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Sexual Violence and the New Title IX Rules: Where Do We Go from Here?

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On May 6, 2020, the U.S. Department of Education (DOE) announced the release of formal Title IX regulations for the first time since 1997. These "Final Rules," which had to be implemented by colleges and universities by Aug. 14, 2020, represent comprehensive changes regarding how schools handle issues of sexual harassment and sexual assault on campus. With colleges and universities already grappling with moving forward in the COVID-19 era, conforming their Title IX policies to the Final Rules presented yet another significant undertaking.

Title IX and Sexual Harassment: How Did We Get Here?

Title IX of the Education Amendments of 1972 was enacted to protect students from sex discrimination under any education program or activity receiving federal funding. The concept of sexual violence on campus as a Title IX sex discrimination issue first took root in 1997, when the DOE's Office of Civil Rights (OCR) issued "Sexual Harassment Guidance" which set forth OCR's compliance standards in investigations and administrative enforcement of Title IX regarding sexual harassment.

In 2001, this guidance was updated, and in 2006 the OCR released a "Dear Colleague Letter" (DCL) reemphasizing that sexual harassment on campus was a Title IX issue that schools must take seriously. It was not until 2011, however, that the OCR released a DCL specifically recognizing sexual violence as a form of sexual harassment prohibited by Title IX.

Released under the Obama Administration, the 2011 DCL defined sexual violence as "physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent due to the victim's use of drugs or alcohol. An individual may also be unable to give consent due to an intellectual or other disability." Examples of sexual violence included rape, sexual assault, and sexual coercion. The 2011 DCL was further expanded when OCR issued Q&A guidance in 2014.

In 2017, the Trump Administration OCR issued a DCL that withdrew both the 2011 DCL and the 2014 Q&A. The 2017 DCL noted these documents were released without affording notice and the opportunity for public comment, and the overall effect of these documents had led schools to adopt procedures that "lack the most basic elements of fairness and due process, are overwhelmingly stacked against the accused, and are in no way required by

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Title IX or regulation." The 2017 DCL instead pointed schools to a new set of published Q&A guidance.

- *OCR Issues Final Rules*

In November 2018, the OCR published proposed regulations for public comment. On May 6, 2020, after reviewing over 124,000 public comments on the proposed regulations, the OCR issued new Title IX regulations for the first time since 1997. Unlike the DCLs and other guidance issued by the Obama administration in 2011 and 2014, the Final Rules will have the force and effect of law.

In the Final Rules, the DOE provides directions for schools on managing Title IX obligations. The Final Rules define a collection of terms, including "sexual harassment," "actual knowledge," "formal complaint," and "supportive measures." The "deliberate indifference" standard applied in Title

IX sex discrimination complaints is also outlined in the Final Rules.

● *Sexual Harassment Redefined*

"Sexual Harassment" has been redefined to encompass misconduct set forth in the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act), the Violence Against Women Act (VAWA), and the Supreme Court's decision in *Davis v. Monroe County Board of Education*.

Sexual harassment now includes three types of misconduct on the basis of sex, all of which jeopardize equal access to education protected through Title IX:

- Any instance of *quid pro quo* harassment by a school's employee;
- Any unwelcome conduct that a reasonable person would find so severe, pervasive, and objectively offensive that it denies a person equal educational access; and
- Any instance of sexual assault (as defined in the Clery Act), dating violence, domestic violence, or stalking as defined in the VAWA.

Under the new sexual harassment definition, sex-based misconduct is prohibited in a manner that addresses First Amendment protections, and the quid pro quo harassment and Clery Act/VAWA offenses that are not evaluated under the *Davis* standard for severity, pervasiveness, offensiveness, or denial of or equal educational access, but nonetheless are sufficiently serious to deprive a person of equal educational access.

● *Actual Knowledge Initiates Response Obligations and Fewer Individuals Deemed Mandatory Reporters*

Actual knowledge of sexual harassment allegations initiates response obligations under Title IX. Any notice to a school's Title IX Coordinator or to "any official of the recipient who has authority to institute corrective measures on behalf of the recipient" imparts actual knowledge to the school triggering response obligations.

A school must now initiate its grievance process whenever a formal complaint of sexual harassment is filed by a complainant or Title IX Coordinator. A formal complaint is a document signed by a complainant or a Title IX Coordinator alleging sexual harassment against a respondent concerning conduct within the school's education program or activity and requesting initiation of the school's grievance procedures.

Schools have discretion in determining whether to mandate all or specific employees to report allegations of sexual harassment to the Title IX Coordinator, and/or which employees must have the complainant's consent to report sexual harassment to the Title IX Coordinator, and to designate specific employees as confidential resources for sexual harassment disclosures without automatically triggering a report to the Title IX office.

All students and employees must be notified of the process to report sexual harassment for purposes of triggering the school's response obligations and the Title IX Coordinator's contact information including, but not limited to, a telephone number for receiving reports at any time.

