Navigating and Implementing the New Title IX Regulations

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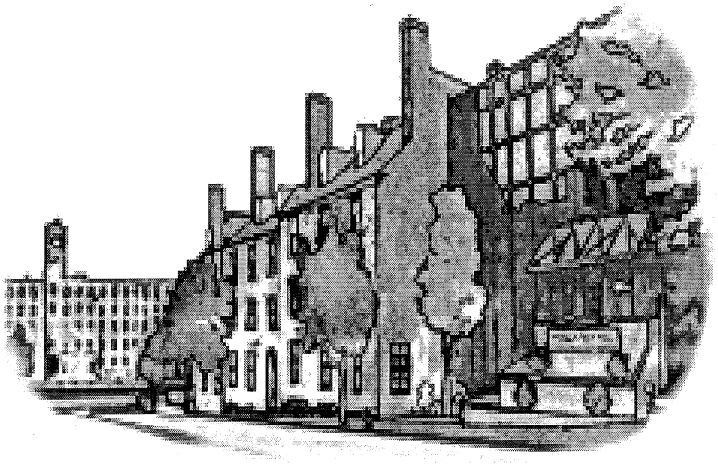

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A Word of Caution

No two cases are exactly alike. This material is designed to provide educators with an understanding of the new Title IX regulations, which took effect on August 14, 2020. This material does not include every aspect of the law pertaining to Title IX. You are strongly encouraged to seek a legal opinion from your legal counsel regarding any specific case. In addition, these amended regulations are being challenged in several courts across the country. This material discusses federal regulations that are subject to change, and the onus is on the reader to ensure that there has been no change to the status of the regulations.

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Overview

The purpose of this material is to assist educators in understanding the new federal regulations pertaining to Title IX. This material does not include every aspect of the law. You are strongly encouraged to seek a legal opinion from your legal counsel regarding any specific case. This material discusses federal regulations that are subject to change, and the onus is on the reader to ensure that there has been no change to the status of the regulations.

I. The New Regulations

In May 2020, the United States Department of Education[1] ("Department" or "Department of Education") released its new Final Regulations under Title IX. The amended regulations took effect on August 14, 2020. The Department has explained the final regulations are intended to bring consistency between the jurisprudence on Title IX and the administrative enforcement of the law. The new regulations will be codified under 34 CFR §106. The revised regulations contain some significant differences from the existing Department of Education regulations and will require recipients of federal financial assistance covered by Title IX (herein collectively referred to as "schools") to revise Title IX policies and procedures.

The full text of the regulations and comments are available on the Department of Education website at https://www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf.

A. Basis in the Law

Title IX of the Education Amendments of 1972 states:

> No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefit of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

20 USC § 1681(a).

Title IX is applicable to all schools that receive federal financial assistance. See 20 U.S.C. § 1681(a).

Title IX offers both substantive as well as procedural protections. See 20 USC § 1681(a); see also 34 C.F.R. § 106.71 (providing that Title IX applies the procedural provisions applicable to Title VI of the Civil Rights Act of 1964).

Both Title IX and our State regulations require that schools have policies and procedures in place to address complaints alleging harassment on the basis of sex.

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[1] All references to the "Department of Education" in this document are to the United States Department of Education, not the New Hampshire Department of Education, unless stated otherwise.

See e.g. Ed 303.01(j) and 306.04(a)(9) (requiring that schools adopt a policy on sexual harassment).

B. Regulations – A Floor, Not a Ceiling

It is important to note that the new regulations establish only the minimum steps necessary to comply with Title IX. For instance, colleges are not required to make professors and coaches "mandatory reporters," but nothing in the regulations prohibits them from placing this responsibility on any employee. Likewise, the Department has also determined that Title IX does not give it jurisdiction over sexual misconduct in study abroad programs, yet schools reserve the authority to still retain jurisdiction over these programs in their own codes of conduct. The 2020 regulations set forth what educational institutions must do and shall not do—not what might be a good idea.

i. Scope: An institution's "education programs and activities."

Under the new 2020 regulations, schools are responsible for Title IX enforcement within an "education program or activity."

An "education program or activity" is broadly defined to include locations, events, or circumstances over which the institution exercises substantial control.[2] However, contrary to previous guidance, the new regulations clarify that Title IX applies only to conduct that occurs in the United States, not to any incident that occurs on foreign soil, including during a school-sponsored study abroad program or other activity. See 34 C.F.R. § 106.8(d).

The authority of the Department of Education to regulate sexual harassment depends on whether sexual harassment occurs in "any education program or activity" because the Department's regulatory authority is co-extensive with the scope of the Title IX statute.[3] Title IX does not authorize the Department of Education to regulate sex discrimination occurring anywhere, but only to regulate sex discrimination in education programs or activities.[4]

Schools should contemplate New Hampshire state law and regulations that might pose additional requirements. See e.g. RSA 193:38-39; Ed 300.

ii. Context and applicability

The amended regulations specify how recipients of federal financial assistance covered by Title IX, including elementary and secondary schools, as well as

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[2] 34 C.F.R. § 106.44(a).

[3] United States Department of Education, Final Regulations and Public Comment (2020) (herein "Final Regulations"), p. 621, available at: https://www2.ed.gov/about/offices/list/ocr/docs/titleix-regs-unofficial.pdf.

[4] See 34 C.F.R. § 106.44(a), "General response to sexual harassment," for a discussion of the other jurisdictional limitations on the scope of Title IX – that the statute protects any person "in the United States."

postsecondary institutions, must respond to allegations of sexual harassment consistent with Title IX's prohibition against sex discrimination.

The new regulations took effect for all elementary, secondary schools, and postsecondary institutions that receive federal financial assistance covered by Title IX on August 14, 2020: in time for many schools' start of the 2020-21 academic year.

