

# Title IX Regulation Changes in a Nutshell

**UAC**

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Office of Institutional Equity

The logo for New Mexico State University, featuring the letters "NM" in a large, serif font above the words "STATE UNIVERSITY" in a smaller, sans-serif font. The logo is set against a white background within a dark red square.

**NM**  
STATE  
UNIVERSITY

**BE BOLD.** Shape the Future.

# Title IX of the Education Act

*“No **person** in the **United States** shall, on the basis of **sex**, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”*

Title IX of the Education Amendments of 1972  
Implementing Regulations at:  
20 U.S.C. § 1681 & 34 C.F.R. Part 106



# 2020 Title IX Regulation Changes

- Released on May 6, 2020, by Department of Education.
- **2083 pages of regulations and guidance to review.**
- Extremely prescriptive changes focusing primarily on due process for Respondents through “grievance process requirements”.
- Regulations take full effect on August 14, 2020.
- Regulations amend the Code of Federal Regulations and are enforceable by OCR.
- Obama changes to Title IX were “guidance” from OCR.
- These changes are codified - have the force of law.

# Major Impact of Regulation Changes on NMSU

- NMSU will have a significantly revised policy.
  - ARP 3.25 Discrimination, Harassment and Sexual Misconduct on Campus has undergone significant changes.
  - Live hearing and cross-examination will be required in Title IX cases alleging sexual harassment, sexual assault, stalking, dating/domestic violence.
  - Extensive training will be required of OIE employees, hearing officers and advisors, and training must be posted on the OIE website.
  - Must adopt the newly codified definition of sexual harassment.

# Sexual Harassment codified



Under the new regulations, prohibited "sexual harassment" means conduct, on the basis of sex, which satisfies one or more of the following:

- 1. an employee** conditioning the provision of an aid, benefit or service on an individual's participation in unwelcome sexual conduct (i.e., *quid pro quo*); or
2. sexual assault (as defined by Clery Act), or "dating violence," "domestic violence" and "stalking" (as defined by Violence Against Women Act); or

# Sexual Harassment Codified cont...

## *Conjunction Junction...*

### **OLD DEFINITION:**

- Unwelcome Conduct of a Sexual Nature, which is sufficiently severe, persistent or pervasive so as to create a hostile work or learning environment.

### **NEW DEFINITION:**

3. Unwelcome Conduct of a Sexual Nature, which is sufficiently severe, persistent and pervasive so as to create a hostile work or learning environment.  
**(Hostile Environment Analysis)**

# Hostile Environment Analysis

Unwelcome conduct determined by a reasonable person, placed in a substantially similar situation, to be so severe, pervasive, *and* objectively offensive that it effectively denies a person equal access to the recipient's education program or activity.



# Jurisdictional Changes

## ▪ **Jurisdiction for Title IX cases limited to:**

- Only incidences occurring in the **United States**
- University must have control of the “harasser” **and** the context of the harassment
  - **Incident must have occurred in program or activity of the institution**
  - **Includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution. i.e. fraternities and sororities**
- Complainant must be a member of, or seeking to be member of NMSU.

# Live Hearings



- Mandates live hearings for Higher Education Title IX cases
- Specific Training for Decision Makers/Hearing Officers Required
- Turns resolution process into mini criminal court
- Parties and witnesses **must** attend hearing and submit to live, advisor-led cross-examination
  - Otherwise **all statements** submitted by absent party must be excluded by the hearing officer even if they previously submitted to an OIE interview.

# Live Hearings cont.

- Hearing officer may not be the Title IX Coordinator, the investigator, or the appeals officer
- Provisions for separate rooms, video-based hearing
  - Must be able to clearly hear and see other parties
- **Must allow live cross-examination to be conducted exclusively by each party's advisor.**
  - Verbal, direct, in real time
  - An advisor must be provided by the University if the student does not have one,



# Presumption and Standard of Proof

- Policy and notice to Respondent must state a presumption that Respondent is not responsible until a determination is reached.
- Preponderance of the evidence will remain the NMSU standard for Title IX cases.
- Standard of evidence must be consistent for all formal complaints of sexual harassment, regardless of policy or underlying statutory authority
- Must also apply the same standard of evidence for complaints against students as for complaints against employees, including faculty.

