



## Frequently Asked Questions: Overview of the Finalized U.S. Department of Education Title IX Regulations

June 2020

On May 6, 2020, the U.S. Department of Education's Office for Civil Rights released [new regulations regarding Title IX](#), the law that prohibits sex-based discrimination and harassment at schools, colleges, and universities.

Institutions of higher education are legally required to make changes to their sexual misconduct policies and processes in alignment with these new regulations. The information below is meant to provide an overview of the most salient changes that will be required by these regulations. Please know that this is not an exhaustive list of the required changes, but rather the changes that will have the greatest impact on St. Olaf's policy and process. The regulations require that all of these changes be implemented at institutions by August 14, 2020.

### ***In a nutshell, what aspects of the current Title IX policy and process are changing and which ones are staying relatively the same?***

The intake and reporting process is remaining relatively unchanged; reporting parties will still have access to the same resources, accommodations, and supportive measures as before, and the choice about whether to proceed with an investigation (now deemed the Grievance Process) will still be in the hands of the reporting party. The Grievance Process, however, will now include additional procedural elements, including a live hearing with an opportunity for the parties' advisors to ask questions of other parties and witnesses.

### ***Do these regulations apply to students only, or are faculty and staff covered as well?***

The regulations clearly state that they apply to students and employees, including both faculty and staff. The updated policy we are working on will apply to our entire community.

### ***I've heard that the regulations changed the definition of "sexual harassment." What is the new definition?***

The new regulations limit the scope of sexual harassment to conduct of a sexual nature that is "severe, pervasive, and objectively offensive." This definition follows how the courts have defined sexual harassment. For St. Olaf, this means that conduct that does not rise to this level is not covered under our sexual harassment policy (though such conduct may be prohibited under other policies). Allegations of sexual assault, dating violence, domestic violence, and stalking will always fall within the definition of sexual harassment under Title IX.

The new regulations also make clear that Title IX's scope is limited to sexual harassment that occurs within a higher education institution's "program or activity" and within the United States. While Title IX

is more limited in scope, the College will still respond to all incidents of unwanted conduct of a sexual nature, sexual assault, dating violence, domestic violence, and stalking. We continue to encourage community members to report any type of sexual misconduct, regardless of where it occurred or whether it happened in the context of a St. Olaf “program or activity” to the Title IX Coordinator. All reporting parties will receive access to resources, accommodations, supportive measures, and, when available, the option to utilize St. Olaf’s Grievance Process.

***What constitutes a school’s “program or activity”?***

The new regulations clarify that Title IX applies when sexual harassment occurs within a St. Olaf “program or activity.” A “program or activity” includes locations, events, or circumstances over which St. Olaf exercises substantial control over both the responding party (i.e., the accused individual) and the context in which the sexual harassment occurred.

While St. Olaf participates in many College activities off campus (e.g., away sporting events, Piper Center events, music tours), there are also many activities where students gather off campus that are not St. Olaf programs or activities (e.g., a purely social gathering at a student’s off-campus residence). While Title IX regulations do not require St. Olaf to apply its policy unless the event relates to a St. Olaf program or activity, other laws such as the Violence Against Women Reauthorization Act may still apply. Because sexual misconduct can severely affect a student’s living and learning environment, regardless of whether it occurs in the context of a St. Olaf program or activity, the College will still respond to allegations that are brought to our attention. We do not anticipate the new regulations limiting our current approach.

The regulations also indicate that Title IX’s application does not extend to study-abroad programs outside of the United States. Similar to the off-campus issues discussed above, we will continue our practice of applying our policy to address circumstances involving sexual harassment, dating violence, domestic violence, and stalking in off-campus study programs occurring outside of the United States.

***How will the regulations affect the College’s reporting process?***

The regulations will have minor impacts on the reporting process. While the regulations alter the legal standard for when a school can be deemed to be “on notice” of sexual harassment, we will not change our approach of encouraging reporting of all known or suspected occurrences of sexual violence and other forms of sexual harassment. We will continue to have a policy expecting all employees, including student employees, who are not “confidential resources” to report incidents so that individuals who experience sexual assault or other forms of interpersonal violence can receive access to support services, accommodations, and information about their rights to seek recourse through on- and off-campus resources. These non-confidential employee reports will now be referred to as “required referrals.”