1. Designation of a Title IX Coordinator

Per the federal regulations, schools are required to designate a "Title IX Coordinator," to manage and oversee school efforts to comply with Title IX. This individual must be referred to as the "Title IX Coordinator." In addition, the policy must include the name, office address, e-mail address and telephone number of the employee(s) designated as the Title IX Coordinator. The Title IX Coordinator's contact information must be included in a school's policy, on the school website, and in each student/parent handbook. See 34 C.F.R. § 106.8.

C. Brief history

Title IX was passed in 1972 in order to prohibit discrimination on the basis of sex in education programs and activities that receive Federal financial assistance.[5] In 1979, the Supreme Court of the United States clarified that the objectives of Title IX are two-fold: to "avoid the use of Federal resources to support discriminatory practices" and to "provide individual citizens effective protection against those practices." *Cannon v. University of Chicago*, 441 U.S. 677, 704 (1979).

i. From "best practices" to more specific guidance

Since 1997, the Department of Education has released a series of guidance documents, including the 2001 Revised Guidance on Sexual Harassment: Harassment of Students by School Employees, Other Students, or Third Parties ("2001 Guidance"),[6] the withdrawn 2011 Dear Colleague Letter: Sexual Violence ("Dear Colleague Letter"),[7] the withdrawn 2014 Q&A on Sexual Violence ("2014 Guidelines"),[8] and the 2017 Q&A on Campus Sexual Misconduct "("2017 Guidelines").[9] These preceding publications offered "best practices" and acted as a "status quo" that principally applied to students.

The new 2020 regulations apply to students and employees and set forth concrete grievance procedures that apply regardless of whether complainant or respondent is a student or employee. Further, these new regulations replace a school's responsibility to implement best practices of taking effective action "to prevent,

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[5] 20 U.S.C. 1681.
[6] U.S. Dep't. of Education, Office for Civil Rights, *Revised Guidance on Sexual Harassment: Harassment of Students by School Employees, Other Students, or Third Parties* (Jan. 19, 2001).
[7] U.S. Dep't. of Education, Office for Civil Rights, *Dear Colleague Letter: Sexual Violence* (April 4, 2011).
[8] U.S. Dep't. of Education, Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence* (April 29, 2014).
[9] U.S. Dep't. of Education, Office for Civil Rights, *Q&A on Campus Sexual Misconduct* (Sept. 22, 2017).

eliminate, and remedy sexual harassment" by "changing the culture," with specific guidance that articulate a school's responsibility to address particular cases of serious sexual misconduct.

The Department of Education has explained that the new regulations are intended to "better align the Department's Title IX regulations with the text and purpose of Title IX, the U.S. Constitution, Supreme Court precedent and other case law, and to address the practical challenges facing students, employees, and recipients with respect to sexual harassment allegations in education programs and activities."[10]

ii. Addressing Due Process

A primary component to the 2020 regulations is the underscoring of procedural due process protections "to ensure a fair and reliable factual determination when a recipient investigates and adjudicates a formal complaint of sexual harassment."[11] The new rules also articulate several additional due process requirements that will replace some of the practices adopted by colleges in response to the Dear Colleague Letter and 2014 Guidelines.

In recognizing the principle that Title IX cannot be interpreted in a manner that denies any person due process of law under the U.S. Constitution, the Department of Education asserts that the new regulations' grievance process "provides a fair process rooted in due process protections that improves the accuracy and legitimacy of the outcome for the benefit of both parties."[12]

II. Key Provisions of the New Regulations

The 2020 regulations specifically provide:

- Concrete definitions under Title IX, including "sexual harassment," "educational program or activity," "official with authority," "actual knowledge," "knew or reasonably should have known" standard, "complainant," "formal complaint," "respondent," and "supportive measures";

- Procedural guidelines specifying conditions that activate an obligation to respond to allegations and initiate a grievance process to investigate and adjudicate allegations of sexual harassment;

- Preventative and remedial responsibilities placed upon schools;

- Deference to schools regarding standards of evidence and implementation of the new regulations;

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[10] Final Regulations, p. 19.
[11] Id. at 21.
[12] Id. at 87.

- Establishment of procedural due process protections throughout the grievance process to ensure a fair and reliable factual determination; and,

- Support for survivors of sexual harassment.[13]

The focus of this material is on Title IX of the Education Amendments of 1972. The reader should be aware of Title VII of the Civil Rights Act of 1965, which also protects employees from sex-based discrimination. The Title VII regulations and standards differ in some ways from the Title IX regulations, and nothing in the new Title IX regulations limits an employee's rights under Title VII. 34 C.F.R. § 106.6(f).

A. Definitions

i. "Sexual Harassment"

Sexual harassment is defined by the new regulations in 34 CFR § 106.30 as:

> Conduct on the basis of sex that satisfies **one or more** of the following:
>
> (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
>
> (2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity;
>
> **[or]**
>
> (3) "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

1. History

The Department of Education has released a concrete definition of what constitutes sexual harassment, a term that was not originally mentioned in the original Title IX of the Education Amendments of 1972. Beginning in the 1980s, federal courts held that sexual harassment constitutes a form of sex discrimination under Title VII of the Civil Rights Act, and in the 1990s, courts applied similar rules to schools under Title IX. The Department of Education's Office for Civil Rights ("OCR") subsequently issued its series of guidance documents building upon these judicial precedents.

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[13] U.S. Department of Education Title IX Final Rule Overview (May 6, 2020).

