



Title IX and ADA Intersectionality

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Title IX Final Regulatory Changes



Where are we now?

- The Final Rule is incredibly long and complicated. It was released 100 days before the effective date, the Final Rule is 2,033 pages and 636,609 words.
 - DOE took three years to draft the new rules and provided 100 days to implement.
 - Published in the Federal Register on May 19, 2020.
- The regulations became effective August 14, 2020.
 - There is no grace period, OCR started enforcement on August 14th
 - DOE issued a new Case Processing Manual on August 26th
- Nationwide injunctions are no longer a feasible route to slow implementation of the regulations.

How institutions prepared

- Some institutions joined SUNY SCI and used all their webinars and resources, many also sent numerous people to week-long virtual seminars from ATIXA.
- Institutions monitored and reviewed DOE OCR web trainings and clarification blogs.
- Brandee Hancock, from OSU, and I co-developed and co-presented a four-part webinar series for the state in July <https://www.tulsacc.edu/title-ix-regulations-conference>.
 - All conference materials and templates were provided in Word for ease of use at each institution, all resources were made available open-source.
 - The webinars are archived and captioned at <https://www.tulsacc.edu/title-ix-regulations-conference>.
 - We had participants from every institution in the state and an average attendance of 80 per session.
- We are collaborating with more than 20 institutions across the state to put out a state-wide request for proposal for decision makers, advisors, and informal resolution facilitators and to share resources for their training.
- By now each of your institutions should have a significantly revised Title IX policy on your website.

Notable and Specific Major Changes



Uniform definition of sexual harassment

- Revised and uniform definition of sexual harassment across all institutions.
- The Final Rule § 106.30 defines “sexual harassment” as conduct on the basis of sex that satisfies one or more of the following:
 - (i) An employee conditioning educational benefits on participation in unwelcome sexual conduct (i.e., quid pro quo);
 - (ii) 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 educational institution’s education program or activity; or
 - (iii) Sexual assault (as defined in the Clery Act), or dating violence, domestic violence, or stalking as defined in the Violence Against Women Act (VAWA). The joint guidance has all the definitions for you see <https://system.suny.edu/sci/tix2020/>

Institutional response expectations

- How does the Institution have “actual knowledge”
 - If one of these people know:
 - the Title IX Coordinator or
 - “any official...who has authority to institute corrective measures on behalf of the recipient”
- If an Institution receives a “report” it must
 - Offer of supportive measures
 - Explanation of formal complaint process
- If an Institution receives a “formal complaint” it must
 - Must investigate
 - Grievance process must be consistent with the regulations
 - Unless circumstances requires (or permits) dismissal

Dismissal of formal complaints

- Dismissal is determined after you have a formal complaint
 - There is a big difference between what you must dismiss vs. what you may dismiss.
- Formal complaint **must** be dismissed (from the Title IX process) if conduct:
 - Would not constitute sexual harassment even if proved,
 - Did not occur in institution's program/activity, or
 - Locations, events, or circumstances in which an institution exercises substantial control over both the respondent and the context in which the sexual harassment occurs Locations include buildings owned or controlled by officially recognized student organizations. §106.44(a)
 - Did not occur against a person in the United States.
- Formal complaint **may** be dismissed (from the Title IX process) if conduct:
 - If complainant requests to withdraw their complaint
 - If respondent is no longer enrolled or employed
 - When specific circumstances prevent gathering evidence sufficient to reach a determination

Processes that have changed

- If you have a formal complaint you can offer an informal process (mediation) unless it is faculty on student issue, then the informal process is not allowed.
- Interim suspensions are now emergency removals and require a modified risk analysis and appeal, which will likely occur through a Behavioral Intervention Team.
- All investigations end with a written report.
- Investigative report evidence review and Pre-hearing evidence review
 - Before the investigator issues their report and again before the hearing, the parties must have at least 10 days to review any relevant information directly related to the allegations raised in a formal complaint gathered by the investigators, including both inculpatory and exculpatory evidence. At the end of that ten day period, the parties have the right to submit a written response, which the investigator “will consider” before completing their investigative report