***How will the regulations affect the College’s intake process with the Title IX Coordinator? Will the options and resources offered to reporting parties change under these new regulations?***

The reporting/intake process with the Title IX Coordinator will also remain mostly the same. Our main focus when we receive a report of sexual misconduct is to provide access to services and to educate individuals about all of their options. Our goal is to provide this information so that individuals who report incidents are better equipped to make their own decisions about how they wish to proceed.

The regulations state that institutions must provide reporting parties with a choice about whether they want to proceed with the Grievance Process (i.e., an investigation and hearing process) or not. This regulation is in line with our current policy and process. Therefore, reporting sexual misconduct does not and will not automatically result in an investigation/hearing by the College. During the intake discussion, we will continue to leave it up to the reporting party to decide whether to initiate the Grievance Process. The regulations clearly state that institutions must honor a reporting party's preference about whether to proceed with the Grievance Process and can only take additional action when the College believes further action is legally required. If a reporting party is not interested in pursuing the Grievance Process at the time of reporting, their option to pursue the Grievance Process remains available to them into the future.

The new regulations make it clear that institutions must offer supportive measures (such as counseling, academic accommodations, modifications to class and/or work schedules, mutual no-contact directives, etc.) to reporting parties. As stated above, St. Olaf will offer these supportive measures to *all* reporting parties, regardless of whether their reported incident officially falls under the new scope of Title IX or not and regardless of whether the reporting party chooses to move forward with the Grievance Process.

The College's Grievance Process will continue to include the option to pursue an informal resolution. The informal resolution process will remain largely unchanged from the previous policy and process and will be accessible to all reporting parties.

Lastly, all reports to the Title IX Coordinator and any subsequent actions will still be kept extremely private. Only College personnel who have a "need to know" the information will be informed. Typically, this does not include anyone outside of the Title IX Coordinator, the [Title IX CORE Team](#), and when applicable, personnel involved in investigating and adjudicating matters under the College's Grievance Process.

***Will the informal resolution process change?***

The informal resolution process will remain relatively unchanged and will be available to individuals reporting sexual misconduct or harassment. After initiating our Grievance Process, parties will be able to meet separately with a facilitator to work towards an agreement on outcomes that will help the two parties safely and more comfortably coexist on campus. As has always been our policy, the regulations state that we must obtain parties' voluntary, written consent prior to utilizing the informal resolution process. The regulations also state that we cannot use the informal resolution process when the individual accused of committing the sexual harassment is a staff or faculty member.

***What will the new Grievance Process (i.e., investigation/hearing process) look like for Title IX incidents?***

The new regulations make it clear that all reporting parties have autonomy over if and when they want to initiate the Grievance Process. St. Olaf was already providing this autonomy to reporting parties, so this aspect of our policy and process will not change. As was also our policy previously, the regulations provide that schools cannot impose disciplinary sanctions on accused individuals without first following their Grievance Process.

In order to initiate the Grievance Process, the reporting party will need to submit what the regulations call a “Formal Complaint” requesting that the institution investigate and adjudicate the allegations. Once a Formal Complaint has been submitted, either an investigation will begin or, if requested by the parties, the College will proceed with the informal resolution process. As stated above, the informal resolution process will remain relatively unchanged from the previous policy and process.

If the parties choose not to use the informal process, or the matter is not resolved at that stage, the College will proceed with an investigation and hearing process. The investigation part of this process will look similar to the investigation phase of our current process. Both parties will still be offered support measures and are still able to have an advisor of their choice with them throughout the investigation. The College will still continue its practice of retaining outside investigators who are attorneys trained to conduct these investigations. The investigator will collect evidence and conduct interviews regarding the allegations. Due to changes in the regulations, the investigator will no longer make a determination as to whether the responding party violated College policy. Instead, the investigator will provide an investigation report that the parties and the College will use in the hearing phase of the process.

The hearing required under the new regulations is an additional phase required under the new regulations, and provides the parties an opportunity to ask questions of each other and the witnesses. The questions cannot be asked directly by the parties themselves, but will be asked either through their advisor or, if the party does not have an advisor, through an individual provided by the College. The hearing will be conducted live online so that all parties have an opportunity to see and hear the proceedings without needing to be in the same room with one another. A hearing panel will moderate the hearing and will determine whether any questions are not relevant to the allegations under consideration.

