The new Title IX Rule, which becomes effective on August 14, 2020, schools may find it necessary to post new information on their websites.

1. **Education Program or Activity.** The DOE has added two new provisions in the final regulations specifically aimed at covering off-campus conduct.

Technology center:

The first is that an “education program or activity” includes any events or circumstances where “the school exercised substantial control over both the respondent and the context[.]” This language comes straight from *Davis*, where it originally referred to the control K-12 schools have over elementary school students on school property. As used in the regulations, it is likely to encompass school employees or other agents who engage in misconduct at any off-campus, school-sponsored events.

Making sure that all staff is informed and understand the two big things here are:;

To ensure that tech center staff know that they are responsible when they are leading an off campus event, whether it’s a day or overnight trip.

That anyone can report sexual harassment. It no longer has to be the individual who is being harassed. If another student or anyone on the trip, sees an incident, they can report the incident to any member of the tech center and that person has to file a grievance procedure to the Title IX coordinator as soon as they can.

Higher education:

The second new provision covers “any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.” The DOE has been very clear that this provision is intended to cover sexual misconduct at off-campus Greek houses. This provision likely also will encompass off-campus events put on by student organizations (e.g., when the club soccer team rents a local event space for a mixer).

However, the DOE has also been clear that these regulations do ***not*** cover conduct occurring during study abroad programs. Therefore, it is up to each institution to decide whether it wants to voluntarily include study abroad and other off-campus misconduct within the scope of its Title IX procedures.

1. **Sexual Harassment.** The regulations make several changes intended to narrow the definition of “sexual harassment” and sync that definition with the rules courts have applied since *Gebser* and *Davis*. The regulatory definition of “sexual harassment” now includes three types of sex-based conduct.
   1. First, Title IX covers “quid pro quo” harassment, when a school employee conditions access to educational benefits on unwelcome sexual conduct. Note that this provision does not cover sexual conduct by students or other agents.
   2. Second, sexual harassment includes “unwelcome conduct that a reasonable person would determine is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school’s education program or activity.” This represents the DOE’s efforts to raise the threshold for Title IX harassment from Obama-era rules, and match the Supreme Court’s definition.
   3. Third, the new definition incorporates four components from the Clery Act and the Violence Against Women Act: sexual assault, domestic violence, dating violence and stalking. These additions are intended to clarify that one particularly severe incident (even if not “pervasive”) can qualify as Title IX sexual harassment if it falls within any of these definitions.

Perhaps most importantly, this definition covers conduct by employees against other employees — not just conduct directed at students. The DOE has been very clear that it expects schools to apply the same procedural protections and the same standard of proof to or employer/employee or employee/employee sexual harassment claims as to student claims, provided the employee claims meet the definitional requirements above. This is true even for at-will employees. So, in addition to updating, Title IX policies and procedures, schools will need to make sure their employee handbooks and collective bargaining agreements are updated to account for these new procedural requirements.

School will now need to add the grievance procedures and policies and grievance forms in the ~~to~~ the faculty and employee handbooks

They will also need to add the above definitions a, b, & c to the handbook.

They also need have the grievance for in the handbook and on line to ensure that anyone can file a sexual harassment claim. If a school employee witnesses an event, they have to report it to the Title IX coordinator immediate.

If a school employee is notified that an incident has taken place, they have to report it to the Title IX coordinator. Example: if a student tells a maintenance worker or a member of the kitchen staff, they need to report it right away. A grievance report no longer has to be filed solely by the victim.

The same verbiage that is added to the employee/faculty handbooks will also need to be added to the collective bargaining agreement.

**Actual Knowledge and Deliberate Indifference.** These two definitions, taken together, govern when and how a school must respond to (or be liable for failing to respond to) reports of sexual harassment.

* 1. “Actual knowledge” means a mandated reporter has notice of “sexual harassment *or* allegations of sexual harassment.” In the K-12 context, all employees are now mandatory reporters. Colleges and universities have more flexibility in this regard and can determine for themselves which employees have “authority to institute corrective measures” such that their knowledge of a sexual harassment complaint is “actual knowledge” for Title IX purposes.
  2. A school cannot be liable for failing to respond to known allegations of harassment unless it acts with “deliberate indifference,” defined as actions that are “clearly unreasonable in light of the known circumstances.” This is always a fact-specific inquiry, but promptness, impartiality, freedom from conflicts of interest, and adherence to published policies and procedures will always be very important. And, the school’s response must always include offering supportive measures (more on that below). Again, these definitions come directly from *Gebser* and *Davis*.

1. **Formal Complaints Versus Reports of Sexual Harassment.** Based on the DOE’s proposed regulations issued in 2018, commenters were concerned that victims would be deterred from seeking help because only a “formal complaint” of harassment triggered a school’s duty to respond. Now, a school’s duty to respond arises on receiving any “report” of sexual harassment. Also unlike in the proposed regulations, there is no “safe harbor” for schools that provide supportive measures — offering supportive measures is now required in every case.
   1. A “report” means a report of sex discrimination (including sexual harassment) made by any person, at any time, and by any means (in person, phone, mail or email) that results in the Title IX coordinator receiving the person’s verbal or written report. Reports are not limited to a school’s campus community and may come from others, such as on-campus visitors. Upon ~~On~~ receiving a report, the Title IX coordinator ***must*** promptly:
   2. 1. contact the complainant, i.e., the alleged victim (if that person can be identified);
      2. offer the complainant supportive measures;
      3. explain the process of filing a formal complaint;
      4. explain that supportive measures can be available with or without a formal complaint;
      5. consider the complainant’s wishes with regard to supportive measures;
      6. contact the respondent, who must also be offered supportive measures; and
      7. if supportive measures are not provided to a complainant, the school must document why it did not provide a complainant with supportive measures and why not providing such measures is not deliberately indifferent.
   3. A “formal complaint” is 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.” Only those who are “participating in or attempting to participate in” the school’s “education program or activity” (i.e., students, employees, applicants and, in some cases, parents) may file a formal complaint. The formal complaint must contain the complainant’s signature (physical or electronic) or otherwise definitively indicate that the complainant is the person filing the complaint. Filing a formal complaint triggers the school’s duty to initiate the grievance process (discussed in a later alert).
2. **Supportive Measures.** As noted above, one of the key concepts in the new regulations is the importance of offering “supportive measures” upon receipt of any report or formal complaint of sex discrimination. The 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[.]” These measures are designed to preserve the complainant’s access to education without unreasonably burdening the respondent. Examples of possible supportive measures include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual contact restrictions, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of campus, and other similar measures. Supportive measures should be coordinated by the Title IX coordinator and kept confidential to the extent reasonably possible. Importantly, supportive measures should be equitably offered to both the complainant and the respondent.
3. **Training of Title IX Coordinators and Posting of Training**

