

## HMBR Summary: Key Provisions in the New Title IX Regulations on Sexual Harassment

On May 6, 2020, the U.S. Department of Education released its much anticipated final Title IX regulations on sexual harassment. These new regulations amend the current regulations for implementing Title IX of the Education Amendments of 1972 (Title IX). The effective date of the final regulations is August 14, 2020. The Department's press release, the final regulations and analysis, and related documents, and a video are available [here](#).

We hope that the following summary of the final Title IX regulations will be useful to colleges and universities as they consider what changes are needed to ensure compliance with the final Title IX regulations. Please note that this summary will be posted on our website, and will be updated as appropriate as we continue to closely review the final regulations and analysis. The information provided in this summary is for your general information and is not intended to constitute legal advice for any specific institution.

We understand that the issuance of these final Title IX regulations comes at a particularly difficult time for colleges and universities due to the ongoing COVID-19-related challenges. We also recognize that many colleges and universities have already devoted substantial resources to building their Title IX compliance programs based upon previous law and policy guidance in this area. Many of the requirements of the final Title IX regulations were contained in the *Interim Guidance on Campus Sexual Misconduct*, issued by the Department's Office for Civil Rights (OCR) in September 2017. Thus, these requirements from the *Interim Guidance* should already be incorporated into the current Title IX compliance programs of colleges and universities. However, other provisions in the final Title IX regulations are new and will require that colleges and universities make significant changes to their current policies, procedures and organization. These include the use of the deliberate indifference standard, the revised definition of sexual harassment and the more limited scope of sexual misconduct that triggers an obligation under Title IX for response by the school, and the requirement for live hearings with the opportunity for cross examination.

Moving forward, we believe that the best strategy for colleges and universities is a "Title IX plus" approach whereby colleges and universities review and revise their policies, procedures and structures in a manner that both ensures compliance with Title IX *and* builds upon their previous accomplishments, institutional values and commitments relating to campus safety. In the final regulations, the Department specifically recognizes that some sexual misconduct may fall outside the scope of the final Title IX regulations and that recipients may use other non-Title IX disciplinary procedures to address this conduct.

We offer our recommendation for a "Title IX plus" approach to sexual misconduct because the culture on college campuses has fundamentally changed in the past decade. Today, students, their parents, and college communities expect that their institutions will have robust, fair and effective sexual misconduct policies and procedures, which may go beyond what the final Title IX regulations require. In addition, educational institutions need to be mindful that their obligations to respond to sexual misconduct are not limited to the nondiscrimination requirements in Title IX and that even these requirements are subject to change in the future. Other state and federal laws may apply, including the federal Clery Act and the Violence Against Women Act (VAWA) (also enforced by the Department, with heavy fines possible), state



## HMBR Summary: Key Provisions in the New Title IX Regulations

and local sexual harassment regulations, federal and state case law on constitutional due process, contract, and tort “duty of care” claims and heightened scrutiny of campus sexual misconduct issues by organizations such as the National Collegiate Athletic Association (NCAA) and the National Science Foundation, as well as other federal agencies.

### Why the Final Title IX Regulations are Significant

With the final Title IX regulations, the Trump Administration has *recalibrated* the scope of Title IX and the role of the federal government in campus sexual misconduct – both expanding and contracting previous Title IX policy guidance. Importantly, while the Department has long viewed the sexual harassment of students and employees as a form of sex discrimination prohibited by Title IX, the final regulations mark the first time in the history of the Title IX statute that the Title IX regulations themselves prohibit sexual harassment in education programs and activities. By issuing regulations, rather than new policy guidance, the Department is essentially using a Sharpie pen to more permanently lay out this administration’s view of what types of sexual misconduct constitutes illegal “sexual harassment” under Title IX and when a school’s response (or lack of response) to sexual harassment will be found by OCR to have violated federal civil rights law.