● *Expansion of What Constitutes a School's "Education Program or Activity"*

The Final Rules define "education program[s] or activit[ies]" for which Title IX protections apply. Any building owned or controlled by a student organization that is officially recognized by the school, such as a fraternity or sorority, is considered a location substantially controlled by the school. However, the interactions between the school and the student organization establishing an "officially recognized" or "school sanctioned" designation are not defined.

Under the Final Rules, a school is liable for sex discrimination where the school responds with deliberate indifference to allegations of sexual harassment that is "clearly unreasonable in light of the known circumstances." A school with actual knowledge of sexual harassment, including sexual assault, in its education program or activity, must respond promptly and confidentially, ensure that the Title IX Coordinator contacts the complainant and provides notice of available supportive measures, consider the complainant's wishes regarding supportive measures irrespective of the filing of a formal complaint, and inform complainant of the process to file a formal complaint.

Supportive measures are now those "designed to restore or preserve access to the recipient's education program or activity, without unreasonably burdening the other party; protect the safety of all parties and the recipient's educational environment; and deter sexual harassment." Supportive measures may include counseling, course-related adjustments, modifications of work or class schedules, campus escort services, and other similar measures. Supportive measures must be maintained in confidence "to the extent that maintaining such confidentiality would not impair the ability of the institution to provide the supportive measures."

Schools are now held accountable for protecting complainants' access to equal education and providing due process protections to both parties. Schools must adopt a grievance process that complies with a standardized framework outlined in the Final Rules' provisions. The provisions now codify the school's discretion to apply a *preponderance of the evidence* standard or *clear and convincing evidence* standard in all formal complaints of sexual

harassment. The designated standard must be applied consistently for formal complaints involving student or employee respondents.

● *Right to a Live Hearing, to Cross-Examine, and Other Notable Mandates*

The grievance process must provide all involved students written notice of allegations, the right to an advisor, a presumption of non-responsibility until a determination of responsibility is made, the protection of legally recognized privileges, a copy of the school's investigative report summarizing all relevant evidence, both inculpatory and exculpatory, and the opportunity to submit, challenge and cross-examine evidence at a live hearing. Notwithstanding the right to a live hearing, only cross-examination by the parties' advisors is permitted. Protections shield complainants from questions or evidence concerning prior sexual behavior. Such evidence is deemed irrelevant unless offered to prove consent, or that someone other than the respondent committed the alleged misconduct. Furthermore, at either party's request, the school must facilitate a live hearing with the parties located in separate rooms with video and audio transmissions enabling the parties to hear and see each other.

In a significant departure from prior practice, for allegations exclusively involving students providing voluntary and written consent, schools are permitted to offer and facilitate informal resolution processes. Remedies required to be provided to a complainant when a respondent is found responsible must be designed to maintain the complainant's equal access to education, but they do not have to be non-disciplinary or non-punitive and need not avoid burdening the respondent. Nevertheless, the grievance process must offer appeals equally to both parties.

Title IX and Sexual Harassment: Where Do We Go from Here?

The timing of the May 6 release of the Final Rules was met with opposition by many in higher education, as well as numerous states' Attorneys General. However, these protestations did not deter Secretary of Education Betsy DeVos, who insisted upon the release with an assurance that "it's actually an ideal time for campus administrators to begin implementing this when students are not on college campuses."

On May 29, 2020, the U.S. Court of Appeals for the Third Circuit issued a significant and unanimous opinion affirming that "fairness" in campus sexual misconduct proceedings means that students must be afforded a live hearing and the right to cross-examination procedures. In *Doe v. University of the Sciences*, plaintiff Doe sued USciences when he was expelled after being deemed responsible during an investigation into allegations of sexual misconduct by two female students. The Third Circuit reversed the District Court's dismissal of the case partly based on the fact that Doe was not afforded "a real, live, and adversarial hearing," nor was he permitted to "cross-examine witnesses—including his accusers." The *Doe* decision coming on the heels of the release of the Final Rules reinforces the mandates in the Final Rules for live hearings and the ability to confront one's accuser.

On June 4, 2020, Attorneys General from 18 states, including Attorney General Gurbir Grewal of New Jersey, sued Secretary DeVos and the DOE in the Southern District of New York for declaratory and injunctive relief "to prevent implementation of the unlawful" Final Rules. Similar actions have been filed by the ACLU and other organizations. In the Attorneys General lawsuit, they argue that if the Final Rules go forward, they will "reverse decades of effort to end the corrosive effects of sexual harassment on equal access to education." They also caution that the Final Rules in general, and the August 14 deadline specifically, would necessitate colleges and universities to "completely overhaul" their existing procedures for addressing sexual misconduct allegations in less than 90 days during the COVID-19 pandemic. By Order and Opinion filed on Aug. 9, 2020, Judge Koeltl denied the motion by the Attorneys General for a preliminary injunction, or a stay, as to the Final Rules.

With the Fall 2020 higher education school year upon us, and with widespread remote learning a reality, higher education administrators are already facing numerous unprecedented challenges. The requirement to comply with the Final Rules has now become yet another reality with which colleges and universities must contend.

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