



# Final Title IX Regulations: A President's Perspective

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Barbara Mistick, NAICU President

## Speakers

Teresa L. Amott, Ph.D., President, Knox College (IL)

David A. Armstrong, J.D., President of St. Thomas University (FL)

Jody Feder, Director of Accountability and Regulatory Affairs, NAICU

*May 13, 2020*

# Agenda

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1. Welcome
2. Overview of Final Title IX Regulations – **Jody Feder**
3. Challenges and Implications of Implementing New Title IX Rules: Conversation with Presidents Teresa Amott and David Armstrong – **Moderated by Barbara Mistick**
4. Questions & Answers



# Overview of Final Title IX Regulations

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# Background

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- Obama Administration
  - Issued Title IX guidance in 2011 and 2014
- Trump Administration
  - Rescinded Obama guidance
  - Issued interim guidance in 2017
  - Published proposed rules on November 29, 2018
  - Released final rules on May 6, 2020
- Final rules
  - Are similar to proposed rules
  - Require supportive services for survivors
  - Provide new procedural protections for accused students

# Standards

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- Adopts Supreme Court standards for individual Title IX lawsuits
- Institutions only have to respond to complaints:
  - If they have actual knowledge of sexual harassment
    - Occurs only if a school official with authority to take corrective action receives notice
  - In a manner that is not deliberately indifferent
  - If the misconduct occurs within the school's program or activity

# Definition of Sexual Harassment

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- Sexual harassment includes three types of conduct:
  1. Quid pro quo sexual harassment by employees
  2. Sexual assault, dating violence, domestic violence, and stalking, as defined by the Clery Act
  3. Any other “unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it denies a person access to the recipient’s education program or activity
- The Title IX framework is applicable both to students and employees

# Responding to Sexual Harassment Complaints

Institution's response is separate from investigation

- Institutions must respond to harassment reports by providing supportive services to victims
  - Such services are required even if no formal complaint triggering an investigation is filed
- Institutions required to investigate formal complaint only



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# Responding to Sexual Harassment Complaints

Institution's response is separate from investigation

- Institutions required to dismiss complaints that:
  - Do not meet the definition of sexual harassment
  - Have not occurred within their educational program or activity
  - Did not affect a person in the United States
- Institution still allowed to respond to misconduct that does not rise to the level of a formal Title IX complaint



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# Requirements for Formal Complaints

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- The regulations contain numerous detailed requirements regarding:
  - Grievance procedures
  - Notice
  - Investigations
  - Hearings
- Institutions still allowed to hire outsiders or use their own employees to investigate and adjudicate complaints

# Cross-Examination for Hearings

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- Institutions must:
  - Provide for a live hearing;
  - Allow advisors for both parties to cross-examine the other party and witnesses; and
  - Provide an advisor to students who don't have one.
- Limits on cross-examination
  - No questions about a complainant's sexual behavior or disposition.
    - Unless offered to establish consent or another party's responsibility for violation.
  - Separate rooms allowed.
- Institutions not allowed to rely on statements that are not subject to cross-examination.

# Other Disciplinary Hearing Requirements

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- Institutions allowed choice of:
  - Preponderance of the evidence standard
  - Clear and convincing evidence standard

## **BUT**

- Institutions must use the same standard of evidence for complaints against employees, including faculty.
- Institutions must offer an opportunity to appeal based on procedural irregularities, new evidence, or bias or conflict of interest of coordinator, investigator, or descision-maker.
- Institutions can offer informal resolution instead of investigation and adjudication.
  - Need consent from both parties.



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# Miscellaneous Provisions

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- Retaliation prohibited
- State law preempted
- No requirement to submit written requests in order to invoke religious exemption
- Emergency removal of students allowed
- Applicability of other laws clarified



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# Beneficial Provisions

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- Flexibility on timing of investigations
- Ability to offer informal resolution
- Adoption of actual knowledge and deliberate indifference standards
- Clarification of religious exemption

# Concerns

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- Criticisms of new procedural protections for accused students:
  - Highly prescriptive and legalistic
  - Turn schools into courts
  - Costly and difficult to implement
  - Likely to have chilling effect on victims
  - May increase liability
- Problematic procedural requirements:
  - Live hearing with cross-examination and appointment of an advisor
  - Standard of evidence
  - Access to evidence
  - Elimination of single investigator model

# Notable Changes from Proposed Rule



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- Broadens definition of sexual harassment.
  - Includes sexual assault, dating violence, domestic violence, and stalking
- Add protections for victims:
  - Supportive services required
  - No cross-examination by a party personally
  - No use of medical treatment records as evidence without consent

# Notable Changes from Proposed Rule



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- Eliminates requirement that institutions apply the same standard as is used in other disciplinary hearing
- Prohibits retaliation
- Clarifies that “program or activity” includes buildings controlled by recognized student groups, such as fraternities
- Eliminates references to “due process”
- Clarifies that the federal regulations preempt state law when there is a conflict



# Other Changes

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- Applies Title IX framework to sexual harassment complaints by employees
- Eliminates the safe harbor for institutions that comply with the specified grievance procedures
  - Instead institutions must follow those procedures
- Excludes conduct that did not occur against a person in the United States
- Adopts mandatory appeals process

# What's Next?

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- Implementation: August 14, 2020
- Lawsuits?
- Congressional action?
- The college president perspective



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# Challenges and Implications of Implementing New Title IX Rules

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**Barbara Mistick, D.M.**  
*NAICU President*

# NAICU Resources

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- NAICU [Executive Summary](#) of Final Title IX Rules
- NAICU [Technical Summary](#) of Final Title IX Rules
- Questions? Contact Jody Feder ([jody@naicu.edu](mailto:jody@naicu.edu))