### What the Final Title IX Regulations Require

Importantly, the final Title IX regulations raise the liability standard – to deliberate indifference - for when OCR may find that a school has engaged in sex discrimination in violation of Title IX for the way that it did or did not respond to sexual harassment. The deliberate indifference standard has been used in private Title IX litigation for many years, as required by the U.S. Supreme Court’s decisions in *Gebser v. Lago Vista School Dist.* (1998) and *Davis v. Monroe County Bd. of Ed.* (1999). With the Title IX regulations, deliberate indifference will be the standard for determining a recipient’s liability under Title IX in both private litigation and in OCR investigations and administrative proceedings.

The final Title IX regulations amend several existing Title IX regulations and also include two new major Title IX regulatory provisions: Section 106.44 and Section 106.45. Together with the amended definitions in Section 106.30, these two new provisions set forth the requirements for when and how colleges and universities must respond to campus sexual misconduct under the final Title IX regulations.

#### **A. Recipient’s Response to Sexual Harassment (34 C.F.R. § 106.44)**

Under Section 106.44, the Department has narrowed the circumstances under which educational institutions may be held responsible by OCR for responding to sexual harassment. Section 106.44 states that, generally, ***a recipient with actual knowledge of sexual harassment in a recipient’s education program or activity against a person in the United States must respond in a manner that is not deliberately indifferent.*** A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances. Previous OCR policy guidance provided that, whether or not a student files a complaint of alleged sexual misconduct or otherwise asks the school to take action, where the school knows or reasonably should know of an incident of sexual misconduct, the school must take steps to understand what occurred and to respond appropriately. Section 106.30 includes specific definitions of key terms in the above new language, including sexual harassment, formal complaint, actual knowledge, education program or activity, and supportive measures.



## HMBR Summary: Key Provisions in the New Title IX Regulations

Section 106.44 makes clear what sexual misconduct will be considered within the scope of Title IX's protections. As with prior policy guidance, the final regulations define **sexual harassment** to include sexual assault and quid pro quo harassment, as well as other forms of sexual misconduct that constitute a sexually hostile environment. However, the Department has revised its previous definition of hostile environment for Title IX proposes to include only unwelcome conduct determined by a reasonable person to be so severe *and* pervasive *and* objectively offensive that it effectively denies a person equal access to a recipient's education program or activity. In addition, the Department has added domestic violence, dating violence and stalking to the definition of sexual harassment; these categories (as well as sexual assault) are defined by reference to VAWA.

The final regulations also specify that a **formal complaint** means a document that is filed and signed by a complainant (with a physical or digital signature) or the Title IX Coordinator and requests the recipient to investigate the allegation of sexual harassment against the respondent. The definition states that, at the time of filing a formal complaint, a complainant must be a participant or attempting to participate in the education program or activity of the recipient.

The definition of **actual knowledge** states that this term means allegations or other notice of sexual harassment to a Title IX Coordinator or "any official of the recipient who has the authority to institute corrective measures on behalf of the recipient." A responsible employee's obligation to report sexual harassment does not qualify that employee as someone who has the authority to take corrective measures on behalf of the recipient. The final regulations also state that "notice" as used in this provision includes, but is not limited to, a report of sexual harassment to the Title IX Coordinator.

Section 106.44 states that (for purposes of this Sections 106.30, 106.44 and 106.45) **education program or activity** includes locations, events, or circumstances "over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution." As noted, the Section 106.44 provision also requires that the action be taken **against a person in the United States**.

Unlike the proposed regulations, the final Title IX regulations do not include any so-called "safe harbors" for recipients. Instead, the final regulations require that recipients follow the specific requirements in Section 106.45 in response to a formal complaint before imposing discipline or any other action (other than supportive measures) against a respondent. The regulations further state that, with or without a formal complaint, recipients must respond promptly in a manner that is not deliberately indifferent.

