

In Brief

U.S. DEPARTMENT OF EDUCATION RELEASES FINAL TITLE IX RULES

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On May 6, 2020, the U.S. Department of Education released its [final Rules](#) governing how educational institutions must address allegations of sexual harassment and assault under Title IX of the Education Amendments of 1972. The Rules, which go into effect on August 16, 2020, will require significant revisions to institutional policies and grievance procedures, as well as training for employees.

Among some of the final Rules' key provisions are the following:

1. **A narrowed definition of sexual harassment** – namely, “unwelcome conduct [on the basis of sex] determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the educational institution’s educational program or activity.” This definition is significantly narrower than that in previous Office for Civil Rights guidance, which defined sexual harassment as harassment that is “sufficiently serious that it interferes with or limits a student’s ability to participate in or benefit from the school’s program.”
2. **A requirement that educational institutions are obligated to respond only to alleged sexual harassment of which they have “actual knowledge.”** This requirement departs from previous guidance, which required educational institutions to respond to alleged sexual harassment about which they “knew or should have known.”
3. **A limitation on the categories of individuals whose knowledge is sufficient to trigger an investigatory obligation for higher education institutions.** A higher education institution will be deemed to have actual knowledge only when the person who receives the report of alleged harassment is “an official with authority to institute corrective measures on behalf of the [institution].” For elementary and secondary schools, a school will still be deemed to have actual knowledge if alleged harassment is reported to any employee at the school.
4. **A provision allowing institutions to choose the standard of proof to be applied in sexual harassment investigations.** Educational institutions may apply either a preponderance of the evidence standard or a clear and convincing evidence standard in determining responsibility for alleged sexual harassment.
5. **Provisions governing educational institutions’ sexual harassment investigation and determination procedures.** At the higher education level, a final determination must be made following a live hearing which allows for cross-examination. In elementary and secondary schools, a hearing is not required, but the parties must be allowed to submit written questions to test the credibility of the other party and of witnesses before a decision is made.

6. **More expansive due process protections for individuals accused of sexual harassment.** For example, an educational institution's grievance procedures must include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process. In addition, the Rules provide that any supportive measures offered before or after the filing of a formal complaint, or where no formal complaint has been filed, must be "non-disciplinary" and "non-punitive," emphasizing that an institution may not punish an accused person prior to a determination regarding responsibility.

Stay tuned for additional Robbins Schwartz publications regarding the new Rules. In addition, for an in-depth analysis of the Rules and recommendations on steps that institutions should take to prepare for implementation, Robbins Schwartz will be hosting separate webinars for K-12 schools and higher education institutions in the coming weeks. Should any questions arise in the meantime, please contact the author of this Law Alert or any Robbins Schwartz attorney.