In the late 1990s, the Supreme Court of the United States weighed in on two key Title IX decisions and provided definitional framework:

- *Gebser v. Lago Vista Independent School District*: The Supreme Court held that damages may not be recovered for teacher-student sexual harassment under Title IX, unless a school district official—who at a minimum has authority to institute corrective measures on the district's behalf—had (1) "**actual notice** of the misconduct" and (2) "responded with **deliberate indifference**." *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 280-93 (1998) (emphasis added).

- *Davis v. Monroe County Board of Education*: The Supreme Court built on *Gebser* jurisprudence, holding that a Title IX damages action may lie against a school board in cases of student-on-student harassment, but only where the funding recipient had "actual knowledge," acted "deliberately indifferent" to sexual harassment, and that the harassment is "**so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school**." *Davis v. Monroe County Board of Education*, 526 U.S. 629, 638-53 (1999) (emphasis added).

The Supreme Court's interpretation of Title IX was narrower than judicial interpretations of Title VII of the Civil Rights Act and previous administrative interpretations of Title IX.

In the 2001 Guidelines, the Department of Education rejected the Supreme Court's framework by announcing that the court's interpretation was only applicable to lawsuits for money damages, and not to the conditions attached to the receipt of federal funding by school districts. The OCR imposed more demanding requirements on educational institutions, but for over a decade it made little effort to enforce its mandate. The Dear Colleague Letter and 2014 Guidelines then pushed schools to address harassment before it "becomes severe or pervasive" in order to prevent the creation of "a hostile environment." However, these, like the 2001 Guidelines, acted merely as "best practice" suggestions that had not gone through the rigorous Administrative Procedures Act's rulemaking process, and thus were not unambiguously legally binding.

2. New Definitions, New Process

Given the narrowly prescribed definition set forth by the Supreme Court in *Gebser* and *Davis*, and the Obama administration's more expansive definition, the Department of Education sought to steer a middle path in contemplation of the 2020 regulations. Importantly, the new regulations' definition of sexual harassment can be broken down into categories:

- (1) ***Quid pro quo* harassment** constitutes a **per se violation** of Title IX.

- Per the new regulations, any form of *quid pro quo* harassment—regardless of its severity or pervasiveness—violates Title IX.
- *Quid pro quo* harassment constitutes conduct without any constitutional protection.
- An employee conditioning the provision of an aid, benefit, or service of the recipient on the individual's participation in unwelcome sexual conduct constitutes *quid pro quo* harassment, as introduced in the 2001 Guidelines.

- (2) **Any form of sexual assault**, **dating violence**, **domestic violence**, or **stalking** as defined by the Clery Act can constitute sexual harassment.
  - These forms of misconduct are so serious in themselves that no finding of "pervasiveness" is required.
  - A single instance of sexual assault, dating violence, domestic violence, or stalking can constitute sexual harassment under the new regulations. The Department opined that "[s]uch incorporation is consistent with the Supreme Court's observation in *Davis* that a single instance of sufficiently severe harassment on the basis of sex *may* have the systemic effect of denying the victim equal access to an education program or activity (italics in original).[14]
  - This approach guards against a pattern of sex-based stalking being deemed "not severe" even though the pattern of behavior is "pervasive."[15]

- (3) The **"severe, pervasive, and objectively offensive"** standard.

3. "So severe, pervasive, and objectively offensive" standard

The most controversial aspect of the definition is encompassed in 34 C.F.R. § 106.30(a)(2) which states that to violate Title IX, **all other forms of "unwelcome conduct" must be "so severe, pervasive, and objectively offensive** that it effectively denies a person equal access" to an educational program. (Emphasis added). The Department of Education rejected the position that Title IX requires schools to prohibit comments that might seem minor in themselves but contribute to a broader "hostile environment" as an effort to balance First Amendment considerations and not unequivocally equate a workplace to a school environment. The Department of Education reasoned that "evidence that broadly and loosely worded anti-harassment policies have infringed upon constitutionally protected speech and academic freedom is widely available."[16]

The Department of Education opined that the definition of sexual harassment found in 34 C.F.R. § 106.30 is "designed to capture non-speech conduct broadly (based on an assumption of the education-denying effects of such conduct), while applying the

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[14] Final Regulations, p. 41; see also *Davis*, 526 U.S. at 652-53.
[15] Final Regulations, p. 41-42.
[16] Id. at p. 506.

Davis standard to verbal conduct so that the critical purposes of both Title IX and the First Amendment can be met."[17]

Note: The new regulations do clarify that a school may address harassing conduct that does not meet the Title IX definition of "sexual harassment" under other policies, such as a code of conduct. See e.g. 34 C.F.R. § 106.45(b)(3).

ii. "Actual Knowledge"

Actual Knowledge is defined by the new regulations in 34 C.F.R. § 106.30 as:

> *Actual knowledge* means **notice** of sexual harassment or allegations of sexual harassment **to a recipient's Title IX Coordinator or any official of the recipient** who has authority to institute corrective measures on behalf of the recipient, **or to any employee of an elementary and secondary school**.

(Emphasis added).

According to the framework established by the Supreme Court and adopted by the Department of Education's new regulations, a school bears responsibility for redressing sexual harassment only when it has "actual knowledge" of such misconduct. The new regulations note that:

- Schools are still subject to the "knew or reasonably should have known" standard for purposes of remedial action under Title VII and most state and local laws.[18]

- Schools that elect to expand mandatory reporting to beyond elementary and secondary school employees, such as volunteers and independent contractors, should exercise care in extending training to those designees.

- The "actual knowledge" standard is not met when the only official with actual knowledge of the alleged sexual harassment is the respondent. 34 C.F.R. § 106.30(a) (definition of "actual knowledge").

- Actual knowledge does not necessarily trigger the obligation to investigate, but it does trigger the obligation to provide supportive measures. See *infra* at Section II(A)(iii), "Supportive Measures."