The regulations require that recipients offer **supportive measures** to the complainant or respondent as appropriate as reasonably available, and without fee or charge before or after the filing of a formal complaint or where no formal complaint has been filed. The requirements relating to supportive measures (previously termed, "interim measures") are substantially the same (with some further clarification) as in previous Title IX policy guidance. The Title IX Coordinator is responsible for the "effective implementation" of supportive measures. Section 106.30 defines supportive measures as non-disciplinary, non-punitive and individualized services designed to restore or preserve access to the recipient's education program or activity, without unreasonably burdening the other party, including measures designed to protect the safety of all parties and the recipient's educational environment or to deter sexual harassment.



## HMBR Summary: Key Provisions in the New Title IX Regulations

The regulations list the following as examples of supportive measures: 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, and other similar measures. Section 106.30 also specifically requires the recipient to maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the institution to provide the supportive measures. Section 106.44 adds that the Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures with or without the filing of a formal complaint, “consider the complainant’s wishes with respect to supportive measures,” and explain the process for filing a formal complaint.

Section 106.44 also includes new specific provisions specifically providing that Title IX does not preclude a recipient from placing a non-student employee respondent on administrative leave during the pendency of a grievance process that complies with Section 106.45 or from removing a respondent from the recipient’s education program or activity on an emergency basis. In the later situation, a recipient must conduct an individualized safety and risk analysis, determine whether an immediate threat to the health or safety of students or employees justifies removal, and, if so, provide the respondent with notice and an opportunity to challenge the decision immediately following the removal.

Finally, the Department declined to include a definition of *consent* in the final regulations, stating that OCR will not require recipients to adopt a particular definition of consent with respect to sexual assault.

### **B. Grievance Process for Formal Complaints of Sexual Harassment (34 C.F.R. § 106.45)**

Section 106.45 prescribes a number of specific procedural requirements for responding to sexual harassment that falls within the scope of Title IX under Section 106.44 and therefore triggers an institution’s obligation to respond in a manner that is not deliberately indifferent. As noted, colleges and universities must follow the procedural requirements in Section 106.45 in response to a formal complaint of sexual harassment.

#### Dismissal of a formal complaint of sexual harassment

The final regulations require that, if the conduct alleged in the formal complaint would not constitute sexual harassment as defined in § 106.30 even if proved, did not occur in the recipient’s education program or activity, or did not occur against a person in the United States, the recipient must dismiss the formal complaint with regard to that conduct *for purposes of sexual harassment under Title IX and its implementing regulations*. Importantly the Department clarified that such a dismissal does not preclude action under another provision of the recipient’s code of conduct.

The regulations also provide that a recipient may dismiss a formal complaint or allegations in a formal complaint during an investigation or hearing in three specific circumstances:

1. The complainant requests in writing to withdraw the complaint or allegations;
2. The respondent is no longer enrolled or employed by the recipient; or
3. Specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.



## HMBR Summary: Key Provisions in the New Title IX Regulations

In these situations, the recipient must promptly send written notice of the dismissal and reason(s) for the dismissal simultaneously to the parties.

### Consolidation of formal complaints

The final regulations specifically allow recipient 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.

### Informal Resolution

This section specifically provides that recipients may use (but are not required to use) informal resolution (such as mediation) for formal complaints of sexual harassment, provided that the recipient gives written notice to the parties and obtains their voluntary, written consent. The notice must inform the parties as to the circumstances, if any, under which the recipient would preclude the parties from resuming a formal complaint. This provision is consistent with previous policy guidance, but is the first time that informal resolution has been specifically permitted by regulations. The final regulations specifically prohibit recipients from requiring any waiver of the right to an investigation and adjudication of formal complaints of sexual harassment. The final regulations also prohibit the use of informal resolution to resolve complaints that an employee sexually harassed a student.

### Basic requirements for grievance process

The grievance process used by a recipient for addressing formal complaints of sexual harassment must meet the “basic requirements for grievance process” set forth in the final regulations. The existing Title IX regulations already provide that recipients must provide a prompt and equitable resolution of Title IX sex discrimination cases. The final regulations essentially explain what the terms “prompt and equitable” mean in the context of a formal complaint of sexual harassment. The basic requirements listed in the final Title IX regulations are largely the same as requirements in previous policy guidance, with some clarifications and a final requirement that grievance process specifically include a presumption that the respondent is not responsible for the alleged conduct.