After the hearing is over, the hearing panel will review the evidence and determine whether the evidence establishes that the responding party is responsible for the alleged misconduct. If the hearing panel finds the responding party responsible, the panel will also determine what sanctions and any other actions should be taken.

***Will there be an appeal process as part of the Grievance Process?***

Yes. The regulations state that either party may appeal the hearing panel’s determination of responsibility for any of the following reasons: procedural irregularity that affected the outcome of the

matter; newly discovered evidence that could affect the outcome of the matter; and/or Title IX personnel had a conflict of interest or bias that affected the outcome of the matter.

Once an appeal is submitted, the non-appealing party will have an opportunity to review the appeal and submit a response. The person presiding over the appeal will not have been previously involved in the matter as a hearing panel member, investigator, or in any other capacity. Any sanctions imposed by the hearing panel will not go into effect unless and until the hearing panel's decision is upheld on appeal or the deadline for appeal has expired.

***Who will serve as hearing panel members, appeal officers, and Informal Resolution facilitators?***

The regulations provide flexibility to institutions regarding who serves as a hearing panel member and how many hearing panel members we have during a hearing. We are still working on identifying who exactly will serve on these hearing panels but anticipate that leadership in staff and faculty positions, particularly those in the Student Life Division, will serve as hearing panel members. We are also anticipating having three hearing panel members present for each hearing. We anticipate training a similar pool of individuals for the appeal officer role and for the Informal Resolution facilitator role.

***How long will the Grievance Process take under these new regulations?***

The regulations state that schools must include reasonably prompt time frames for conclusion of the Grievance Process, but they provide institutions the ability to create their own time frames. We are still determining what our own time frames will be, but will incorporate those time frames into our policy and process so that parties know what to expect. St. Olaf remains committed to completing the Grievance Process as swiftly as possible while also ensuring that it is thorough. Given the additional hearing and evidence review processes we must incorporate into our process, we anticipate that the Grievance Process will take longer to complete than the previous 60-day period and could take closer to 80 days to complete.

***How will the proposed regulations affect the standard of evidence that the College uses in making its decisions about responsibility during the Grievance Process?***

Currently the College uses a "preponderance of evidence" standard when making the determination as to whether an accused student is responsible for violating College policy. Under this standard, the College looks to whether it is more likely than not that the accused student committed the alleged misconduct (or, in other words, whether it's at least 51% likely that the accused student violated our policy). Under the new regulations, the College will be required to use the higher standard of "clear and convincing evidence" (i.e., 75% likely that the accused individual violated our policy) *if* the College uses such a standard in making any other disciplinary decisions relating to students, staff, or faculty. It is our intention to continue to utilize the preponderance of evidence standard, and we are currently working to review and revise policies that contain a different standard so that we can continue to utilize this standard of review in compliance with the new regulations.

***Do these new regulations apply retroactively? In other words, would cases that have already been through St. Olaf's previous investigation and adjudication process be subject to additional review under these new regulations?***

No. Cases that have already been investigated and adjudicated are officially closed and are not subject to further review. These regulations are only applicable for matters initiated under our Grievance Process after August 14. Keep in mind that an incident may have been reported prior to the August 14 deadline, but if the reporting party decides to initiate a Grievance Process *after* the August 14 deadline, the matter will be resolved using the investigation and hearing process that will go into effect on August 14. It is the date that the Grievance Process commences, and not the date of the reported incident, that determines which process will be used to investigate and adjudicate the matter. Therefore, if a reporting party requests to move forward with an investigation/adjudication prior to August 14, the existing Investigation and Adjudication Process would be utilized (outlined in our [current policy](#)).

***When will all of these changes take effect?***

All institutions are legally required to incorporate these changes by August 14, 2020. We are currently working to update our policy and process, and we will train and educate the community about our new policy and process this fall.

***Is it possible that these regulations will get challenged in court so that schools do not have to implement them?***

It is likely that there will be legal challenges to these regulations. It is also possible that a future administration may change the regulations. Until the regulations are changed by either the Department of Education or the courts, the College must treat them as legally binding and must have a Title IX policy that complies with these requirements.



*If you have additional questions that were not addressed in this document, please contact the [Title IX Coordinator](#) at [titleix@stolaf.edu](mailto:titleix@stolaf.edu).*

*Additional information and resources, including confidential resources, are available on the Title IX website, <https://wp.stolaf.edu/title-ix/>.*