



New Proposed Regulations Under Title IX

What You Should Know
and Considerations
for Public Comments

January 16, 2019 Webinar



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Education Law Practice Area
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Please consult with your attorney for specific legal information, advice, or individualized inquiries.

Webinar Agenda

- Highlights of Proposed Regulations
 - Legal Changes
 - Practical Changes
- Controversial and Education-Level Specific Proposed Changes
- Public Comments, Implementation, and Potential Areas of Change
- Q&A Time

Continuing Education Credits

The following credits are approved.

- State CLE
- SHRM
- IASBO

We will send activity details in our follow-up email with the recording link and feedback survey.

Presentation Team



Emily
Kolbe



Kristy
Latta



Rebecca
(Becky)
Reif



Miriam
Van
Heukelem

TOPIC #1

Highlights of the Proposed Regulations

Legal Changes

Attorney Emily Kolbe



NEW Definition of Sexual Harassment

Goal: “The definition. . . seeks to include only sex-based discrimination that is sufficiently serious as to effectively deprive a student of equal access to a funding recipient’s educational program or activity.”



NEW Definition of Sexual Harassment

1. A school employee conditioning an educational benefit or service upon a person's participation in unwelcome sexual conduct (often called quid pro quo harassment);

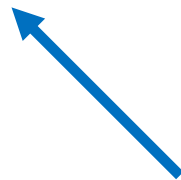
OR

2. Unwelcome conduct on the basis of sex that is so severe, pervasive and objectively offensive that it effectively denies a person equal access to the school's education program or activity (often called hostile work/educational environment harassment),

OR

NEW Definition of Sexual Harassment

3. Sexual assault as that crime is defined in the Clery Act regulations



*Familiar to Higher Ed –
not applicable to K-12*

Clery Act - Sexual Assault

An offense that meets the definition of the following offenses in the FBI's UCR Program:

- Rape,
- Fondling,
- Incest, or
- Statutory rape

Publicly available in Appendix A to Clery regulations:

<https://www.law.cornell.edu/cfr/text/34/appendix-A> to subpart D of part 668



Jeanne Clery

Obligation to Respond

- Triggered only with “actual knowledge” of sexual harassment
- Reasons:
 - Consistent with court decisions
 - Liability only when school “knows and has control”

Actual Knowledge:

1. K-12 Teachers

2. Title IX Coordinators

3. “An official with authority to take corrective action”

Title IX Jurisdiction

- Conduct must occur in “educational program or activity”
 - Does not mean geography – no on/off-campus bright line rule
 - Look at circumstances with considerations of multiple factors
- Conduct must be against a person “in the United States”
 - Does not apply to study abroad

Option: Can still initiate student conduct code or offer supportive measures; but not Title IX



TOPIC #2

Highlights of the Proposed Regulations

Practical Changes

Attorney Kristy Latta



Investigation & Resolution

- Schools must “meaningfully respond” to every report of sexual harassment
- Full spectrum of responses:
 1. Supportive Measures
 2. Informal Resolution
 3. Formal Resolution



Supportive Measures

- If a Complainant does not want to file a formal complaint, the school does not need to respond*, but still must “**offer the complainant supportive measures**”
- Supportive measures:
 - Reasonably available
 - Without fee or charge
 - Designed to protect the safety of all parties and deter sexual harassment
 - *Non-disciplinary*

**Note: We will discuss exceptions under Topic III*

Supportive Measures

- Examples:
 - Counseling
 - Extensions of deadlines or other course-related adjustments
 - Modifications of work or class schedules, campus escort services
 - Mutual restrictions on contact between the parties
 - Changes in work or housing locations
 - Leaves of absence
 - Increased security and monitoring of certain areas of the campus

Supportive Measures

Goals:

- *Take Complainants' wishes into account*
- *Increase reporting (the Department found the prior processes disincentivized reporting); and*
- *Meets Title IX goals of fostering an educational environment for all*



Informal Resolution

- May occur “at any time prior to reaching a determination regarding responsibility”
- No restrictions on mediation or other alternative dispute resolution
- Requires written notice:
 - Allegations
 - Informal Resolution process, including preclusion of further formal process
 - Potential consequences (e.g., records)
 - Need written, voluntary consent



Formal Complaints

- Initiated by Complainant or Title IX Coordinator
- Triggers investigation and formal processes for potential punishment of Respondent
 - Presumption of Innocence
 - Objective Evaluation of Evidence
 - No Conflict of Interest
 - No training materials with sex stereotypes
 - Reasonably prompt timeframes
 - Prohibition on “single investigator” model

Goal: Due Process, whether public or private

Investigation – Formal Complaints

- Written Notice to both parties, including:
 - Grievance Procedures
 - “Sufficient details” to allow respondent to prepare for interview
 - Statement of presumption of innocence
 - Information about review of investigative evidence
 - Warnings about providing false information