Processes that have changed

- For all decisions (faculty, staff, and students) the Institution must have a live hearing with cross-examination by an advisor, which can be done virtually
 - The College or university must provide an advisor “without fee or charge” to any party without an advisor in order to conduct cross-examination (can limit to only CX)
 - The decision maker must rule on relevance of questions on the record
- A decision maker may not draw any inference from a party’s refusal to participate in cross-examination. If a party is not subject to cross-examination, then:
 - No reliance on their statement in determining responsibility.
 - No inference as to responsibility.
- Live hearings may be conducted with all parties present in the same location or virtually, as long as participants can simultaneously see and hear each other.
- A recording or transcript must be created and made available for the parties to review and inspect.
- All training materials used for anyone in the Title IX process must be made public on a website. See <https://www2.ed.gov/about/offices/list/ocr/blog/20200518.html>

Employment challenges

- This new process applies to employees as well as students.
 - This is a huge issue because the law does not read the same.
 - Title VII and Title IX are not the same thing.
- Title VII defines sexual harassment as “severe or pervasive” not the Title IX “severe and pervasive.”
- Title VII “knew or should have known” versus Title IX “actual knowledge”
- Title IX you now “must dismiss” a formal complaint if conduct is not against a person in the United States, nevertheless Title VII applies to United States citizens working abroad.
- “The recipient must keep confidential the identity of...any individual who has been reported to be the perpetrator of sex discrimination, any respondent...except as may be permitted by...FERPA...or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.” §106.71 (a)
 - NSF requires notifications in grant terms and conditions.

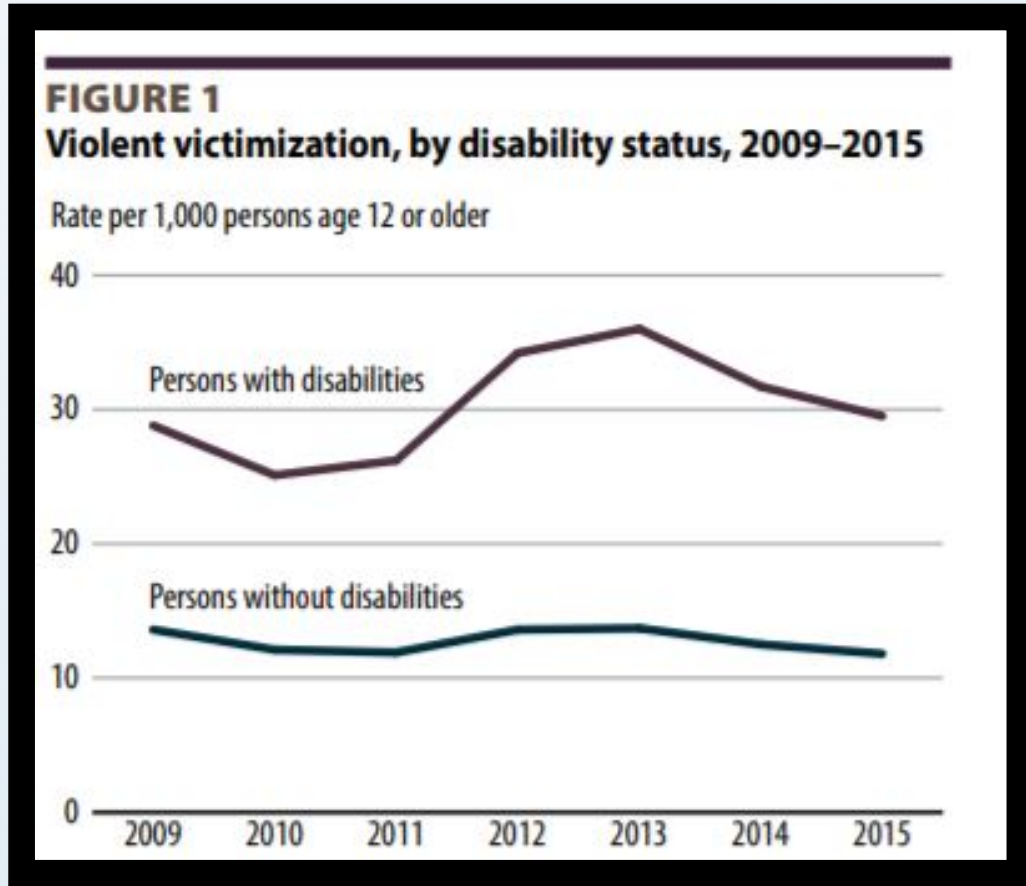
General closing observations regarding the regulations