# Appeals

- Must offer equitable appeal based on determination or dismissal of any allegations. **Grounds limited to:**
  1. Procedural irregularity that affected the outcome of the matter;
  2. New evidence that was not reasonably available at the time the determination was made, that could affect the outcome of the matter; and
  3. The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against a party in general or individually, that affected the outcome of the matter.
- **All parties receive notification of any appeal.**
- **Opportunity for all parties to oppose outcome. i.e. both parties have the right to appeal.**
- **Written decision with rationale** delivered simultaneously to the parties from the hearing officer.
- Appeal decision maker cannot have had any other role in the investigation or resolution process.
- “Reasonably prompt” timeframe for producing appeal decision.

# Notice under New Regulations

- Regulations do not *require* a Title IX investigation unless the institution receives **actual notice through a formal complaint**
  - Actual notice = written, signed **document** of sexual harassment to TIXC or appropriate official who has authority to implement corrective measures.
  - TIXC can also sign a complaint on behalf of a party, but is not a party to the investigation.
  - Constructive notice/respondeat superior – now insufficient to hold institution responsible
- Formal complaints are needed even for informal resolutions under new regs.
- All forms of notice to TIXC still require appropriate supportive measures.

# Title IX Coordinator Notice

- Instead of notifying only students and employees of the Title IX Coordinator's contact information, NMSU must also notify:

- **All applicants** for admission;
- **Applicants for employment**, and
- **All unions**,

Of the name or title, office address, e-mail address, and telephone number of the Title IX Coordinator.

- Also, NMSU must prominently display on their websites the required contact information for the Title IX Coordinator.



# **Bottomline:**

- Must have procedure and policy in place by August 14, 2020 - Friday.
- Reporting obligation has not changed at NMSU.
- Retaliation strictly prohibited by the new regs.
- TIX Team will have to grow to include pool of Advisors, Hearing Officers, and Appeal Decision-Makers to avoid claims of conflict of interest and bias – this will have budget implications.
- Conduct may not meet the now higher Title IX standard. OIE may still address the conduct under Title VII, generally under ARP 3.25, or refer out as a violation of student code of conduct, ARP 3.80 or ARP 3.00.

# Supreme Court Decision June 2020

- Opinion by Gorsuch and joined by four justices.
- Major victory for LGBTQ community.
- SCOTUS found in favor of Plaintiffs.
- Three cases in front of the court:
  - Two cases involved employees who alleged they were fired because they are gay.
  - One of them was fired after working for six years as a male funeral director and fired two weeks after telling her boss that she was transgender and would be coming to work as a woman.



# Supreme Court Decision Cont.

- Landmark case rules that the Civil Rights Act of 1964 prohibits employment discrimination on the basis of **sexual orientation and gender identity**.
- Rectified the lop-sidedness of the legality of same-sex marriage (2015) with the right to be fired for being gay.
- The meaning of a statute, Title VII of the Civil Rights Act of 1964, which bars employment discrimination based on **race, religion, national origin and sex** was in question. They had to decide whether discrimination “because of sex” — applies to gay and transgender workers.

# Supreme Court Decision cont.

- "Today," Gorsuch said, "we must decide whether an employer can fire someone simply for being homosexual or transgender. The answer is clear."
- The Court said such discrimination is barred by the Civil Rights Act that bans discrimination in employment based on race, religion, national origin or **sex**.
- Highly controversial. Will overturn many state laws.

# Impact on NMSU



- Very little impact.
- NMSU Policy ARP 3.25 already prohibits discrimination on the basis of sexual orientation or gender identity.
- New Mexico Human Rights Act of 1969 makes it illegal to discriminate against someone on the basis of gender identity, sexual orientation, etc. in the areas of employment, housing, credit and public accommodations.

# Contact Information

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