With respect to the promptness requirement, the final regulations require that grievance procedures for formal complaints of sexual harassment include “reasonably prompt timeframes for conclusion of the grievance process,” including the timeframes for filing and resolving appeals, and for the informal resolution process if a recipient offers informal resolution. The regulations do not include any specific number of days for what constitutes “reasonably prompt timeframes.” The regulation states that the timeframes may be extended temporarily for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action. The regulations state that “good cause” may include considerations such as the absence of a party, a party’s advisor or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities.



## HMBR Summary: Key Provisions in the New Title IX Regulations

With respect to the requirement that the grievance process provide an equitable resolution, the final regulations include the following “basic requirements.” Grievance process for formal complaints of sexual harassment must:

1. Treat complainants and respondents equitably. This requires that the recipient provide remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and the recipient follows a grievance process that complies with Section 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures against a respondent. Remedies must be designed to restore or preserve equal access to the recipient’s education program or activity. Such remedies may include the same individualized services as “supportive measures”; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent;
2. Require an objective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence – and provide that credibility determinations may not be based on a person’s status as a complainant, respondent, or witness;
3. Require that any individual designated by a recipient as a coordinator, investigator, informal resolution facilitator, or decision-maker not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.
4. 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;
5. Describe the range of possible disciplinary sanctions and remedies that the recipient may implement following any determination of responsibility;
6. Describe the standard of evidence (preponderance of the evidence or clear and convincing evidence) to be used to determine responsibility. Recipients must apply the same standard of evidence for formal complaints against students as for formal complaints against employees and apply the same standard of evidence to all formal complaints of sexual harassment.
7. Include the procedures and permissible bases for the complainant and respondent to appeal; and
8. Describe the range of supportive measures available to complainants and respondents.

The Department also added a final requirement relating to privileged information, which was not part of the proposed regulation. The requirement prohibits recipients from requiring, allowing, relying upon or otherwise using questions or evidence that may be privileged, unless the privilege is waived.



## HMBR Summary: Key Provisions in the New Title IX Regulations

### Initial and Ongoing Notice of the Allegations to the Parties

Section 106.45 includes specific requirements regarding the notice that must be provided to the parties (who are known) upon receipt of a formal complaint and on an ongoing basis if the recipient decides to include additional allegations during the course of the investigation. The regulations require that the notice inform the parties of the allegations that potentially constitute sexual harassment as defined under the final regulations and include the identities of the parties involved in the incident sufficient details about the allegations, including the identities of the parties if known, the conduct allegedly constituting sexual harassment, and date and location of alleged incident, if known. The regulations also require that the written notice include notice of the applicable grievance process and advise the parties that they may have an advisor of their choice and may inspect and review evidence obtained in the investigation. The written notice must also inform the parties of any provisions in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

### Investigation and Adjudication

The final Title IX regulations require that the recipient provide specific procedural protections to the parties throughout the investigation and adjudication processes for formal complaints of sexual harassment. This section contains major changes and clarifications relating to investigation and adjudication, including the requirement for a live hearing, clarification about the required standard of evidence, clarification of the access to evidence that must be provided to the parties, a specific prohibition on the decision-maker(s) being the same person(s) as the Title IX Coordinator or the investigator(s), and greater specification as to timing for providing the draft investigation report to the parties for review and response, as well as the content of the final written determination.