- Each institution reviewed both Title IX and Student Conduct processes and extensively revised both this summer.
 - Even without a pandemic this would have been exceptionally challenging. This process was already long, involved, and complex, it is now much more so.
- These revisions required significant engagement with HR due to the process being extended to faculty and staff as well as students.
 - This often required modifications to Faculty Handbooks, which again was very challenging over the summer.
- Institutional Title IX Coordinators must continue to be exceptionally adept.
- Many institutions have few matters that they will have jurisdiction over, many concerns are with respondents who have no relationship to the College so the College has no jurisdiction (violence in the home committed by non-student paramour). Institutions spend most of their energy providing supportive measures and resources. These new rules do not hamper an institution's ability to support student survivors in this way, which is good news.
- The outcome of the election will have a direct impact on these regulations.
 - Biden stated on May 6, 2020 when asked about the regulations...“It's wrong,” he continued. “And, it will be put to a quick end in January 2021, because as President, I'll be right where I always have been throughout my career — on the side of survivors, who deserve to have their voices heard, their claims taken seriously and investigated, and their rights upheld.” See <https://www.politico.com/news/2020/05/06/biden-vows-a-quick-end-to-devos-sexual-misconduct-rule-241715>

By the numbers



Department Of Justice Statistics



Nonfatal violent crimes include rape or sexual assault, robbery, aggravated assault, and simple assault.

TABLE 2

Rate of violent victimization against persons with and without disabilities, by type of crime, 2011–2015

Type of crime	Persons with disabilities	Persons without disabilities*
Total	32.3 †	12.7
Serious violent crime	12.7 †	4.0
Rape/sexual assault	2.1 †	0.6
Robbery	4.7 †	1.3
Aggravated assault	5.9 †	2.1
Simple assault	19.6 †	8.7

Note: Based on the noninstitutionalized U.S. residential population age 12 or older. Rates presented per 1,000 persons. Rates for persons without disabilities were adjusted using direct standardization with the population with disabilities as the standard population. See *Methodology*. See appendix table 7 for standard errors.

*Comparison group.

†Significant difference from comparison group at 95% confidence level.

Source: Bureau of Justice Statistics, National Crime Victimization Survey, 2011–2015; and U.S. Census Bureau, American Community Survey, 2011–2015.

A higher percentage of violence against persons with disabilities (40%) was committed by persons the victims knew well or who were casual acquaintances than against persons without disabilities (32%)

TABLE 8

Victim-offender relationship, by victim's disability status, 2011–2015

Victim-offender relationship	Persons with disabilities	Persons without disabilities*
Total	100%	100%
Intimate partner ^a	14.7	12.8
Other relatives ^b	10.0 †	6.4
Well known/casual acquaintances	40.0 †	32.5
Strangers	30.3 †	39.4
Unknown	5.0 †	8.8

Note: Based on the noninstitutionalized U.S. residential population age 12 or older. See appendix table 13 for standard errors.

*Comparison group.

^aIncludes spouses, ex-spouses, boyfriends, and girlfriends.

^bIncludes parents, children, and other relatives.

†Significant difference from comparison group at 95% confidence level.

Source: Bureau of Justice Statistics, National Crime Victimization Survey, 2011–2015.

□ 65% of rapes or sexual assaults against persons with disabilities were committed against those with multiple disability types, the highest percentage among the crime types examined.

