

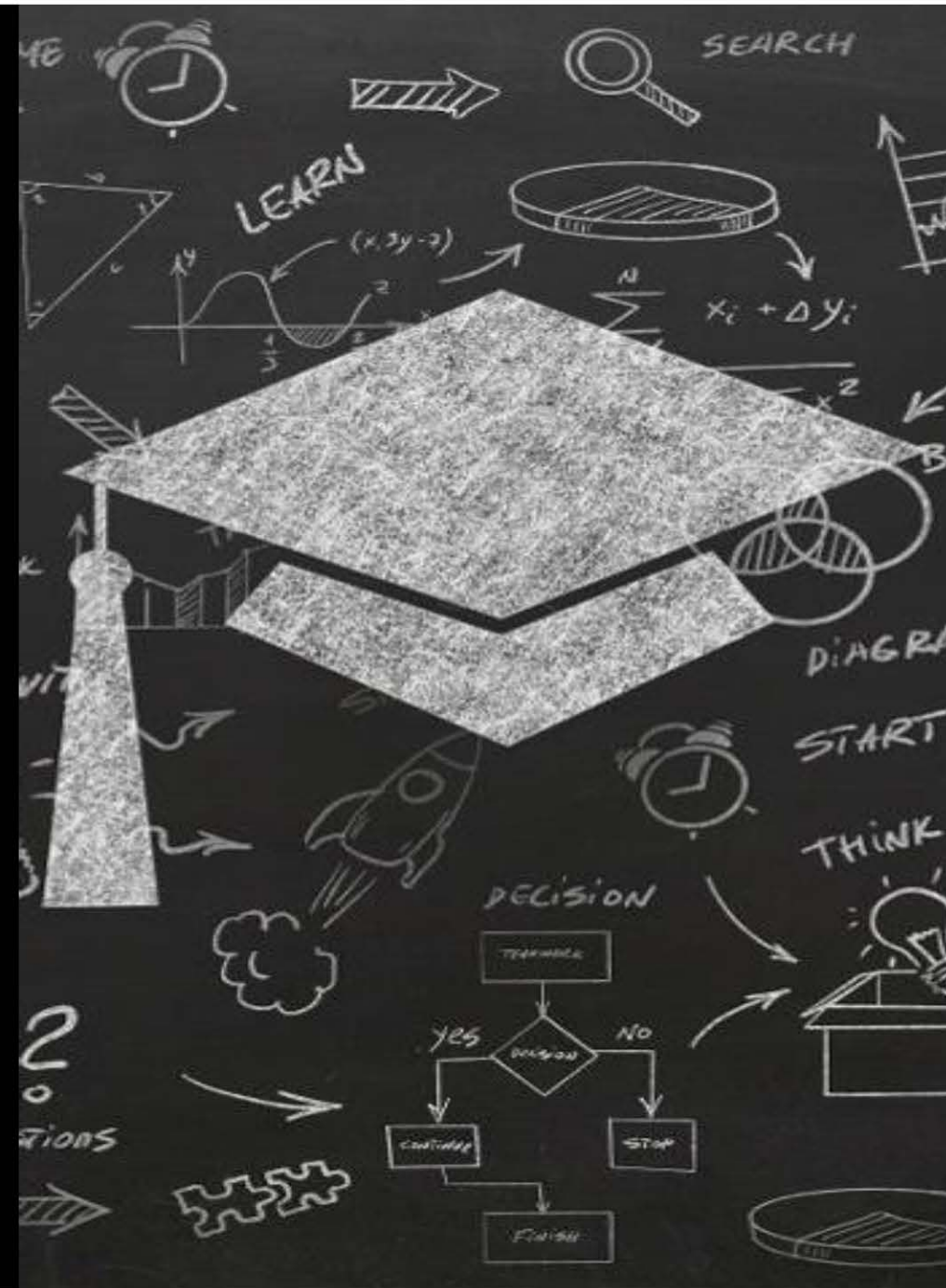
BAKER TILLY WEBINAR

Understanding the Final Title IX Regulations

June 24, 2020



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BACKGROUND

Objectives

In this webinar, participants will learn:

- 01 Key considerations and applicability of the Final Regulations
- 02 How provisions in the Final Regulations compare to provisions in the 2018 proposed guidance
- 03 Actions institutions should take to comply with the Final Regulations by Aug. 14, 2020



TITLE IX BACKGROUND AND APPLICABILITY

Title IX history

Final Title IX Regulations

- Colleges and universities have a responsibility under Title IX of the Education Amendment of 1972 to protect students' rights to equal education in an environment free from sexual misconduct and harassment
- In 2018, the Department of Education (ED) released proposed Title IX guidance and provided the public with an opportunity to review and comment on the proposed regulations
- On May 6, 2020, ED released its final Title IX regulations, "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance" (Final Regulations), which are effective starting Aug. 14, 2020
- The Final Regulations apply to all higher education institutions receiving federal financial assistance, regardless of size, and include both public and private institutions