*Live hearings.* The most significant change in the Title IX requirements relating to investigation and adjudication is the final regulatory requirement that colleges and universities must provide for live hearings for formal complaints of sexual harassment. This means that schools may no longer use the single-investigator model for their sexual harassment cases. At the hearing itself, the recipient must allow direct cross-examination by the parties' advisors and "never by a party personally." The regulations state that if a party does not have an advisor present at the hearing, the recipient must provide that party with an advisor of the recipient's choice to conduct cross-examination on behalf of the party and the advisor may or may not be an attorney. (The final regulations drop the proposed language that an advisor must be "aligned with that party to conduct cross-examination.") The parties may request to have the cross-examination conducted with the parties in separate rooms with technology "enabling the decision-maker and parties to simultaneously see and hear the party answering questions." The final regulations also state that only "relevant" cross-examination or other questions may be asked of a party or witness and before an answer, the decision-maker must first determine whether the question is relevant and explain any decision to exclude questions as not relevant. As before, questions and evidence about a complainant's sexual predisposition or prior sexual behavior are not relevant except in limited and specified circumstances.

Further, in making a determination regarding responsibility, the decision-maker must not rely upon any statement made by a party or witness who does not submit to cross-examination at the hearing. The final regulations add that the decision-maker cannot draw a determination regarding responsibility based



## HMBR Summary: Key Provisions in the New Title IX Regulations

solely upon a party's or witness's absence from the hearing or refusal to answer questions or submit to cross-examination. Recipients are also required to create audio or audio visual recording or transcript of any live hearing and make it available to the parties. Finally, and particularly relevant during the current COVID-19 crisis, the regulation states that hearings may be conducted with all parties physically present in the same geographic location or, *at the recipient'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.

*Standard of Evidence.* Another significant development in the final Title IX regulations is that, as noted above, the Department has clarified that the standard of evidence to be used in reaching this determination may be either the preponderance of the evidence standard or the clear and convincing standard. The recipient must use the same standard for all sexual harassment proceedings, including student and employee conduct proceedings. The Department dropped the proposed requirement that a recipient must also use the same standard for other types of student or employee misconduct.

*Access to Evidence.* The final regulations require that recipients give both parties equal opportunity to inspect and review evidence obtained as part of the investigation. This general requirement (also contained in the VAWA regulations) was included in previous policy guidance, and the final regulations add more details to this requirement. The final regulations state that the evidence to be made available for inspection and review must be evidence that is directly related to the allegation in the investigation, evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility, and inculpatory and exculpatory evidence. The recipient must make all such evidence available at any hearing, so as to give the parties an opportunity to refer to such evidence during the hearing. Prior to completion of the investigative report, the recipient must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format *or hard copy* (this part is new) and give the parties at least ten days to submit a written response, which the investigator will consider prior to completion of the investigative report. The evidence must also be made available for inspection and review at a hearing.

*Decision-maker.* The final Title IX regulations specifically state that the decision-maker(s) in the investigations and adjudications of formal complaints of sexual harassment cannot be the same person as the Title IX Coordinator or investigator(s).

*Investigative Report.* Prior to the hearing, the recipient must prepare an investigative report that "fairly summarizes relevant evidence" and provide the investigative report to the parties at least ten days prior to a hearing (if a hearing is required) or other time of determination regarding responsibility for their review and written response.

Section 106.45 also includes the following additional requirements relating to the investigation and adjudication of sexual harassment complaints, most of which were largely contained in previous policy guidance:

1. Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties (with limitations noted relating to obtaining medical information);



2. Provide equal opportunity for the parties to present witnesses – *including fact and expert witnesses* (this part is new) --and other inculpatory and exculpatory evidence;
3. Not restrict the ability of either party (*e.g.*, through “gag orders” to discuss the allegations under investigation or to gather and present relevant evidence;
4. Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice; and
5. Provide written notice to the parties when their participation is invited or expected or required for hearings, investigative interviews, or other meetings. The notice must describe include the date, time, location, participants, and include a description of the purpose of the hearing, interview or meeting.

*Written Determination.* After the hearing, the decision-maker must issue a written determination regarding the responsibility of the respondent and any sanctions to the parties. The decision is to be issued to the parties simultaneously. The written determination must include:

1. Identification of the allegations potentially constituting sexual harassment;
2. A description of the procedural steps taken from the receipt of the complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;
3. Findings of fact supporting the determination;
4. Conclusions regarding the application of the recipient’s code of conduct to the facts;
5. A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient’s education program or activity will be provided by the recipient to the complainant; and
6. The recipient’s procedures and permissible bases for the complainant and respondent to appeal.