1. "Knew or reasonably should have known" standard

Previous guidance allowed for "constructive notice" and required schools to respond when a "responsible employee" "knew or reasonably should have known" of

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[17] Federal Regulations, p. 507.
[18] Id. at p. 21; see generally *Gebser*, 524 U.S. 274.

the sexual harassment. In the Title IX regulations, this has been abandoned and replaced with the actual knowledge standard.

2. "Official with Authority"

Though not a term that has its own definition, "official with authority" is a term that is embedded in the definition of the term "Actual Knowledge." 34 C.F.R. § 106.30(a). Importantly, it indicates who has the authority, and consequently the responsibility, **to institute corrective measures** on behalf of the alleged victim of sexual harassment.

"Determining whether an individual is an 'official with authority' is a legal determination that depends on the specific facts relating to a recipient's administrative structure and the roles and duties held by officials in the recipient's own operations." The Supreme Court viewed this category of officials as the equivalent of what 20 U.S.C. 1682 calls an "appropriate person" for purposes of the Department's resolution of Title IX violations with a recipient.[19]

The new regulations make clear that the Department will not assume that a person is an "official with authority" solely based on the fact that the person has received training on how to report sexual harassment or has the ability or obligation to report sexual harassment. 34 C.F.R. § 106.30(a).

Similarly, the Department will not conclude that volunteers and independent contractors are officials with authority, unless the recipient has granted the volunteers or independent contractors' authority to institute corrective measures on behalf of the recipient.[20]

However, since the definition of "Actual Knowledge" also includes "any employee of an elementary and secondary school," school will likely be deemed to have "actual knowledge" as soon as any employee (regardless of whether he/she is an "official with authority") receives notice of sexual harassment or allegations of sexual harassment. Thus, it will be important to inform allPinkerton employees of their reporting obligations under Title IX.

3. "Deliberate indifference"

Once the second prong to the two-prong test of school liability under Title IX[21], "deliberate indifference" is now no longer analyzed coextensively with actual knowledge, but rather can be found in the regulations' General Response to Sexual Harassment, C.F.R. § 106.44 (a):

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[19] Id. at 51; see *Gebser*, 524 U.S. at 290.
[20] Id. at 65.
[21] *Gebser*, 524 U.S. at 289-93.

> "A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent."

The new regulations state that a school is deliberately indifferent "only if its response to sexual harassment is **clearly unreasonable in light of the known circumstances**." 34 C.F.R. § 106.44(a) (emphasis added). Under the deliberate indifference standard, upon receiving a report of sexual harassment, at a minimum, a school has an obligation to offer supportive measures to the complainant and to follow its grievance process prior to imposing any disciplinary sanctions or other actions that are not supportive measures against a respondent.

iii. "Supportive Measures"

The new regulations define "supportive measures" as "non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed." 34 C.F.R. § 106.30. The regulations go on to state that:

> "Such measures are designed to restore or preserve equal 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 or the recipient's educational environment, or deter sexual harassment."

34 C.F.R. § 106.30.

Supportive measures may include, but are not limited to the following:

- 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.

Id.

The duty to provide supportive measures is triggered upon actual knowledge of a sexual harassment or allegations of sexual harassment, and occurs regardless of whether there is a need to implement an emergency removal. See 34 C.F.R. § 106.44(a) and (c); see also infra. at (III)(B)(iii)(2), "Emergency Removal."

The new regulations also require that the recipient maintain as confidential any supportive measures provided to the complainant or respondent. 34 C.F.R. § 106.30.

The Title IX Coordinator is responsible for overseeing the effective implementation of supportive measures within the school buildings. Id.

The comments to the new regulations elaborate that the supportive measures must be tailored to the complainant/respondents' unique circumstances, and the Department of Education explained that its main focus is to ensure that schools take action to restore and preserve a complainant's equal educational access, while also leaving discretion to schools to make disciplinary decisions only when respondents are found responsible. Further, supportive measures cannot be punitive, such as prohibiting participation in athletics or other student organizations. [22]

iv. "Complainant" and "Respondent"

34 C.F.R. § 106.30(a) defines the Complainant as "an individual who is alleged to be the victim of conduct that could constitute sexual harassment" and the Respondent as "an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment."

The regulations also provide that parents/guardians may act on behalf of a complainant, respondent, party or other individual, consistent with FERPA. 34 C.F.R. § 106.6(e) and (g).

v. "Formal Complaint"

34 C.F.R. § 106.30(a) defines "Formal complaint" as:

> "A document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment.
>
> - At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed.
>
> - 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 § 106.8(a), and by any additional method designated by the recipient."

[22] See e.g. Final Regulations at 1786, 1820.

Please note that in cases where a complainant declines to file formal complaint and indicates that they do not wish to file a formal complaint,Pinkerton is still obliged to offer supportive measures to the complainant. See e.g. 34 C.F.R. § 106.44(a).

The school must investigate allegations in a formal complaint, however, the regulations include provisions pertaining to mandatory dismissal and permissive dismissal of formal complaints. 34 C.F.R. § 106.45(b)(3).

A formal complaint must be dismissed if the allegations would not constitute sexual harassment, even if true, did not occur in the school's education program or activity, or did not occur against a person in the United States. Id. However, such dismissal does not preclude the school from taking action against the respondent based on another provision of its code of conduct. Id.

A school may dismiss the formal complaint, or any allegations contained in the complaint, if the complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the complaint for any allegations therein, the respondent is no longer enrolled or employed by the recipient, or specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein. Id.

The school must provide prompt written notice of the dismissal and any reasons therefore, simultaneously to both parties. Id.