54% of violence against persons with disabilities occurred against those with multiple disability types

TABLE 6

Percent of violent crime against persons with disabilities, by type of crime and number of disability types, 2011–2015

Type of crime	Total	Single disability type*	Multiple disability types
Total	100%	46.4%	53.6% †
Serious violent crime	100%	45.4%	54.6% †
Rape/sexual assault	100%	34.6	65.4 †
Robbery	100%	48.4	51.6
Aggravated assault	100%	46.7	53.3
Simple assault	100%	47.0%	53.0% ‡

Note: Based on the noninstitutionalized U.S. residential population age 12 or older. For persons ages 12 to 14, independent living disabilities are not included as a disability type. See *Methodology*. See appendix table 11 for standard errors.

*Comparison group.

†Significant difference from comparison group at 95% confidence level.

‡Significant difference from comparison group at 90% confidence level.

Source: Bureau of Justice Statistics, National Crime Victimization Survey, 2011–2015.

Statistics cited in the Final Regulations

- Page 30079 of the preamble commentary to the Federal Regulations cites numerous statistics including the following.
 - See <https://www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf>
- Students with disabilities are 2.9 times more likely than their peers to be sexually assaulted.
- As many as 40% of women with disabilities experience sexual assault or physical violence in their lifetimes.
- Almost 20% of women with disabilities will have undesired sex with an intimate partner.
- An exploratory study conducted to learn the rates of abuse among university students who have identified as having a disability found:
 - 22% of participants reported some form of abuse over the last year and nearly
 - 62% had experienced some form of physical or sexual abuse before the age of 17;
 - Only 27% reported the incident, and
 - 40% of students with disabilities who reported abuse in the past year said they had little or no knowledge of abuse-related resources.

Statistics cited in the Final Regulations

- More than 90% of all people with developmental disabilities will experience sexual assault.
- 49% of people with developmental disabilities who are victims of sexual violence will experience ten or more abusive incidents.
- 30% of men and 80% of women with intellectual disabilities have been sexually assaulted.
- Individuals with intellectual disabilities are sexually assaulted and raped at more than seven times the rate of individuals without disabilities; women with intellectual disabilities are 12 times more likely to be sexually assaulted or raped than women without disabilities.
- 54% of boys who are deaf and 25% of girls who are deaf, have been sexually assaulted, compared to 10% of boys who are hearing and 25% of girls who are hearing.

National Sexual Violence Resource Center

- NSVS has an extensive toolkit about working with individuals with disabilities and is focused on first responders using a victim-centered approach.
 - <https://www.nsvrc.org/sarts/toolkit/6-6>
- This toolkit includes statistics, people-first language usage, communication strategies, and many other resources.

Specific commentary
from the Final Title IX
Regulations impacting
individuals with
disabilities



“Signed” formal complaints

“The DOE revised the § 106.30 definition of “formal complaint” to describe a “document signed by a complainant” as “a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the recipient) that contains the complainant’s physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint.” Fed. Reg. 30136

Accommodations during the process

“The equal opportunity for both parties to receive a disability accommodation does not mean that both parties must receive a disability accommodation or that they must receive the same disability accommodation. Similarly, both parties may not need a translator, and a recipient [College of University] need not provide a translator for a party who does not need one, even if it provides a translator for the party who needs one.” Fed. Reg. 30186

Document exchange

“The Department revised § 106.45(b)(5)(vi) to specifically provide that the recipient may provide the party and the party’s advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy format, and recipients should provide such evidence in a format that complies with any applicable disability laws.” Fed. Reg. 30499

Emergency removals

- “Section 106.44(c) expressly acknowledges that recipients may be obligated under applicable disability laws to conduct emergency removals differently with respect to individuals with disabilities, and these final regulations do not alter a recipient’s obligation to adhere to the IDEA, Section 504, or the ADA.” Fed. Reg. 30226
- “The Department appreciates commenters’ suggestion to mirror the “direct threat” language utilized in ADA regulations; however, we have instead revised § 106.44(c) to refer to the physical health or safety of “any student or other individual” because this language better aligns this provision with the FERPA health and safety emergency exception, and avoids the confusion caused by the “direct threat” language under ADA regulations because those regulations refer to a “direct threat to the health or safety **of others**” which does not clearly encompass a threat to the respondent themselves (e.g., where a respondent threatens self-harm). By revising § 106.44(c) to refer to a threat to the physical health or safety “**of any student or other individual**” this provision does encompass a respondent’s threat of self harm (when the threat arises from the allegations of sexual harassment), and is aligned with the language used in FERPA’s health or safety exception.” Fed. Reg. 30228