#### Sanctions and Remedies

OCR’s previous policy guidance specifically stated that disciplinary sanction decisions must be made for the purpose of deciding how best to enforce the school’s code of student conduct while considering the impact of separating a student from her or his education and that any disciplinary decision must be made as a proportionate response to the violation. Previous policy guidance also required that the “notice of outcome of disciplinary proceedings” include a description of any remedies provided to the complainant or sanctions imposed upon the respondent.

The final Title IX regulations do not include this same language. As noted above, the final regulations require that the “written determination” issued by a recipient must also include a “statement of, and rationale for, the result as to each allegation a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient’s education program or activity will be provided by the recipient to the complainant.” Further, Section 106.44 specifically states that a respondent must include follow the grievance requirements in Section 106.45 before imposing any disciplinary sanctions or any other action



## HMBR Summary: Key Provisions in the New Title IX Regulations

against a respondent. Under Section 106.45, grievance process for sexual harassment complaints must describe or list the range of possible disciplinary sanctions and remedies that a recipient may implement following a determination of responsibility. The written determination issued after a hearing must include a statement and rationale for any disciplinary sanctions against the respondent or remedies for the complainant. Finally, any disciplinary sanctions imposed on a respondent must be included in the recipient's records relating to sexual harassment investigations.

### Appeals

Unlike prior policy guidance, the final Title IX regulations now *require* that recipients offer both parties an opportunity to appeal the recipient's written determination regarding responsibility or the dismissal of a formal complaint. Notably, the regulations do not require or address the possibility of appeals of disciplinary sanctions issued against the respondent.

The final regulation also provides that an appeal may be based on:

1. Procedural irregularity that affected the outcome of the matter;
2. 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
3. Bias (for or against complainants or respondents generally or the individual complainant or respondent as well as a conflict of interest by the Title IX Coordinator, investigator(s), or decision-maker(s) that affected the outcome of the matter; and
4. Additional bases identified by the recipient and offered equally to both parties.

The recipient must give both parties a reasonable opportunity to submit a written statement in support of, or challenging, the outcome. The appeal decision-maker must issue (simultaneous to the parties) a written decision describing the appeal result and rationale for the result. The appeal decision-maker may not be the same person as the decision-maker(s) that reached the determination of responsibility or dismissal, the investigators or the Title IX Coordinator.

### Training

Section 106.45 include a specific requirement for the training of Title IX coordinators, investigators, and decision-makers and any person who facilitates an informal resolution process. Training must include the definition of sexual harassment under the new Title IX regulations, the scope of a recipient's education program or activity, and how to conduct an investigation and grievance process, including hearings, appeals, and informal resolution processes, as applicable. The regulations also specifically state that a recipient must provide training on "how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias." Recipients must also ensure that decision-makers receive training on any technology that will be used at a live hearing and on issues of relevance of questions and evidence. Training for investigator must address "issues of relevance to create an investigative report that fairly summarizes relevant evidence." The regulations state that any training must not rely on sex stereotypes and must promote impartial investigations and adjudications of sexual harassment. The recipient is further required to retain these training materials for seven years and to make the training materials publicly available on its website (or upon request, if the recipient does not maintain a website.)



## HMBR Summary: Key Provisions in the New Title IX Regulations

### Recordkeeping

Section 106.45 includes a specific requirement that recipients create and maintain for a period of seven years (increased from three years in the proposed regulations) records of each sexual harassment investigation (including any recordings or transcripts), any disciplinary sanctions imposed on the respondent or remedies provided to the complainant; any appeal and the results of the appeal; informal resolution, if any, and the results of informal resolution; and the materials used to train coordinators, investigators, decision-makers, and facilitators of informal resolution. A new part of the recordkeeping obligations for recipients is to make these training materials publicly available on its website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public.