B. Procedural Guidelines

The new regulations set forth concrete procedural requirements regarding a recipient's response to formal complaints in 34 C.F.R. § 106.45, and establish a clear grievance process.

i. Reporting

Any person may report sexual harassment whether relating to her/himself or another person, and such reports may be made at any time.[23] While it is strongly encouraged that reports of sexual harassment be made directly to the Title IX Coordinator, the report may also be made to any Pinkerton employee. See *supra*, Section II(A), "Definitions".

If the Title IX Coordinator is the alleged respondent, the report or formal complaint may be made directly to the Superintendent, who shall thereafter fulfill the functions of the Title IX Coordinator regarding that report/complaint, or delegate the function to another person.

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[23] See e.g. Final regulations at 375-376.

The new regulations' reporting rules place few new demands on schools that had previously instituted procedures in place which comply with the Dear Colleague Letter and 2014 Guidelines.

ii. Grievance Process Requirements Overview

Per 34 C.F.R. § 106.45(b), a recipient's grievance process must:

- Treat the parties to the formal complaint equitably;
- Require an objective evaluation of all relevant evidence;
- Require that the Title IX Coordinator, investigator, decision-maker, or any person designated to facilitate an informal resolution process:
    - not have a conflict of interest or bias;
    - receive training on the definition of sexual harassment, the scope of the education program or activity, how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and how to serve impartially;
    - receive training on any technology to be used at a live hearing (if applicable) and on issues of relevance of questions and evidence;
    - receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence;
- Apply a presumption that the respondent is not responsible for the alleged conduct until a determination of responsibility has been made;
- Provide "reasonably prompt time frames" for the grievance process;
- Describe the range of possible disciplinary sanctions and remedies that the school may implement following any determination of responsibility;
- Determine the standard of evidence to be used (preponderance of the evidence or clear and convincing evidence);
- Include procedures/permissible bases for a party to appeal;
- Describe the range of supportive measures available; and,
- "Not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege."

The Title IX Grievance Process commences upon the filing of a formal complaint of sexual harassment. 34 C.F.R. § 106.45(b).

iii. Notice

Once a complainant files a formal complaint of sexual harassment, the school/Title IX Coordinator must provide written notice to the complainant and the complainant's parent/guardian, and to the respondent (if known) and the respondent's parent/guardian, as well as to any other known parties. The notice must include the following:

- Notice of the school's grievance process, including any informal resolution process, AND
- Notice of the allegations of sexual harassment, "including sufficient details known at the time and with sufficient time to prepare a response before any initial interview." Sufficient details include:
    - the identities of the parties involved in the incident, if known,
    - the conduct allegedly constituting sexual harassment, and
    - the date and location of the alleged incident, if known.
- A statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process.
- Notice to the parties that they may have an advisor of their choice and of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

34 C.F.R. § 106.45(b)(2). If, during the course of an investigation, the school expands the scope of the investigation to include allegations that were not included in the above notice, the school must provide notice of the additional allegations. Id.

The school's policy should contemplate whether there is to be an exception to notifying the parent/guardian if such notification could result in harm to the student.

1. Presumption of Non-Responsibility

The new regulations require that the respondent be presumed not responsible until the conclusion of the grievance process. 34 C.F.R. § 106.45(b)(1)(iv). This presumption is not intended to suggest that a respondent must be considered truthful, or that the respondent's statements must be given any more or less credence, based solely on the respondent's status as a respondent. Likewise, the presumption of non-responsibility should not be used to avoid the duty to provide of supportive measures.

The Department of Education asserts that the presumption itself is intended to reflect principles of due process and uphold the requirement that investigators and decision-makers serve impartially without prejudging the facts at issue. It also notes that "nothing about this presumption deprives complainants of the robust procedural protections granted to both parties."[24]

2. Emergency Removal

The new regulations permit a school to temporarily remove a student from a class on an interim basis during the pendency of a complaint, and only in limited "emergency" circumstances where there is an "immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual

[24] Final Regulations, p. 851.

harassment." 34 C.F.R. § 106.44(c) (emphasis added). Prior to the removal, the school must "undertak[e] an individualized safety and risk analysis." Id. In addition, the school must "provid[e] the respondent with notice and an opportunity to challenge the decision immediately following the removal. Id. However, nothing in the Title IX regulations modifies any rights under the IDEA, Section 504 or the ADA. Id.

Per New Hampshire law, the ability of a public school to remove a student is significantly limited by state law pertaining to public school access. Schools are limited to those circumstances where suspension is warranted pursuant to student code of conduct, or upon emergency injunctive relief order from the court. See e.g. RSA 193:13.

The final regulations do not limit a school's ability to place an employee on administrative leave during the pendency of a complaint. 34 C.F.R. § 106.44(d). Whether such leave is paid or unpaid is a question of New Hampshire law and any applicable collective bargaining agreements or employment contracts.

iv. Time Frames

The new regulations also require schools to establish "reasonably prompt time frames" for completion of the grievance process, including appeals and any informal resolution processes. 34 C.F.R. § 106.45(b)(1)(v).

Any delays or extensions of the school's designated time frames must be "temporary," "limited," and "for good cause," and the school must notify the parties of the reason for any such short-term delay or extension. 34 C.F.R. § 106.45(b)(1)(v). The regulations provide that "[g]ood 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." Id. Often at the inception of an investigation, it is not possible to determine the scope or time necessary to complete an investigation. As a result, any local policy should include a mechanism for extending such time period to complete an investigation.

v. Investigations

The new regulations also detail the way that Title IX complaints must be investigated.

- The parties must have an equal opportunity to present witnesses, including both fact and expert witnesses and other witnesses. Schools cannot restrict the parties' ability to discuss the allegations or gather and present evidence.
- The parties must be allowed to have an advisor of their choosing present at any meeting or grievance proceeding.