Key considerations in the Final Title IX Regulations

KEY CONSIDERATIONS IN THE FINAL TITLE IX REGULATIONS

Definition of sexual harassment



Final Regulations

- Defined as “misconduct on the basis of sex that satisfies one or more of the following:”
 - A school employee conditioning education benefits on unwelcome sexual conduct (i.e., “quid pro quo”)
 - Unwelcome conduct that denies equal access to the school’s education program or activity
 - Sexual assault, dating violence, domestic violence or stalking



Key actions

Revise the definition of sexual harassment in institution’s policy

KEY CONSIDERATIONS IN THE FINAL TITLE IX REGULATIONS

Actual knowledge and applicability



Final Regulations

- Schools are only responsible for formal complaints made to an “official with authority to institute corrective measures on the recipient’s behalf”
- Complaint must be a written document filed by a complainant or signed by the Title IX coordinator



Key actions

- Clarify which individuals have authority to institute corrective measures
- Consider removing references to “responsible employee” or “mandatory reporter”

KEY CONSIDERATIONS IN THE FINAL TITLE IX REGULATIONS

Standard for response



Final Regulations

- Schools will be held to a “deliberately indifferent” standard when deciding if they responded appropriately



Key actions

- Establish process for Title IX coordinator to provide complainants with information
- Identify a back-up for Title IX coordinator

KEY CONSIDERATIONS IN THE TITLE IX FINAL REGULATIONS

Location of incidents



Final Regulations

- Schools are only responsible for incidents within their “education program or activity”
- Policies and grievance procedures do not apply to persons outside the United States



Key actions

- Revise policy to specify school’s jurisdiction for Title IX
- Clarify that addressing off-campus incidents must occur through student conduct

KEY CONSIDERATIONS IN THE FINAL TITLE IX REGULATIONS

Roles and responsibilities



Final Regulations

- Decision-maker of responsibility cannot be the Title IX coordinator or investigator
- Title IX personnel must be free of conflict of interest or bias and trained to serve impartially without prejudging the facts at issue



Key actions

Differentiate individuals for Title IX coordinator, investigator and decision-maker roles

Establish a process for addressing conflicts of interest

KEY CONSIDERATIONS IN THE FINAL TITLE IX REGULATIONS

Training



Final Regulations

- Training of Title IX personnel must include the following:
 - Definition of sexual harassment
 - Scope of school's education program or activity
 - Conducting investigation and grievance process
 - How to serve impartially
 - Technology used in live hearing



Key actions

Train Title IX personnel on required topics

Publish training material on the school's website or make them publicly available

KEY CONSIDERATIONS IN THE FINAL TITLE IX REGULATIONS

Accessible reporting to the Title IX coordinator



Final Regulations

- Refer to the employee designated to coordinate Title IX responsibilities as the “Title IX coordinator”
- Schools must notify students, faculty, employees and unions the name and contact information of Title IX coordinator
- Contact information must be displayed on institution’s website



Key actions

Notify necessary personnel of the name and contact information of Title IX coordinator

Display the Title IX coordinator’s name and contact information on the institution’s website

KEY CONSIDERATIONS IN THE FINAL TITLE IX REGULATIONS

Grievance process



Final Regulations

- Treat complainants and respondents equitably
- Include reasonably prompt timeframes for conclusion of the grievance process
- Describe supportive measures available and sanctions a school may impose on a respondent



Key actions

Provide remedies to complainants when respondents are found responsible

Establish reasonably prompt timeframes for conclusion of the grievance process

Update policies to include supportive measures available and range of sanctions a school may impose

KEY CONSIDERATIONS IN THE FINAL TITLE IX REGULATIONS

Supportive measures



Final Regulations

- Schools must offer complainants supportive measures
- Examples include class or dorm reassignment or no-contact orders



Key actions

Clarify that supportive measures are to be free, individualized services

Measures should restore or preserve equal access to education

Measures should be non-punitive or disciplinary with respect to another student

KEY CONSIDERATIONS IN THE FINAL TITLE IX REGULATIONS

Presumption of innocence



Final Regulations

- Grievance procedures and written notice of allegations must include “presumption of non-responsibility,” meaning that respondent is presumed not responsible until the conclusion of the grievance process



Key actions

Clarify that respondents are presumed not responsible for Title IX violations until conclusion of the grievance process

KEY CONSIDERATIONS IN THE FINAL TITLE IX REGULATIONS

Written notice

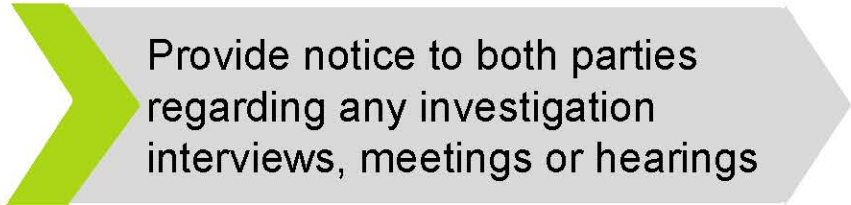


Final Regulations

- School must provide written notice to the parties with “sufficient details of the sexual harassment allegations being investigated”
- Send written notices of any investigation interviews, meetings and hearings to both parties