The regulations also require that recipients create and maintain for a period of seven years records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment. The regulations further state that, “[i]n each instance,” the recipient must document “the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve access to the recipient’s educational program or activity.” If no supportive measures are provided to a complainant, the recipient must document the reasons “why such a response was not clearly unreasonable in light of the known circumstances.”

### **C. Title IX Coordinator, Nondiscrimination Notice, and Grievance Procedures (34 C.F.R. § 106.8)**

The final Title IX regulations make several technical amendments to the existing Title IX procedural requirements relating to the designation of a Title IX Coordinator, the Title IX nondiscrimination notice, and Title IX grievance procedures.

*Title IX Coordinator.* The final regulations continue to require that recipients designate at least one employee to coordinate the institution’s efforts to comply with its responsibilities under Title IX and notify all students and employees of the contact information for the Title IX Coordinator. The regulations provide that the notice should include, as before, the name or title, office address, and telephone number of Title IX Coordinator(s). The final regulations add that the email address of the Title IX Coordinator(s) must be included in the notice. As noted, Section 106.45 provides that the Title IX Coordinator cannot be the same person as the decision-maker(s) in formal complaints of sexual harassment. The final regulations also add that any person may file a verbal or written report of sex discrimination or sexual harassment to the Title IX Coordinator at any time, including during non-business hours.

*Nondiscrimination Notice.* The final regulations continue to require (as OCR has required in numerous resolution agreements) that recipients issue a notification of nondiscrimination that includes each of the following statements:

1. The recipient does not discriminate on the basis of sex in the education program or activity that it operates;
2. The recipient is required by Title IX and its implementing regulations not to discriminate in such a manner;
3. The requirement not to discriminate in the education program or activity extends to employment and admission; and



## HMBR Summary: Key Provisions in the New Title IX Regulations

4. Inquiries about the application of Title IX and its implementing regulations may be referred to Title IX Coordinator(s), OCR's Assistant Secretary, or both.

The final regulations simplify the required methods of distribution of the notice. Under the final regulations, recipients must prominently display a statement of the policy on their websites, if any, and in each handbook or catalog made available to persons entitled to a notification.

*Grievance Procedures.* The final regulations continue to require recipients to adopt and publish a grievance procedure that provide for the prompt and equitable resolution of *student and employee* complaints of any action that would be prohibited by the Title IX regulations and a grievance procedure that complies with the requirements of Section 106.45 for formal complaints. The final regulations state that the grievance procedures must include notice of its grievance procedures and process, including how to report or file a complaint of sex discrimination and sexual harassment and how a recipient will respond. The Department also added a new provision, stating that the grievance procedures requirement applies only to sex discrimination occurring against a person in the United States.

### **D. Other Provisions in the Final Title IX Regulations**

*Retaliation.* The final Title IX regulations amend the existing prohibition on retaliation by adding further explanation relating specifically to retaliation in the context of campus sexual harassment. Specifically, Section 106.71 specifically adds that intimidation, threats, coercion, or discrimination, including 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, constitutes retaliation.

This section also includes a specific new regulatory requirement that the recipient 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 Family Educational Rights and Privacy Act (FERPA) statute or regulations, or as required by law, or to conduct of any investigation, hearing, or judicial proceeding under the final sexual harassment regulations. Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination. The regulations also specifically identify two special circumstances that do not constitute retaliation: the exercise of rights protected under the First Amendment and 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.

*Religious Exemption.* The final Title IX regulations amend the section (34 C.F.R. § 106.12(b) relating to religious exemptions to allow religious educational organizations to assert, without the Department's preapproval, that they are entitled to an exemption from any Title IX requirements that conflict with a specific tenet of the religious organization.