    - Schools are still permitted to establish restrictions regarding the extent to which the advisor may participate in the proceedings, so long as the restrictions apply equally to both parties.
- The school must provide written notice to the parties in advance of any meeting, interview, or hearing conducted as part of the investigation or adjudication in which they are expected or invited to participate.
- Schools cannot access or rely upon any treatment records maintained by a healthcare provider, including the school's student health center, unless the party provides consent.
- Both parties must have an equal opportunity to inspect and review evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including evidence which the school does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence, so that each party can meaningfully respond to the evidence prior to the conclusion of the investigation.

34 C.F.R. § 106.45(b)(5).

Importantly, the new regulations make clear that the burden of gathering evidence sufficient to reach a determination regarding responsibility rests on the school, not on either party. 34 C.F.R. § 106.45(b)(5)(i).

1. The Role of the Investigator and School

The new regulations explicitly prohibit schools from using the "single investigator" or "investigator only" model. This is because combining the investigative and adjudicative functions to one person "may decrease the accuracy of the determination regarding responsibility." In the comments to the regulations, the Department of Education opined that fundamental fairness to both parties requires that after completing the investigation, "a separate decision-maker must reach the determination regarding responsibility; that determination can be made by one or more decision-makers (such as a panel), but no decision-maker can be the same person who serves as the Title IX Coordinator or the investigator."[25]

vi. Pre-decision access to evidence

Before concluding the investigation and prior to completing the investigative report, the school must provide the parties and their advisors, if any, with an equal opportunity to inspect and review any evidence obtained during the investigation that "is directly related to the allegations raised in a formal complaint," even if the school will not rely on that evidence in reaching a determination. All inculpatory and exculpatory evidence must be included. 34 C.F.R. § 106.45(b)(5)(vi).

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[25] Final Regulations, p. 1247.

At the conclusion of the investigation, the investigator must create an **investigative report** that fairly summarizes relevant evidence. The investigative report must be provided to the parties and the decision-maker in an electronic format or a hard copy, and the parties must be given at least 10 days prior to the determination of final responsibility to provide supplementary, limited follow-up questions and answers to those questions. 34 C.F.R. § 106.45(b)(5)(vii).

Schools have the discretion to include a hearing as a part of the grievance process. The regulations contain specific requirements pertaining to the conduct of such hearings. See 34 C.F.R. § 106.45(b)(6). Pinkerton's policy does not include a hearing process.

vii. Adjudication

1. Standard of Evidence

The final regulations **give schools the discretion to determine whether to use a preponderance or clear and convincing evidentiary standard** in adjudicating allegations of sexual harassment.

- Preponderance of the evidence requires the factfinder to consider the greater weight of the evidence. This is the burden of proof in most civil trials, in which the jury is instructed to find for the party that, on the whole, has the stronger evidence, however slight the edge may be, commonly in the context of a finding of "more likely than not."[26]
- Clear and convincing evidence indicates that the thing to be proven is highly probable or reasonably certain. This is a greater burden than preponderance of the evidence, but less than evidence beyond a reasonable doubt, the norm for criminal trials.[27]

Pinkerton has adopted the **preponderance of the evidence** standard. The same evidentiary standard must be applied to claims involving employees, as well as those involving students.

2. Hearings – optional for elementary and secondary schools

For elementary and secondary schools, the grievance process may, but need not, provide for a hearing. For postsecondary institutions, the recipient's grievance process must provide for a live hearing. 34 C.F.R. § 106.45(b)(6).

3. Decision making

Because schools are prohibited from utilizing the "single investigator" model, more players are required in the new Title IX grievance procedure. The Department

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[26] PREPONDERANCE OF THE EVIDENCE, Black's Law Dictionary (11th ed. 2019).
[27] EVIDENCE, Black's Law Dictionary (11th ed. 2019).

dually acknowledges that separating the investigative and decision-making functions may lengthen the adjudicative process in some cases.[28]

After the parties and decision-maker have received the final investigative report, and at least 10 days prior to the determination regarding responsibility, the decision-maker must provide "each party with the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party." 34 C.F.R. § 106.45(b)(5)(vii) and (6)(ii). "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. The decision-maker must explain to the party proposing the questions any decision to exclude a question as not relevant." 34 C.F.R. § 106.45(b)(6)(ii).

The decision-maker then must consider all of this evidence before the issuance of a written determination.

a. Written determination

The new regulations also dictate the contents of the decision-maker's final written determination regarding responsibility. The Department of Education opined that this serves the important function of ensuring that both parties know the reasons for the outcome of a Title IX grievance process.[29] Per 34 C.F.R. § 106.45(b)(7)(ii), a written determination must include:

- Identification of the allegations potentially constituting sexual harassment;
- A description of the procedural steps taken from the receipt of the formal complaint through the determination, including notification to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;
- Findings of fact supporting the determination;
- Conclusions regarding the application of the school's code of conduct to the facts;
- A statement of the result as to each allegation, including a rationale for each result. This must also include:
    - A determination regarding responsibility;
    - Any disciplinary sanctions to be imposed on the respondent;
    - Whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the school to the complainant; and

[28] See e.g. Final Regulations at 1253.
[29] Final Regulations, p. 1323.

- The school's procedures and permissible bases for either party to appeal.

34 C.F.R. § 106.45(b)(7); see also 34 C.F.R. § 106.6(e) ("The obligation to comply with [the Title IX regulations] is not obviated or alleviated by the FERPA statute . . . or FERPA regulations").