Delays in the process

“The Department also notes that recipients must comply with obligations under applicable disability laws, and that the final regulations contemplate that disability accommodations (e.g., a short-term postponement of a hearing date due to a party’s need to seek medical treatment for anxiety or depression) may be good cause for a limited extension of the recipient’s designated, reasonably prompt time frame for the grievance process.” Fed Reg 30316

Advisors

“Although these final regulations do not expressly require recipients to allow complainants to bring a supportive friend to an initial meeting with the Title IX Coordinator, nothing in these final regulations prohibits complainants from doing so. Indeed, many people bring a friend or family member to doctors’ visits for extra support, whether to assist a person with a disability or for emotional support, and the same would be true for a complainant reporting to a Title IX Coordinator. Once a grievance process has been initiated, these final regulations require recipients to provide the parties with written notice of each party’s right to select an advisor of choice, and nothing precludes a party from choosing a friend to serve as that advisor of choice.” Fed. Reg. 30109

Supportive measure and accommodation overlap

- “To the extent that disability accommodations may overlap with supportive measures or remedies required under Title IX, the Department notes that **if an accommodation involves a Title IX supportive measure or remedy, the final regulations specify that the Title IX Coordinator is responsible for the effective implementation of such supportive measures.**” Fed. Reg. 30494
- “For example, when a supportive measure involves changing a dorm room assignment and doing so through the housing office, and a student with a disability needs to ensure a housing unit modified to accommodate a disability, or when a remedy involves re-taking an exam and doing so through an academic affairs office.” Fed. Reg. 30494

Bureaucracy

“The Department acknowledges commenters’ concerns noting that a student with a disability may need to interact with separate offices within a recipient’s organizational structure (e.g., a disability services office, and a Title IX office). The Department emphasizes that recipients must comply with obligations under disability laws with respect to students, employees, or participants in a Title IX reporting or grievance process situation, regardless of the recipient’s internal organizational structure. These final regulations, which concern sexual harassment, do not address a recipient’s obligations under the ADA and do not preclude recipients from notifying students involved in a Title IX grievance process that the students may have rights to disability accommodations.” Fed. Reg. 30499

Hearing process is triggering

“The Department understands that victims of sexual violence often experience PTSD and other significant negative impacts, and that participating in a grievance process may exacerbate these impacts. The Department believes that the final regulations appropriately provide a framework under which a recipient must offer supportive measures to each complainant (without waiting for a factual adjudication of the complainant’s allegations), and provide remedies for a complainant where the respondent is found responsible following a fair grievance process. Complainants can receive supportive measures from a recipient, and each complainant can decide whether, in addition to supportive measures, participating in a grievance process is a step the complainant wants to take. In this manner, these final regulations respect the complainant’s autonomy.” Fed. Reg. 30316

Respondents with disabilities

“Even when conduct committed by a respondent with a disability constitutes sexual harassment (e.g., because the conduct constitutes sexual assault, or because the conduct is severe, pervasive, and objectively offensive), the Department does not second guess whether the recipient imposes a disciplinary sanction on a respondent who is found responsible for sexual harassment, and thus **recipients have flexibility to carefully consider the kind of consequences that the recipient believes should follow in a situation where a respondent with a disability unintentionally committed conduct that constituted sexual harassment, perhaps not realizing the effect of the conduct on the victim.** For example, the recipient could determine that counseling or behavioral intervention is more appropriate than disciplinary sanctions for a particular respondent. (We note that in such a circumstance, the complainant is still entitled to remedies designed to restore or preserve the complainant’s equal educational access.)” Fed. Reg. 30498

Thank you!