*Related Laws.* The final Title IX regulations include specific provisions explaining the relationship between Title IX, the U.S. Constitution and other federal laws. The final regulations provide that the Title



## HMBR Summary: Key Provisions in the New Title IX Regulations

IX requirements must not be interpreted in any way to restrict any rights that would otherwise be protected from government action by the First Amendment of the U.S. Constitution; deprive a person of any rights that would otherwise be protected from government action under the Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution; or restrict any other rights guaranteed against government action by the U.S. Constitution.

In addition, the final Title IX regulations specifically provide that nothing in the regulation may be read “in derogation of an employee’s rights” under Title VII of the Civil Rights Act of 1964. The final regulations further state that the obligation to comply with the Title IX regulations is not obviated or alleviated by the provisions of the statute and regulations for Section 444 of General Education Provisions Act (GEPA)/FERPA. As noted above, the Department has also included specific references to the VAWA categories (sexual assault, domestic violence, dating violence, and stalking) in the revised definition of sexual harassment.

Importantly, the final Title IX regulations specifically state that the final Title IX sexual harassment regulations have a preemptive effect on state and local law, to the extent there is a conflict between the laws.

### Implementation Date

The final regulations require implementation by August 14, 2020. Litigation challenging the final Title IX regulations is expected to be filed almost immediately and may result in changes to one or more parts of the final regulations, including the implementation date. Other factors, such as further complications resulting from COVID-19 the results of the 2020 Presidential election, and/or legislative changes, may also affect the implementation of the regulations. The final Title IX regulations include provisions specifying that if any part of the regulations is held to be invalid, the rest of the regulations will not be affected.

### What Changes do Colleges and Universities Need to Make to Comply with the Final Title IX Regulations?

Based upon our initial review of the final regulations, we recommend that colleges and universities consider the implementation of the final Title IX regulations in three broad areas:

1. Sexual misconduct policies and procedures

Colleges and universities should carefully compare their sexual misconduct policies and grievance procedures to the definitions and requirements in Sections 106.30, 106.44 and 106.45 of the final Title IX regulations and make revisions accordingly. Colleges and universities should more generally review their sexual misconduct and harassment policies and procedures to ensure that they are not biased against or for either party and that they are clear and understandable to students (and their parents), employees, and others involved in the investigation and adjudication process.

It is important to emphasize that, under the final Title IX regulations, not all campus sexual misconduct will be considered a *Title IX* issue that triggers a *Title IX* obligation for a college or university to investigate or resolve the matter. Colleges and universities will thus need to decide if and how they want to address sexual misconduct that is outside the scope of the final Title IX regulations going forward, keeping in mind their obligations under other laws and expectations of their communities. The final Title IX regulations do



## HMBR Summary: Key Provisions in the New Title IX Regulations

not preclude colleges and universities from addressing sexual misconduct in a broad manner that includes sexual misconduct both within and outside the scope of the final Title IX regulations.

### 2. Organizational Structure

Colleges and universities will also need to consider whether changes are needed to the roles of those involved in the sexual misconduct prevention and response program at their institution. For example, institutions may need to make changes to the role of the Title IX Coordinator to make sure that he or she is not the decision-maker(s) for an investigation. Schools that have not been providing hearings as part of their processes will need to designate new hearing officers or members of the hearing panel. Schools will also have to clearly identify the individuals “with the authority to take corrective action” at their institutions and decide whether to make any changes to their requirements relating to “responsible employee”, those with an obligation to report sexual harassment. Schools will also be required to provide complimentary advisors for either party that does not have an advisor for a hearing.

### 3. Campus Culture

Schools will also need to update their training and outreach programs to include information about any changes to their policies and procedure. Given the importance of the hearing process, we strongly recommend providing specific training for any new hearing officers or hearing panel members on how to conduct sexual harassment hearings in a manner that ensures equity and due process for all parties.

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We recognize that the final Title IX regulations raise (or may raise) questions that we have not addressed in this summary. Please know that HMBR attorneys will continue to review the final regulations and analysis closely and we will update our summary of the final regulations and recommendations as appropriate. We are also available to discuss any questions you have about the final Title IX regulations and/or about the legal services we offer relating to Title IX compliance.