This written determination must be provided to the parties simultaneously as an important due process protection for both parties, ensuring that they have relevant information about the resolution of allegations (34 C.F.R. § 106.45(b)(7)(iii)), and the Title IX Coordinator is responsible for effective implementation of any remedies (34 C.F.R. § 106.45(b)(7)(iv)). The written determination should also be provided to the Title IX Coordinator and Superintendent.

The written decision becomes final after the conclusion of any appeal, or the expiration of the appeals period contained in Pinkerton's Title IX policy. See 34 C.F.R. § 106.45(b)(7)(iii).

4. Right to Appeal

The issuance of the written determination, including dismissal of a formal complaint or any allegations therein, triggers the right to appeal. 34 C.F.R. § 106.45(b)(8).

Schools have discretion to set the appeal time frame, so as long as the policy offers "reasonably prompt time frames" for completion of the grievance process, including appeals. In keeping with the new federal regulations in respect to the time frame, schools should establish or should include within their written policies a clear time frame in which to file an appeal, as well as the manner in which to do such, with whom the appeal is to be filed and an appellate standard of review.

34 C.F.R. § 106.45(b)(8)(i) provides three limited bases for appeals by either party:

- Procedural irregularity that affected the outcome;
- New evidence that was not reasonably available when the determination of responsibility or dismissal was made that could affect the outcome; and
- The Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias that affected the outcome.

The new regulations state that schools are permitted to allow additional grounds for appeal but must do so equally for complainant and respondent. 34 C.F.R. § 106.45(b)(8)(ii). Pinkerton's policy does not include any additional grounds for appeal. The Department of Education specifically gives schools deference to decide whether

the severity or proportionality of sanctions is an appropriate basis for an appeal, but any such appeal must be offered equally to both parties.[30]

The federal regulations provide that the decision-maker for the appeal must not be the same person as the initial decision-maker, the investigator or the Title IX Coordinator. 34 C.F.R. § 106.45(b)(iii)(B). This leaves open the question for schools as to whether the decision-maker is a Superintendent, a contracted third-party hearing officer, the School Board, or a subcommittee of the Board.

Although a school board is not precluded from serving as a decision-maker with respect to appeals, any decision-maker must meet both the training and conflict of interest requirements that apply to the initial decision-maker, investigator and Title IX Coordinator. See 34 C.F.R. § 106.45(b)(iii)(C); 34 C.F.R. § 106.45(b)(1)(iii). It is possible that such training could be provided on an as-needed basis, but because of necessary timelines, the framework would need to be in place long before a case is appealed.

In addition, when an appeal is filed, Pinkerton must:

- Notify the other party in writing and implement appeal procedures equally for both parties;
- Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;
- Issue a written decision describing the result of the appeal and the rationale for the result; and
- Provide the written decision simultaneously to both parties.

34 C.F.R. § 106.45(b)(8)(iii).

viii. Informal Resolution

The Department of Education recognizes that informal or alternative dispute resolution processes have become increasingly available throughout the American legal system and can offer a variety of potential benefits. It acknowledges that alternative dispute resolution can present the same potential benefits for sexual harassment cases. However, it keeps in mind that the more formal grievance process may still be an appropriate mechanism to address sexual misconduct under Title IX in many circumstances due to clarity of procedural safeguards. The final regulations balance these two considerations and permit schools to utilize informal resolution processes, but only after a formal complaint has been filed. [31]

Schools maintain general discretion as to when informal resolution may be offered; however, a school is prohibited from offering or facilitating an informal

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[30] Final Regulations, p. 1350.
[31] Id. at 1365.

resolution process where the allegations in the formal complaint allege that an employee sexually harassed a student. 34 C.F.R. § 106.45(b)(9).

Prior to proceeding with an informal resolution process, both parties must give voluntary, informed, written consent. Either party may withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint at any point. Id.

ix. Retaliation

The new regulations expressly prohibit retaliation against any individual for exercising his/her right under Title IX, including participating in or refusing to participate in the filing of a complaint, the investigation, or any proceeding or hearing. 34 C.F.R. § 106.71 (emphasis added).

x. Recordkeeping

The new regulations impose broad recordkeeping requirements and require that schools maintain certain documents relating to Title IX activities for seven years. 34 C.F.R. § 106.45(b)(10). These include the following records:

- Each sexual harassment investigation, including any determination regarding responsibility, certain records relating to the hearing (if applicable), any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to Pinkerton's program or activity;
- Any appeal and the result therefrom;
- Any informal resolution and the result therefrom;
- All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. Pinkerton must make these training materials publicly available on its website; and
- Records of any actions, including supportive measures, taken in response to a report or formal complaint of sexual harassment, including documentation of the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to Pinkerton's educational program or activity.
    - If a complainant did not receive supportive measures, Pinkerton must document the reasons why its response was not clearly unreasonable in light of the known circumstances.

34 C.F.R. § 106.45(b)(10).

C. Pinkerton's Responsibilities

As previously mentioned, the new regulations offer a floor, not a ceiling, that provides the minimum requirements for Title IX schools to abide by. The Department of Education has rolled back the requirements set forth by the previous administration's Dear Colleague Letter and 2014 Guidelines.

The new regulations require schools to investigate and adjudicate formal complaints of sexual harassment occurring in an education program or activity, using a grievance process that incorporates due process principles as articulated in the regulations. This includes both remedial and preventative responsibilities bestowed upon the school.

i. Remedial Responsibilities

Under the new regulations, schools must offer clear, accessible options for any person to report sexual harassment, and the school is responsible for responding promptly when any school employee has notice of sexual harassment.

Schools must also offer supportive measures to the alleged victim, as discussed in this document in Section II(A)(iii), a timely grievance process steeped in due process principles, and an equal right of appeal for both parties to a Title IX proceeding.

