “state whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard, apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty.”

### **Appeal process clarifications**

The Final Rule clarifies that:

- The appeal process must be offered to both parties.
- The appeal may be of the determination of responsibility and “from a school’s dismissal of a formal complaint or any allegations therein, on the following bases: procedural irregularity that affected the outcome of the matter; new evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and/or the Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias that affected the outcome of the matter.”
- A school may offer an appeal equally to both parties on additional bases.

### **Informal resolution conditional approval**

The Final Rule clarifies that:

- A college cannot require, “as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints.”
- A college cannot require the parties to participate in informal resolution and may not offer informal resolution unless a formal complaint is filed.
- That “[a]t any time prior to agreeing to a resolution, any party has the right to withdraw from informal resolution and resume the grievance process with respect to the formal complaint.”
- Schools must not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

### **Retaliation protection**

Includes the retaliation protections described above.

# TITLE IX SEXUAL HARASSMENT FINAL RULE SUMMARY & ANALYSIS

## SAHEC POLICY GROUP PROPOSED RULE COMMENTS

### Following standards of Supreme Court decisions in *Gebser* and *Davis*

We argued these cases were not on point and thus should not be relied upon. The Final Rule still relies on them, although some changes were made in the Final Rule that did reflect issues we raised in the applications of the findings of these cases.

### Definition of covered sexual harassment

The Final Rule does make some favorable changes to the definition, such as:

- Aligning with Clery Act/VAWA offenses and denotes that in those cases and in quid pro quo cases having to show it rising to level that it “effectively denies a person equal access.”
- Seeming to clarify that “effective” and not “actual denial” is required and that it is not total or entire access, but that of “equal access.”
  - The explanatory section denotes that this allows for a variety of outcomes that meet the requirement of effective denial of equal access, denoting: “individuals react to sexual harassment in a wide variety of ways.”
  - The standard used to measure something meets the definition in a particular incident is “reasonable person in the complaint’s position.”
  - Examples given of potential evidence include skipping class to avoid a harasser, a decline in a student’s grade point average, or having difficulty concentrating in class.
  - The explanatory section makes clear that there must be a link to equal access as the Final Rule no longer supports the term “hostile environment.”
- The Final Rule does not address preventive care as our comment requested, but rather maintains that a formal grievance process, and thus most of the college’s responsibility to address a situation, is kicks in by either a formal complaint by a student or where the Title IX Coordinator feels a signed complaint is justified and then makes one.

### Within program or activity

We raised concerns about the vague terms in the Proposed Rule around “within a [college’s] program or activity.” These concerns were somewhat addressed by the updated “substantial control” and the inclusion of school recognized student organizations. What was not changed, despite our concerns, was any obligation extending to activities and campuses taking place outside the United States. The fact that colleges appear, as outlined in this Final Rule, to have no Title IX obligations to what takes place outside the United States still appears to be a major issue.

### Actual knowledge

The Final Rule makes it much clearer when a college has to take action by relying upon a narrow definition of “actual knowledge” and that occurring only when a student files a complaint, or a Title IX Coordinator feels a signed complaint is justified and then makes one. This removes ambiguity under Title IX regarding positions like those in residential life. At the same time, the Final Rule allows for colleges to

# TITLE IX SEXUAL HARASSMENT FINAL RULE

## SUMMARY & ANALYSIS

set their own rules and practices around who must report what to whom and when it is separate of Title IX.

### **Use of the term “trigger”**

The Department did not heed our comment and continues to use the word ‘trigger’ throughout its explanatory material, but the word does not appear in the Final Rule itself.

### **Non-victim filer/complaint – does not allow**

The Final Rule continues to only allow the alleged victim or the Title IX Coordinator to file a complaint and not non-victim/complaints, but does somewhat address our concerns relating to such by eliminating the “safe harbor” provision included in the Proposed Rule.

### **Title IX Coordinator workload**

The Department does not address the issue of Title IX Coordinator workload, such as recommending or requiring a ration of Coordinators to students, other than to say its Final Rule is meant to be applied regardless of size of college.