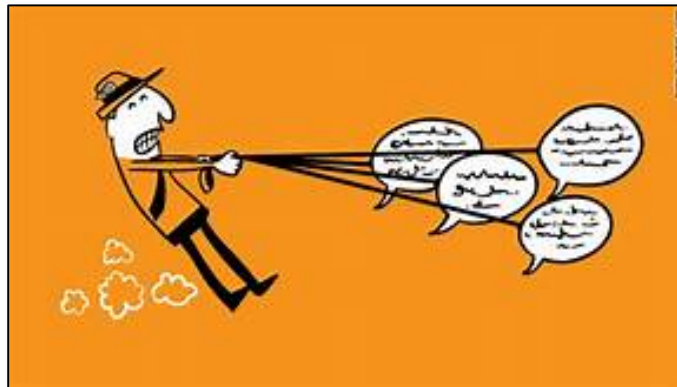
Investigation – Formal Complaints

- Burden of proof is on school, not parties
- Equal opportunities to present inculpatory and exculpatory evidence
- Opportunity to have advisor present at all stages, including an attorney (but can restrict advisors' participation)
- Written notice of all dates, times, and locations of interviews and hearings with adequate time to prepare
- Appeals not required, but must be afforded equally



Investigation – Formal Complaints

- New requirements regarding timeframes for investigation
 - Prior to completing investigative report, each party must be given 10 days to review and comment on “evidence obtained . . . that is directly related to the allegations raised in a formal complaint.”
 - *Cannot be downloaded or copied*
 - Give completed investigative report to parties, and 10 days to review and provide written responses



Poll Question

Does your institution have a dedicated Title IX Coordinator?

Please select your answer and submit.

TOPIC #3

Controversial and Education-Level Specific Proposed Changes



Attorney Miriam Van Heukelem

Formal Complaints: Cross-Examination Requirements

- Significant change from leaked version of regulations
- Background: Court decisions regarding cross-examination in Title IX proceedings as a matter of due process
 - *Doe v. Baum, et al.* (6th Cir. Sep. 7, 2018)
 - *Doe v. University of Cincinnati*, No. 16-4693 (6th Cir. 2017)

- **K-12 Institutions:**



- Live hearing is *optional*
- Investigator must “ask each party and any witnesses any relevant questions and follow-up questions, including those challenging credibility, that a party wants asked of any party or witnesses.”
- The decision-maker must afford each party the opportunity to submit written questions, provide each party with the answers, and allow for additional, limited follow-up questions from each party.



- **Higher Education:**

- Live hearing is *required*
- The decision-maker must allow each party to ask the other party and any witnesses any relevant questions and follow-up questions, including those challenging credibility.
- May allow separate rooms, via technology
- Cross-examination must be conducted by “the party’s advisor of choice.”
- If a party does not have an advisor present at the hearing, *the recipient must provide that party an advisor aligned with that party to conduct cross-examination.*



- **Higher Education:**

- Controversy:

- Cross-examining advisor must be able to effectively apply “rape shield” protections → this takes legal skill and experience
- What advisors are sufficiently “aligned with respondent’s interests”?
 - Resources needed
- Current exclusion rule: *If a party or witness does not submit to cross-examination at the hearing, the decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility.*

Formal Complaints

- K-12:
 - May not honor wishes of Complainant to decline formal complaint, due to additional needed protections for minors
- Higher Education:
 - May honor wishes of Complainant not to file formal complaint unless “reports by multiple complainants of conduct by the same respondent”

Practical Issue: Without party participation/cross-examination, how will resolution process result in sufficient evidence?

Evidence Standard

- Schools may utilize either a “preponderance of the evidence” OR “clear and convincing” evidence standard
- HOWEVER:
 - May only use “preponderance of the evidence” IF:
 1. Same standard for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction
 2. Apply the same standard of evidence for complaints against employees, including faculty

Recordkeeping

- Proposed regulations require the following regulations to be created, made available to parties, and kept for three years:
 1. Each sexual harassment investigation, including determinations, disciplinary sanctions, and any remedies provided to the complainant;
 2. Any appeal and the result therefrom;
 3. Informal resolution, if any; and
 4. *All materials used to train coordinators, investigators, and decision-makers with regard to sexual harassment.*

Recordkeeping

- Proposed regulations require the following regulations to be created, made available to parties, and kept for three years:
 5. Any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment.
 - Document the basis for its conclusion that its response was not clearly unreasonable, and
 - Document that it has taken measures designed to restore or preserve access to the recipient's educational program or activity.

Recordkeeping

- Controversy:
 - Length of time and access
 - What constitutes all training materials?
 - Accessibility of all training materials, when trainings put on by third party vendors
 - Purpose?
 - Assumptions of potential bias or litigation

Jurisdiction

When potential misconduct (1) outside “educational program or activity” or (2) outside United States under proposed regulations:

- School may not proceed under Title IX;
- School may proceed under “student conduct code” or offer supportive measures.



Jurisdiction

Controversy:

- School's discretion to act is limited
- Same potential misconduct with different processes and procedures
- Defining such “non-Title IX” sexual harassment in student conduct codes
- Fairness to complainants

“Gag Orders”

- Schools cannot put “gag orders” on parties, which could restrict them from gathering evidence.
- Controversy:
 - Gathering evidence vs. potential retaliation
 - Will parties understand the difference?
 - Will this process be supervised?



