

Understanding the Changes to Title IX Policy & Procedures

Some of the most significant aspects of the U.S. Department of Education's May 2020 final rule and what that looks like at Swarthmore.

- Colleges and universities are now required to allow cross-examination of the complainant and respondent, as well as any witnesses, during a live hearing led by institution officials. Cross-examination will be conducted by advisors for the parties, including legal counsel, but not the parties themselves.
 - *At Swarthmore:* Cross-examination is required to adjudicate complaints falling under Title IX, a more narrowly defined subset of behaviors. All other behaviors traditionally addressed under College policy will be adjudicated according to the *Procedures for Resolution of College-Defined Sexual Misconduct Complaints against Students*, which does not allow for cross-examination by advisors.
- Colleges are only obligated to respond to reports of sexual harassment that occurred off-campus if the location is in use by an officially recognized student or institution organization, such as recognized fraternity or sorority housing or athletic housing.
 - *At Swarthmore:* While the regulations do not *require* a response from the College, the Title IX Office will continue to address all behaviors that fall under Title IX *or* College-defined sexual misconduct, including off-campus conduct. Please see our policy for complete definitions of prohibited conduct.
- Colleges will be able to determine whether to use a "preponderance of the evidence" or "clear and convincing" standard as a burden of proof and must use the same standard for all complaints, no matter if they involve student or faculty misconduct.
 - *At Swarthmore:* Our policy utilizes the preponderance of the evidence standard of review, meaning it must be determined that the alleged policy violation is more likely than not to have occurred.
- Stalking, domestic violence and dating violence are now officially considered examples of sexual harassment under Title IX.
 - *At Swarthmore:* We have traditionally addressed this behavior in past iterations of College policy, and will continue to do so under both Title IX and College-defined sexual misconduct procedures.
- Colleges are not obligated to handle complaints of sexual harassment that occur

outside the United States. This means any harassment or assault that happens in American education programs abroad would not be covered by Title IX, but the new regulations say institutions “remain free” to apply misconduct policies for programs abroad if they so choose.

- *At Swarthmore:* Again, while the regulations do not *require* a response from the College, the Title IX Office will continue to address all behaviors that fall under prohibited conduct within education programs abroad under the College-defined sexual misconduct procedures. Please see our policy for complete definitions of prohibited conduct.
- If a Title IX coordinator receives multiple informal complaints of harassment against a single respondent, they will not be required to begin a formal complaint process. The department changed this requirement from the proposed rule, which sought to obligate Title IX coordinators to take action after receiving multiple informal reports against the same person.
 - *At Swarthmore:* Our policy uses the term “report” rather than “informal complaint.” Should the Title IX Office receive multiple reports of harassment against a single responding party – someone alleged of sexual misconduct who has not yet had a formal complaint filed against them – the Title IX Coordinator will make an assessment to determine any ongoing threat or safety risk to the community. Unless that threshold is met, no disciplinary action would be taken unless a complainant were to file a formal complaint.
- Colleges can no longer use a “single investigator model,” which has one official tasked with investigating, adjudicating and issuing disciplinary sanctions against respondents. The regulations instead require three separate officials to work through separate pieces of a single Title IX complaint process: a Title IX coordinator, who receives reports of sexual misconduct; an investigator, to gather facts and interview parties and witnesses; and a decision maker, to determine sanctions and remedies for parties.
 - *At Swarthmore:* Swarthmore does not use a “single investigator model.” In formal complaints, we use an external investigator to engage in the fact finding process and we use an external adjudicator to make the determination of responsibility.
- Colleges must train all personnel involved in the Title IX process and publish training materials on their websites. Training must involve review of the new rule’s definition of sexual harassment and the scope of the application of Title IX to college programs and activities, how to conduct a formal or informal process,

and how to “serve impartially,” including avoidance of “prejudgment of the facts at issue, conflicts of interest, and bias.”

- *At Swarthmore:* All College staff involved in the Title IX process receive annual and ongoing training, which is published on the Title IX Office website under “Compliance.” We utilize both external professional development vendors, including the State University of New York Student Conduct Institute and the Association of Title IX Administrators, as well as provide College staff with in-house training and education.
- Title IX processes may be conducted virtually, and staff must be trained on relevant technology to conduct remote investigations and hearings. Live hearings will be recorded, by transcript or audiovisual, and will be made available to parties and maintained in college records for at least seven years.
 - *At Swarthmore:* The College will create an audio recording of the adjudication meeting and make it available to the parties for their reasonable inspection and review. These records will be kept for seven years and will be confidential to the extent permitted by law.
- Colleges must provide evidence related to allegations to parties and advisors at least 10 days prior to requiring a response, and parties will not be prohibited from speaking about the allegations. This means doing away with “gag orders.”
 - *At Swarthmore:* Within the Title IX procedures, parties and their advisors are given two ten day review periods: first, to review interview summaries and provide optional written responses; and second, to review the final case packet including submitted written responses, and prepare for cross-examination. All participants in the formal complaint process are reminded that they are free to speak about their individual experiences, while also respecting the privacy of the parties involved.
- Colleges are not obligated to follow a specific time frame for responding to reports of sexual misconduct. They are instead required to have “reasonably prompt” periods for carrying out each step in the Title IX complaint process.
 - *At Swarthmore:* Reports of sexual misconduct are addressed within 24-48 hours of receipt by our office when the College is open. From there, the process is driven, to the extent possible, by the wishes of the reporting party, including frequency of contact and the pursuit of resolution options. Within the formal complaint process, specific timelines are provided while also allowing flexibility to accommodate individual needs.