



Introduction to the Joint Guidance

May 7, 2020

On May 6, 2020, the US Department of Education (ED) issued Final Regulations under Title IX of the Education Amendments of 1972. The Regulations are **effective August 14, 2020**, leaving institutions with potentially just one hundred days to implement them.

Responding to this challenge, the Joint Guidance on Federal Title IX Regulations will review each provision, provide analysis (including overlap, harmony, or conflict with the Clery Act as amended by the Violence Against Women Act as well as state law including New York State’s Education Law 129-B), and provide some initial guidance regarding implementation and challenges that may arise. We have broken down the analysis into numerous chapters and will post content as we move through over 2,000 pages of ED regulations and responses to public comments. An overview of these topics is summarized below.

The Joint Guidance you are reading now is a project of about 50 attorneys who work on campus Title IX issues.¹ You can see the participants listed alphabetically on our homepage. It is intended to be thoughtful, high-quality, and widely available to institutions large and small, public and private, urban and rural, well-resourced, and budget challenged. This Joint Guidance will be continuously updated as additional resources come online. While hosted and coordinated by SUNY, this is a project of equal partners dedicated to collegially helping colleagues in higher education.

There may be a tendency to “panic” about what this will mean for institutions, processes, and most importantly, students. Individuals from certain quarters may use language that encourages such panic. But student and community trust in the systems that we use on our college campuses comes not from panic and rapid changes in response to political winds, but from a steady approach, mindful of the laws and regulations on point, but always seeking to build balanced policies that best serve students.

¹ The Joint Guidance on the 2020 Title IX Regulations is prepared as a service by in-house and firm attorneys, but does not represent legal advice. The Joint Guidance is compliance advice and no attorney/client relationship is formed with any contributor or their organization. Legal advice for specific situations may depend upon state law and federal and state case law and readers are advised to seek the advice of counsel. The Joint Guidance is available absolutely free pursuant to a [Creative Commons Attribution-NonCommercial-ShareAlike 4.0 International license](#) (meaning that all educational institutions are free to use, customize, adapt, and re-share the content, with proper attribution, for non-commercial purposes, but the content may not be sold).

The intent of this Joint Guidance is firmly *not* to sow or contribute to panic but to provide clear, plain-language analysis and compliance guidance, as well as an update on the effective date, litigation and legislation that may postpone effectiveness, and compliance resources that are available for use. There may be several more steps before institutions have to implement the changes in these regulations, and we urge a thoughtful, campus-specific, approach (prepared in partnership with your campus or outside counsel, and mindful of your state and local laws and regulations) rather than jumping into major changes before full consideration.

Further, we recognize that these Regulations come amidst the significant challenges of responding to a global pandemic. This may pose additional challenges for institutions trying to meet the obligations of these Regulations.

A Brief History of the Title IX Regulations

In 2016, with the start of the new administration in Washington, schools understood Title IX through the lens of [Policy Guidance](#) issued in 2001, as well as Dear Colleague Letters (DCL's) issued in [2011](#), [2014](#), and [2015](#). On September 7, 2017, Secretary Betsy DeVos announced that the administration would be taking a different approach and would issue regulations under Title IX of the Education Amendments of 1972. On [September 22, 2017](#), ED withdrew the 2011 and 2014 DCL's, leaving in place the 2001 and 2015 DCLs, and issued a new 2017 set of questions and answers.

On November 29, 2018, ED issued [Proposed Regulations](#) and set a comment period. By the close of the comment period in February 2019, ED had received 124,196 comments from a wide variety of interest groups, regulated colleges and universities, students, activists on all sides of the political spectrum, and other interested parties.

The Department reportedly reviewed these comments and submitted Final Regulations to the Office of Management and Budget (OMB) which conducted a review pursuant to Executive Order 12866. OMB conducted dozens of meetings regarding the regulations.

ED's Office for Civil Rights (OCR) issued its first guidance document on sexual harassment in 1997 in response to a growing number of complaints filed with the agency. The Guidance, "[Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties](#)," had been published in the Federal Register for notice and comment prior to final issuance. As explained in the preamble to the Guidance, OCR had also first held a series of meetings with groups representing students, teachers, school administrators, and researchers. In these discussions, OCR gained valuable information regarding the realities of sexual harassment in schools, as well as information regarding promising practices for identifying and preventing harassment. These insights and learning were reflected in the Guidance.