TOPIC #4

Public Comments, Implementation, and Potential Areas of Change



Attorney Rebecca Reif

Timeline



- Public Comment period open until **January 28, 2019**
- The Department prefers electronic submissions:
 - Federal eRulemaking Portal:
<https://www.regulations.gov/>
 - Submit only once
 - Reference Document ID at the top of submission:
ED-2018-OCR-0064-0001
 - Submit comments or attachments in Microsoft Word format, or readable/searchable pdf
 - Comments are open for public viewing
- As of 1/6/19: **51,348** comments submitted

Timeline

- Next Steps:
 - Review of comments
 - Issuance of final regulations
 - Effective Date of final regulations: 30-60 days at minimum
 - Potential for legal challenges
 - Consistency with language of Title IX
 - State law issues
 - New York: “Enough is Enough” law, which conflicts in key respects

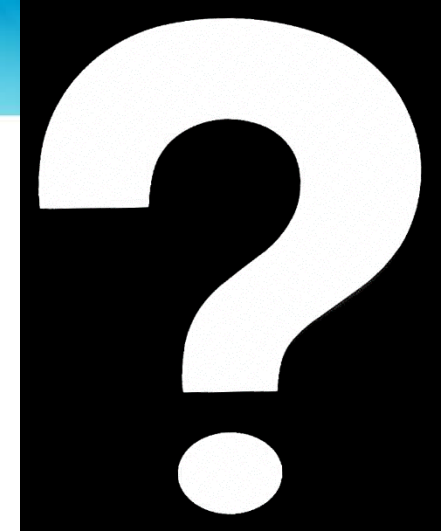


Directed Questions

- Nine Areas of requests of comment; could signal areas of potential change



Proposed Regulations



1. Applicability to K-12s

- Past sexual misconduct guidance directed to higher ed, but Title IX applies to both
- DOE:
 - Parts unworkable in K-12 setting?
 - Parts that should be based on age-appropriateness, rather than level of education?
 - Involve parents and guardians?
 - Other systemic differences to consider?

Directed Questions



2. Applicability Based on Age

- Proposed rules vary based on K-12 vs. Higher Ed
- Would more appropriate measure be the age of the parties, i.e., over or under 18 years?
- DOE:
 - Should we allow some K-12s to decline to investigate reports based on wishes of Complainant, if old enough?
 - Should cross-examination requirements be based on age of parties?

Directed Questions



3. Applicability To Employees

- Proposed rules apply to sexual harassment by students, employees, and third parties
- Court split: Title IX or Title VII for employees?
- Clery Act regulations: Unclear
- DOE:
 - Should there be unique processes for employee situations?

Directed Questions



4. Training

- Proposed rules require training for (1) Title IX Coordinators, (2) investigators, and (3) decision-makers on the definition of sexual harassment, and how to conduct an investigation and grievance processes
- DOE:
 - Is this adequate?
 - Should others be trained, especially at K-12 level? (Perhaps teachers?)

Directed Questions



5. Individuals with Disabilities

- Proposed rule provides for rights under the IDEA, ADA, and Section 504 for individuals with disabilities
- DOE:
 - Are there are other issues to include regarding persons with disabilities in Title IX procedures?
 - More specific measures when they are parties?
 - Additional experiences, challenges, and needs that should be considered?

Directed Questions



6. Standard of Evidence

- Proposed rule explained above – two different possible standards, with strings attached for use of the “preponderance of the evidence” standard
- DOE:
 - Is uniform standard better?
 - If so, which is most appropriate?
 - Should whatever standard a school employs apply to all student conduct proceedings?

Directed Questions



7. Clarification of “Directly Related to” for Materials provided to parties

- Proposed rule – schools must provide parties an equal opportunity to inspect and review “any evidence directly related to the allegations obtained as part of the investigation, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility.”
- DOE:
 - Do we need to clarify what this means?

Directed Questions



8. Time Period for Record Retention

- DOE:
 - Is three years too long or too short?

9. Technology for parties to be in separate rooms for live hearings

- DOE:
 - Do schools already have this technology?
 - Is it going to be hard or easy to get?

Directed Questions

What is not included in the Directed Questions:

- Cross-Examination Requirements (Besides Age)
- Live Hearing Requirements
- Jurisdictional Issues
- Any differences between public and private institutions in regards to due process, recordkeeping, etc.

Poll Question

Have you used an attorney in the past for Title IX related services?

Please select your answer and submit.

Q & A Time



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United States Department of Education Press Release: New Proposed Regulations under Title IX on Schools' Responses to Sexual Harassment and Assault

November 20, 2018

By attorneys Emily Kolbe, Rebecca Reif, and Miriam Van Heukelem Over a year ago, the U.S. Department of Education ("DOE") repealed several guidance documents on sexual misconduct under Title IX, the federal civil rights law which prohibits sex discrimination in federally-funded education programs and activities, and provided notice of its... [Read More](#)

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