### **Department’s investigatory authority**

The Final Rule does not include our recommended language clarifying that even though corrective action cannot be instituted by the Department based on disagreeing with a proceeding’s determination/finding, when such determination/finding seems to hold little basis, further scrutiny of the process may be called for, and it should be clear that such further scrutiny, itself, is not barred under the Final Rule.

### **Action to prevent future harm**

While the Final Rule does not go as far as we recommended in allowing colleges to take corrective actions, it does change the presumptive language and makes clearer what actions a college can take to prevent future harm and allows for emergency actions to take place. Outside of emergency actions, no action can be seen as punitive to either party outside unless there has been a finding of guilt through the formal process. This would prevent, for example, preemptive moves of changing the room or class, of an accused perpetrator without their consent.

### **Number of individuals required**

The Final Rule does not change the number of individuals needed for a formal program to address our concerns about small colleges. Instead, the Department denotes that this Final Rule applies to all colleges regardless of their size.

### **Duration**

The Final Rule does not provide clearer guidance, after removing the 60 day rule, on what a college might consider a reasonable period of time.

# TITLE IX SEXUAL HARASSMENT FINAL RULE

## SUMMARY & ANALYSIS

### **No identity shield provision**

The Final Rule does not take up our concerns relating to revealing the identity of the alleged victim, but rather continues to the Proposed Rule's interpretation of the Due Process requirement requiring that such information be made available to all parties as part of the formal grievance process. The Final Rule does make clear that the provision of many rape shield laws, that past experience, in most cases, cannot be brought up during questioning, applies.

- *Note: It is unclear whether the Title IX requirements for sharing of identities of the parties as part of the formal grievance process might conflict with state rape shield prohibitions on sharing the names of alleged victims.*

### **In-person cross examination, cross examination by a third person, and other court like provision**

The Final Rule takes some steps to address some of the concerns raised regarding the court like nature of the formal grievance process, but does not fully deal with our concerns that by allowing the parties to pick their own agents that "attack dog" type agents could be the result. The Final Rule also makes it even clearer that colleges, regardless of size and financial capabilities, need to have the technological capabilities to carry out close circuit hearing and recording of proceedings. Lastly, it does not include the inclusion of hearsay exemptions, as we requested.

### **Standard of evidence**

The Final Rule does modify the provision around standard of evidence, such as delinking it to other non-Title IX issues, but still requires all Title IX proceedings to follow the same standards regardless of whether an employee is a party or not and thus potentially linking student Title IX standards to provisions in negotiated labor contracts.

### **Informal resolution**

The Final Rule does take steps to ensure that the consent to informal resolution is informed and voluntary and does provide some guidance on how the process should be employed, but does not allow for a distinction/special consideration for incidents involving alleged violent acts for which our comments asked.

### **Recordkeeping**

The language in the Final Rule language does seem address our concerns about confusion on when the time count starts, such as not explicitly stating when the seven year starts.

### **Constitutional protections**

The Final Rule continues to single out Constitutional protections, despite our comment that the Rule should make it clear that the Rule or actions prescribed by such must not conflict with any protection of the Constitution.

# TITLE IX SEXUAL HARASSMENT FINAL RULE SUMMARY & ANALYSIS

## **FERPA**

Despite our comment, the FERPA provision in section 106.6 was maintained in the Final Rule.

## **Title IX not infringed by Title VII protections**

The Final Rule maintains the language, “Title VII of the Civil Rights Act of 1964. Nothing in this part may be read in derogation of any individual’s rights under title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. or any regulations promulgated thereunder.”

## **§ 106.8 Designation of coordinator, dissemination of policy, and adoption of grievance procedures.**

Much of our concerns in this section were unaddressed in the Final Rule. It is still rather formal, still uses the word “stating” rather than “suggesting,” and continues to restrict Title IX to actions in the United States.

## **Other requests**

The Final Rule does not take on our comments around special treatment of multiple alleged, but then withdrawn allegations, or for severity of the allegations, nor does it provide protections for transgendered students.