

TITLE IX: THE FINAL RULE

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THE FINAL RULE

The Department of Education has released Regulations that will mark a new era in Title IX implementation and enforcement, as this Regulation will carry the full force of the law and go well beyond previously published guidance. The Rule changes the fundamental provisions of Title IX that have provided guidance since 2011, and some guidance published since 2001.

WHAT IS THE FINAL RULE?

- The Final Rule is the 2,033 page regulation proposed by the Department of Education (“DOE”) on May 6, 2020 regarding how educational institutions including higher ed and K-12 respond to complaints of sexual harassment, sexual assault, dating & domestic violence, and stalking.
- The effective date of the Final Rule is August 14, 2020.
- While there are currently multiple lawsuits against the Department of Education, we must plan for the Rule to be in full effect on August 14, 2020 and for ECU to be in compliance with the Rule.





KEY
CHANGES
UNDER THE
FINAL RULE

JURISDICTION

- Control over Respondent and the context of the harassment
- "Education program or activity"
 - Locations, events, or circumstances under substantial control
 - Any building owned or controlled by an officially recognized student organization
- Limitations on who can file a Title IX complaint

ACTUAL KNOWLEDGE

- Reports made to:
 - Title IX Coordinator
 - Any official who has the authority to institute corrective measures
 - Any employee of an elementary and secondary school



CHANGES TO DEFINITIONS

SEXUAL HARASSMENT:

- Quid Pro Quo
 - Only allows Quid Pro Quo Sexual Harassment to be committed by an employee
- Hostile Environment
 - Any unwelcome conduct that a reasonable person would find so severe, pervasive, and objectively offensive that it effectively denies a person equal educational access.

USING CLERY/VAWA DEFINITIONS:

- Sexual Assault
 - New definition includes: Rape, Sodomy, Sexual Assault with an Object, Incest, Fondling, and Statutory Rape
- Dating Violence
- Domestic Violence
- Stalking

WEBSITE REQUIREMENTS:

- Must publish the Title IX Coordinator's contact information and that the University does not discriminate on the basis of sex in any education program or activity in all materials related to application for admission, application for employment and the ECU Community School.

TRAINING REQUIREMENTS:

- Title IX Personnel including Title IX Coordinator, investigators, decision makers, and appellate officers must receive training on the following:
 - Definitions;
 - Scope of the University's education program or activity;
 - How to conduct an investigation or grievance process;
 - How to serve impartially; and
 - Relevance.
- Decision makers must receive training on technology that will be used at a live hearing.
- All training material must be published on the website and made available for public inspection.

PROCEDURAL REQUIREMENTS

REVIEW OF EVIDENCE

Prior to completing a draft of the Final Investigative Report, the Investigator will provide both parties a copy of all evidence obtained by the Investigator that is directly related to the allegations. Both parties have 10 business days to review and provide a response to the Investigator.

REVIEW OF FINAL INVESTIGATIVE REPORT

The Investigator will provide both parties a copy of the Final Investigative Report for the party to review and respond. Both parties have 10 business days to review and provide a response to the Investigator.





LIVE HEARINGS

PROVIDING AN ADVISOR

- Parties can have an advisor of their choice.
- If a party does not have an advisor, the University must provide one:
 - At no fee or charge
 - May or may not be an attorney

CROSSEXAMINATION

Parties and witnesses must attend the hearing and submit to live, advisor-led cross-examination otherwise all statements submitted by an absent party must be excluded.

WHAT IS
STAYING THE
SAME?






CONSENT

CONSENT DEFINITION

- ECU will continue to use the same definition of consent.
- Consent is **Informed** (knowing); **Voluntary** (freely given); and **Active** (not passive), meaning that, through the demonstration of clear words or actions, a person has indicated permission to engage in mutually agreed -upon sexual activity.

STANDARD OF EVIDENCE

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- ECU will continue to use the preponderance of the evidence standard.
 - Final Rule allowed institutions to choose between the preponderance of the evidence standard or the clear and convincing evidence standard.
 - The standard must be consistent for all formal complaints of sexual harassment.
 - Must be consistent for complaints against students and complaints against employees, including faculty members.

RESPONSIBLE EMPLOYEES

- A Responsible Employee is:
 - A person designated as a supervisor;
 - A person designated as a Campus Security Authority;
 - An employee responsible for coordinating or supervising clinical education experiences, practicums, and/or internships; or
 - Any staff member of the ECU Community School.
- A Responsible Employee is required to report to the University's Title IX Coordinator all relevant details (obtained directly or indirectly) about an incident of Prohibited Conduct that involves a campus community member as a Complainant, Respondent, and/or witness, including dates, times, locations, and names of parties and witnesses



WHAT DOES
THE PROCESS
LOOK LIKE?



STUDENT PROCESS

Formal Complaint

Notice of Investigation

Fact Finding Investigation

Evidence Review

Review of Final Investigative Report

Referral to OSRR

OSRR

Transition from OED to OSRR

- OSRR will notify both parties that OSRR received a copy of the report from OED
- OSRR will provide both parties with a copy of the investigative report
- Both parties will have an opportunity to provide additional information/statements
- OSRR will meet with both parties to review their rights and the process
- OSRR will determine appropriate charges





Hearing Board

Determination of Responsibility

Opportunity to Appeal

Reasons for Appeal

Appeal Route Based on Sanction

OSRR

Hearing

- OSRR will convene a panel of 3 (faculty and Staff)
- Nature and complexity of the case, number of witnesses, and logistics determine the length of the hearing. Historically these take at least 8 hours
- OSRR hearing advisor, OUC representative are both present throughout the hearing
- Panel will be responsible for determining findings, writing a rationale for findings, credibility statements, determine sanctions, and write a rationale for sanctions
- Appeals along the way and the final outcome
 - Complainant can no longer appeal the sanction



ONGOING CONCERNS

- CONFLICT BETWEEN TITLE VII AND TITLE IX
- TRAINING REQUIREMENTS
- CONTINUED LEGAL CHALLENGES
- CONTINUING GUIDANCE/INTERPRETATIONS FROM THE DEPARTMENT OF EDUCATION

ECU's Commitment

ECU is committed to providing high levels of service and offering comprehensive resources that stop, prevent, and remedy sexual violence, sexual harassment, intimate partner violence, and stalking, as well as other forms of sex/gender discrimination.

QUESTIONS?