The new Title IX Rule specifically requires schools to post on their websites:

1. The *contact information* for the school’s Title IX Coordinator(s);
2. The school’s *non-discrimination policy*; and
3. *Training materials* used to train the school’s Title IX personnel.

Information about each of these requirements can be found in the unofficial version of the Title IX Rule posted by the Department, and the Department’s commentary about the Rule, which can be viewed at

**Title IX Coordinator Contact Information / Non-discrimination Policy**

* Section 106.8(a) requires schools to designate and authorize at least one employee as a Title IX Coordinator and to notify students, employees, applicants, parents and guardians, and others of the Title IX Coordinator’s contact information. That information must include the name or title of the Title IX Coordinator, an office address, a telephone number, and an e-mail address.
* Section 106.8(b)(2)(i) requires schools to “prominently display” the Title IX Coordinator’s contact information on the school’s website, if the school has a website.
* Similarly, § 106.8(b)(1) requires schools to notify students, employees, applicants, parents and guardians, and others that the school does not discriminate on the basis of sex, and that Title IX requires the school not to discriminate. This non-discrimination policy must also be prominently displayed on the school’s website, if any, under § 106.8(b)(2)(i).
* These requirements are intended to ensure that a school’s entire educational community understands how to contact the Title IX Coordinator to report sex discrimination, including sexual harassment. Section 106.8(a) expressly states that reports can be made at any time, including during non-business hours, by using the Title IX Coordinator’s listed telephone number or e-mail address, “or by any other means that results in the Title IX Coordinator receiving the person’s verbal or written report.”

**Training Materials for Title IX Personnel: § 106.45(b)(1)(iii) & § 106.45(b)(10)(i)(D)**

* The Title IX Rule requires schools’ Title IX personnel to be unbiased and free from conflicts of interest.
* Title IX personnel include the Title IX Coordinator, any investigator, any decision-maker, and any person who facilities an informal resolution (such as mediation).
* Schools must ensure that Title IX personnel receive training as follows:
  + On Title IX’s definition of “sexual harassment”
  + On the scope of the school’s education program or activity
  + On how to conduct an investigation and grievance process
  + On how to serve impartially, including by avoiding prejudgment of the facts at issue
  + On how to avoid conflicts of interest and bias
  + Decision-makers must receive training on any technology to be used at a live hearing, and on issues of relevance of questions and evidence, including when questions and evidence about a complainant’s sexual predisposition or prior sexual behavior are not relevant
  + Investigators must receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence
* All materials used to train Title IX personnel:
  + Must not rely on sex stereotypes,
  + Must promote impartial investigations and adjudications of formal complaints of sexual harassment,
  + Must be maintained by the school for at least 7 years,
  + Must be publicly available on the school’s website; if the school does not maintain a website the school must make the training materials available upon request for inspection by members of the public.
* Under the Title IX Rule, students, employees, the Department, and the public will be able to examine a school’s training materials, providing a necessary safeguard to improve the impartiality, reliability, and legitimacy of Title IX proceedings. This requirement will improve the overall transparency and integrity of a school’s Title IX policies and procedures.
* Schools must publish training materials that are up to date and reflect the latest training provided to Title IX personnel.
* Section 106.45(b)(10)(i)(D) does not permit a school to *choose* whether to post the training materials or offer a public inspection option. Rather, if a school has a website, the school must post the training materials on its website.
  + A school must post on its website: “*All materials* *used* *to train* Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process.” Posting anything less than “all materials” on the website is insufficient. Accordingly, merely listing topics covered by the school’s training of Title IX personnel, or merely summarizing such training materials is not the same as posting “all materials.”
* If a school’s current training materials are copyrighted or otherwise protected as proprietary business information (for example, by an outside consultant), the school still must comply with the Title IX Rule. This may mean that the school has to secure permission from the copyright holder to publish the training materials on the school’s website.
  + Nothing in the Title IX Rule abrogates intellectual property rights. If a school is unable to secure permission from a third party to post copyrighted training materials, then the school must create or obtain training materials  that can lawfully be  posted on the school’s website.
* The Department does not certify, endorse, or otherwise approve or disapprove of particular organizations (whether for-profit or non-profit) or individuals that provide Title IX-related training and consulting services to schools.

As to every school that has a website, the school must post important information about the school’s Title IX policies and procedures on their website. When the new Title IX Rule becomes effective (August 14, 2020), school websites must include (i) the Title IX Coordinator’s contact information, including an e-mail address; (ii) the school’s non-discrimination policy; and (iii) all materials used to train the school’s Title IX personnel.