Key actions



Provide notice to both parties regarding any investigation interviews, meetings or hearings

KEY CONSIDERATIONS IN THE FINAL TITLE IX REGULATIONS

Informal resolution



Final Regulations

- Schools have the discretion to facilitate an informal resolution after a formal complaint is filed
- Both parties must give “voluntary written consent”



Key actions

Revise procedures to include an informal option for proceedings that do not have an employee respondent

KEY CONSIDERATIONS IN THE FINAL TITLE IX REGULATIONS

Live hearing



Final Regulations

- Grievance procedures must provide for a live hearing with cross-examination conducted by the parties' advisors
- If a party does not have their own advisor of choice at the live hearing, institutions must provide that party, at no fee or charge, with an advisor



Key actions

- Revise grievance procedures to provide for a live hearing
- Provide an advisor to each party
- Create a recording or transcript of each live hearing

KEY CONSIDERATIONS IN THE FINAL TITLE IX REGULATIONS

Burden of gathering evidence



Final Regulations

- School is responsible for gathering evidence to reach a conclusion
- School must not restrict the ability of either party to discuss allegations or present evidence
- Provide all parties the opportunity to present facts, expert witness and other evidence



Key actions

Revise grievance procedures to specify that school has the burden of gathering evidence

Remove restrictions in parties' ability to discuss allegations or gather evidence

Provide parties with opportunity to present facts, witnesses and evidence

KEY CONSIDERATIONS IN THE FINAL TITLE IX REGULATIONS

Confidentiality



Final Regulations

- Schools cannot access, consider, disclose or use privileged treatment records without the party's voluntary and written consent



Key actions

Revise grievance procedures to state that privileged records can only be released with written consent

KEY CONSIDERATIONS IN THE FINAL TITLE IX REGULATIONS

Right to an advisor



Final Regulations

- Both parties must have the same opportunity to select an advisor
- The advisor may be an attorney



Key actions

Allow both parties to select an advisor without restriction

KEY CONSIDERATIONS IN THE FINAL TITLE IX REGULATIONS

Review of evidence



Final Regulations

- School must send evidence and investigative report to both parties and advisors prior to completion
- Each party must have at least ten days to submit written response before the report is finalized



Key actions

Allow each party ten days to review the investigation report and respond

KEY CONSIDERATIONS IN THE FINAL TITLE IX REGULATIONS

Standard of evidence



Final Regulations

- Schools are required to select one of two standards of evidence (“preponderance of the evidence” or “clear and convincing”)
- Apply the same standard of evidence to all formal complaints of sexual harassment under Title IX



Key actions

Revise grievance procedures to specify standard of evidence

KEY CONSIDERATIONS IN THE FINAL TITLE IX REGULATIONS

Right to appeal



Final Regulations

- Schools are required to offer both parties an equal right to appeal a Title IX proceeding



Key actions

- Provide both parties with an equal opportunity to appeal
- Revise grievance procedures to specify grounds for appeal

KEY CONSIDERATIONS IN THE FINAL TITLE IX REGULATIONS

Record retention



Final Regulations

- Maintain documentation related to investigations for seven years
- Provide documentation to complainant and respondent upon request



Key actions

- Establish or update the record retention policy to seven years
- Define a process for requesting and providing documentation

KEY CONSIDERATIONS IN THE FINAL TITLE IX REGULATIONS

Retaliation



Final Regulations

- Expressly prohibit retaliation against any person for exercising Title IX rights
- Protect a complainant against being “intimidated, threatened, coerced or discriminated against” for participating in, or refusing to participate in, a Title IX proceeding



Key actions

- Revise policy and grievance procedures to prohibit retaliation
- Establish or update grievance procedures on filing complaints alleging retaliation



Overall takeaways

UNDERSTANDING THE FINAL TITLE IX REGULATIONS

Key takeaways



The Final Title IX Regulations apply to all institutions receiving federal financial assistance, and are effective beginning Aug. 14, 2020



Institutions should familiarize themselves with the Final Regulations and revise Title IX policies and grievance procedures



Proactively review the Title IX website to ensure compliance with key considerations



Collaborate with the Title IX Coordinator and other key personnel to ensure compliance

UNDERSTANDING THE FINAL TITLE IX REGULATIONS

Additional resources

- [Baker Tilly - Analyzing the updated Title IX regulations](#)
- [U.S. Department of Education - Unofficial Copy of the Final Rule](#)
- [U.S. Department of Education - Title IX Final Rule Overview](#)
- [U.S. Department of Education - Summary of Major Provisions of Title IX Final Rule](#)
- [Brookings - Analyzing the Department of Education's Final Title IX Rules](#)

A top-down view of a dark, textured desk. In the upper right corner, there is a small white pot containing a green cactus with many thin, light-colored spines. To the right of the cactus is a portion of a silver laptop, showing the keyboard and trackpad. Below the laptop, there is a white notebook with a black pen resting on it. A pair of red-rimmed glasses is also visible near the notebook. A large black rectangular box is centered on the desk, containing the text "Questions?" and "Thank you!".

Questions?

Thank you!

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