Shortly after issuance of the Guidance, the Supreme Court issued decisions in *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998), and *Davis v. Monroe County Board of*

Education, 526 U.S. 629 (1999). These decisions were the first by the Court to recognize that sexual harassment can be a form of discrimination prohibited by Title IX. The Court held that a school can be liable for monetary damages if a teacher or other student sexually harasses a student, an official who has authority to address the harassment has actual knowledge of the harassment, and that official is deliberately indifferent in responding to the harassment. The Court explicitly stated that the liability standards established in those cases are limited to private actions for monetary damages, whereas Federal agencies such as OCR could “promulgate and enforce requirements that effectuate [Title IX’s] nondiscrimination mandate,” even in circumstances that would not give rise to a claim for money damages. *Gebser*, 524 U.S. at 292.

In response, OCR once again held a series of stakeholder meetings before publishing the “Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties” in the Federal Register for notice and comment. The final Guidance issued in 2001, reaffirmed much of the 1997 Guidance by grounding its standards in the Title IX regulations, distinguishing them from the standards applicable to private litigation for money damages, and clarifying their regulatory basis as distinct from Title VII of the Civil Rights Act of 1964.

Over the next 10 years, OCR noticed a trend in the nature of the sexual harassment complaints filed with the agency. While many involved allegations of verbal or physical sexual harassment, a growing number involved allegations of sexual violence specifically. Responses to the complaints and media reports indicated that many schools did not understand that sexual violence was a form of sexual harassment -- paraphrasing, unwelcome conduct of a sexual nature that was sufficiently serious to interfere with a student’s education. As a result, OCR issued the 2011 DCL, extending the standards in the 2001 Guidance to specifically address a school’s responsibility to respond to sexual violence. The DCL was developed by staff in OCR’s headquarters, without public input from stakeholders or even from OCR’s regional staff. Not surprisingly, then, the DCL raised a number of additional questions. OCR attempted to respond to a number of these questions in its 2014 DCL (taking the form of a Q&A document).

On September 7, 2017, Secretary DeVos [gave a major speech](#) at George Mason University where she foreshadowed major changes to OCR’s approach to Title IX. A few weeks later, on September 22, 2017, the Department withdrew the 2011 and 2014 DCL’s and issued a new DCL. The DCL noted that the 2001 Guidance remained in effect, but set out a different approach to investigations than in the 2011 and 2014 DCLs -- in particular, with an increased emphasis on protections to be provided to respondents during investigations.

This emphasis was even more apparent in the proposed regulations issued in 2018. The proposed regulations -- applicable to all forms of sexual harassment, including sexual violence -- also largely abandoned the distinctions made in the 2001 Guidance between administrative enforcement and private suits for damages. Instead, the agency would apply the “deliberate indifference” standard set out by the Supreme Court (as interpreted in the proposed regulations) in its enforcement activities. In addition, among other things, the proposed regulations narrowed

the definition of sexual harassment, required actual notice to a school official with the authority to take corrective action (with a broader view of notice for the K-12 setting), limited a school's responsibility to harassment taking place on campus or otherwise in the context of an educational activity, and imposed what amount to specific requirements for grievance procedures for the investigation and adjudication of complaints (including a "safe harbor" for schools implementing those requirements).

Overview of the Joint Guidance

In the Final Regulations, the Department hews to the concepts introduced in the Proposed Regulations, and adds a number of significant and fairly detailed requirements to the mandated grievance process while removing other requirements initially proposed in 2018. Some headlines include the requirement for a hearing in college and university complaints but not in the K-12 setting, detailed notice requirements, detailed letters after findings and appeals, detailed requirements for access to evidence that the institution intends to rely upon and evidence that it does not, and a requirement for live contemporaneous cross-examination by the advisor of choice of the participating parties.

This Joint Guidance will be updated regularly to provide more detail on each of these provisions, including:

1. **Summary of The Final Regulations**
2. **Key Issues in The Preamble**
3. **Changes From The Proposed Regulations**
See also Title IX Text for Text Proposed to Final Comparison and Title IX Summary Proposed to Final Comparison, available at system.suny.edu/sci/tix2020
4. **Effective Date:** The effective date for these regulations will be August 14, 2020 and will apply prospectively.
5. **Section By Section Analysis**
6. **Directed Questions**
7. **Interaction With Other Federal Laws, Regulations, and Guidance**
8. **Select State and Local Issues**

9. **Additional Analysis, including:**
Special Issues for Faith Based Institutions
Title IX Litigation Updates