

Department of Education's Title IX Final Regulations: What do they mean for Marquette?

On May 6, 2020, the U.S. Department of Education released Title IX regulations (known as "Final Regulations") imposing new legal requirements on how schools conduct student and employee discipline processes for sexual harassment and assault. Schools must implement them by August 14, 2020. Many provisions have sparked controversy and uncertainty, and you may get questions about them. Please feel free to refer folks to the Title IX Office to answer them. Here are the big changes you should know about, and how they will (or won't!) impact MU:

Standard of Evidence. Schools may choose between the preponderance standard or the higher clear and convincing evidence standard. MU will use the preponderance standard, as we do now.

Informal Resolution. Schools may offer informal resolution, such as mediation, so long as the accused is not an employee, both parties voluntarily agree to it, and the process is led by a trained facilitator. MU is exploring informal resolution, as it may lead victims to come forward.

Live Hearing. Schools must stop using the "single investigator" process, in which one investigator interviews parties and witnesses, examines evidence, and decides whether the accused is responsible for the alleged misconduct. Instead, they must provide a live hearing, and to allow parties and witnesses to participate virtually. MU currently uses the single investigator process, so we will have to implement a hearing process and recruit and train individuals to hear the cases and determine the outcome.

Cross-Examination at the Hearing. Schools must allow cross-examination during the live hearing. The parties are prohibited from questioning each other; rather, each party's "advisor" - who may be an attorney - may question to the opposing party. The person running the hearing must exclude any questions that are not "relevant." Parties may participate from separate rooms virtually, and schools must "oversee cross-examination in a manner that avoids aggressive, abusive questioning." MU will have to thoroughly train the person running the hearing on relevancy. We will also have to recruit and train individuals to serve as advisors, as we must provide advisors for parties who request them.

Definition of Sexual Harassment. The Final Regulations define sexual harassment to include the following conduct on the basis of sex: quid pro quo harassment, hostile environment harassment and sexual assault, dating violence, domestic violence and stalking as those terms are defined by the Clery Act and the Violence Against Women Act (VAWA). They also adopt the U.S. Supreme Court's definition for hostile environment harassment: unwelcome conduct that a reasonable person would find "so severe, pervasive, and objectively offensive" that it denies a person equal educational access. The regulations make clear that a single instance of sexual assault constitutes sexual harassment. MU currently defines the foregoing offenses differently than proscribed within the Final Regulations, so we will have to change our definitions to comply.

Actual Knowledge and Deliberate Indifference. The Education Department will not find that a school violated Title IX unless the school had “actual knowledge” of an allegation and responded with “deliberate indifference,” which means “clearly unreasonable in light of the known circumstances.” Actual knowledge means notice to the Title IX Coordinator or any official with authority to institute corrective measures. Currently, most schools (including MU) deem nearly all employees as mandatory reporters to the Title IX Coordinator, and they may continue to do so under the new regulations. MU will likely continue this practice, but may consider deeming a few individuals confidential so community members have more confidential support options on campus.

Jurisdiction. Schools do not have to investigate incidents that occur outside the school’s “program or activity,” such as in an off-campus residence. MU will take discretionary jurisdiction when appropriate, as we do now.