When the decision-maker determines that the respondent has violated Title IX, it must provide remedial measures "designed to restore or preserve equal access to the [district's] education program or activity." 34 C.F.R. § 106.45(b)(1)(i). Remedies may include the same services described as supportive measures, but "need not be non-disciplinary or non-punitive and need not avoid burdening the respondent." Id.

The Title IX Coordinator is responsible for the effective implementation of any remedies. 34 C.F.R. § 106.45(b)(7)(iv).

Pinkerton's Title IX policy must include the "range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that [Pinkerton] may implement following any determination of responsibility." 34 C.F.R. § 106.45(b)(1)(vi).

ii. Preventative Responsibilities

In addition to remedial measures that schools must offer upon a report of sexual harassment, schools are also responsible under Title IX for providing preventative measures in the limited context of training. New Hampshire law may require additional preventative measures beyond responsibilities set forth in Title IX. See e.g. RSA 193:38-39.

The 2001 Guidance, Dear Colleague Letter, and 2017 Guidelines took the position that a recipient's response to sexual harassment must effectively stop harassment and prevent its recurrence. The Department acknowledges that "prevention of sexual harassment incidents before they occur is a worthy and desirable goal" and the new regulations reflect the Title IX legal obligations to hold schools accountable in responding to sexual harassment incidents. However, it maintains the position that:

> "Identifying the root causes and reducing the prevalence of sexual harassment across our Nation's schools and campuses remains within the province of schools, colleges, universities, advocates, and experts."[32]

1. Training

The new regulations require that Title IX personnel (Coordinators, investigators and decision-makers) must receive training on:

- The definition of sexual harassment;
- The scope of the school's education program or activity;
- How to conduct an investigation and grievance process, including hearings (if applicable), appeals and informal resolution processes, as well as the standard of evidence;
- How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.

Importantly, the Department of Education declined to specify that training must include implicit bias training, and the nature of the training is left to the school's discretion, so long as it achieves the provision's directive, and that materials used in such training avoid sex stereotypes. The new regulations require that investigators and decision-makers receive training on issues of relevance of questions and evidence, and decision-makers must receive training on any technology used at a live hearing (where applicable). 34 C.F.R. § 106.45(b)(1)(iii).

Per 34 C.F.R. § 106.45 (b)(10)(i)(D), schools are required to publish all training materials on their websites, and if they do not have a website, they must make the materials available for inspection and review by members of the public.

2. Gender neutrality of rules

The new regulations also require that all school rules governing sexual harassment proceedings and all the training provided by the Title IX Coordinator be "gender neutral," free of any "sex bias" or "sex stereotyping," reasoning that the regulations "focus on prohibited conduct, irrespective of the identity of the complainant and respondent."[33]

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[32] Federal Regulations, p. 160 (emphasis added).
[33] Final Regulations, p. 559.

III. Conclusion

A. Areas of Discretion Left to the Schools

Because the Department of Education "agrees that schools themselves know best how to engage with their students," school officials are "encouraged to use their discretion and expertise within the confines of the final regulations."[34]

As previously referenced, under the new regulations, schools are given latitude with respect to:

- Choosing between the *preponderance of the evidence* and *clear and convincing* standards of evidence (the standard selected by the school applies to all sexual harassment cases, including those against faculty members and staff).

- Whether Pinkerton may implement a hearing as a part of its grievance process.

    - Flexibility to use technology to conduct Title IX investigations and hearings remotely.

- Flexibility to expand mandatory reporting for all employees or to designate some employees as confidential resources for students to discuss sexual harassment without automatically triggering a report to the Title IX Coordinator.

- Flexibility in regard to establishing time frames, such as time to complete investigations, file an appeal, and the like.

B. State Education Law Policy Considerations

New Hampshire state law prohibits discrimination in public schools. The law states: "No person shall be excluded from participation in, denied the benefits of, or be subjected to discrimination in public schools because of their age, sex, gender identity, sexual orientation, race, color, marital status, familial status, disability, religion or national origin, all as defined in RSA 354-A. . . ." RSA 193:38, available at: http://www.gencourt.state.nh.us/rsa/html/XV/193/193-38.htm (effective Sept. 17, 2019).

The law also requires that school districts and chartered public schools adopt "a policy that guides the development and implementation of a coordinated plan to prevent, assess the presence of, intervene in, and respond to incidents of discrimination on the basis of age, sex, gender identity, sexual orientation, race, color, marital status, familial status, disability, religion, national origin, or any other classes protected under

[34] Id. at 1685.

RSA 354-A." RSA 193:39, available at:
http://www.gencourt.state.nh.us/rsa/html/XV/193/193-39.htm (effective Sept. 17, 2019).

The new federal regulations will substantially inform the manner in which schools meet this statutory requirement in the area of sex, gender identity, and sexual orientation. The New Hampshire statutory requirement for a coordinated plan to prevent, assess, intervene, and respond to sexual harassment will by necessity be informed by the manner in which title IX informs prevention, assessment, intervene, and respond to these areas. In fact, a Title IX policy team tasked with creating revised state rules is currently drafting a new education policy that incorporates the 2020 federal regulations.

C. The New Regulations and Local Schools

The new Title IX regulations impose, for the first time, legally binding rules with respect to responding to sexual harassment, as opposed to offering broad "best practice" guidelines. The Department of Education's goal in these regulations was to bring consistency between the jurisprudence on Title IX and the administrative enforcement of the law by balancing First Amendment implications, due process considerations, and ensuring that Title IX schools do not discriminate on the basis of sex. In sum, the final regulations seek to limit the range of conduct that requires institutional action under Title IX, impose a number of new procedural requirements to promote due process, and unequivocally establish that these requirements apply equally to employees and students of Title IX institutions.

All schools receiving federal funding must comply with the new regulations by no later than August 14, 2020.