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A New Day On Campus For Title IX

By **Debbie Osgood** (May 18, 2020, 5:51 PM EDT)


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The final Title IX regulations on sexual harassment were announced earlier this month, on May 6, by the U.S. Department of Education.[1] Not surprisingly, the issuance of the new regulations some 17 months after they were first proposed, after thousands of comments to the department and hundreds of meetings, and with over 2,000 pages of explanation in the preamble, was met with elation in some quarters and outcry in others.

Already litigation has been filed challenging the department's issuance of the regulations, and the issue has been thrust into the presidential campaign as former Vice President Joe Biden has promised to undo the regulations if elected.

My vantage point in watching the new Title IX regulations unfold is somewhat unique. Today, I serve as outside counsel to colleges and universities on Title IX and other civil rights issues. Previously, I was an official at the department's Office for Civil Rights, which is responsible for enforcing Title IX.

During my 25-year tenure at the OCR, I definitely saw the ebb and flow of the OCR's Title IX policy, beginning with the 2001 Sexual Harassment Guidance and continuing through to the Obama administration's 2011 Dear Colleague Letter on Sexual Violence and later enforcement.

Importantly, while the department has long viewed the sexual harassment of students and employees as a form of sex discrimination prohibited by Title IX of the Education Amendments of 1972, the final regulations mark the first time in the history of the Title IX statute that the Title IX regulations themselves (not departmental policy) prohibit sexual harassment in education programs and activities.

The final regulations mark an important line in the sand that cannot be crossed backward — college and universities are responsible for addressing the sexual harassment of their students and their employees.

As colleges and universities unpack the new Title IX regulations in preparation for the Aug. 14 effective date, it is important to bear in mind what the department is doing and is not doing in promulgating the new Title IX regulations.

Essentially, the department is recalibrating the scope of Title IX and the role of the federal government in campus sexual misconduct. The final regulations carefully outline the parameters of sexual misconduct that is within the scope of Title IX, and then set forth very specific rules for grievance

processes and how colleges and universities must conduct investigations and make determinations for sexual harassment within Title IX's scope.

The department is not prescribing how colleges and universities may address sexual misconduct that is not within the scope of Title IX. Under the final regulations, this sexual misconduct, even if true, does not violate Title IX because it does not deprive an individual of access to their education or employment. The department goes to great lengths in the preamble and the final regulations themselves to make clear that that the final regulations are a floor, not a ceiling, for how colleges and universities address sexual misconduct.

The New Scope of Title IX

Under the final Title IX regulations, campus sexual misconduct must be within the scope of Title IX in order to trigger a Title IX obligation for a college or university to investigate or otherwise respond.

To be in compliance with Title IX, a college or university with actual knowledge of sexual harassment in an education program or activity against a person in the United States must respond in a manner that is not deliberately indifferent (explained as "clearly unreasonable"). The department has incorporated the high "deliberate indifference" standard set forth by the U.S. Supreme Court[2] for private Title IX litigation into the administrative Title IX context where the OCR may terminate the federal funding provided to a school for noncompliance with Title IX.[3]

As with prior OCR policy, the final Title IX regulations define "sexual harassment" to include sexual assault and quid pro quo harassment, as well as other sexual misconduct that constitutes a sexually hostile environment. Under the final regulations, however, the department has added categories to the definition of sexual harassment, namely domestic violence, dating violence and stalking, which (along with sexual assault) are covered by the Violence Against Women Act.

In addition, the final regulations narrow the department's definition of hostile environment for Title IX purposes to include only sexual conduct that in the view of a reasonable person is so severe and pervasive and objectively offensive that it effectively denies a person equal access to a school's education program or activity.

Further, to violate Title IX, the alleged sexual harassment must have taken place in an education program or activity and against a person in the United States. Study-abroad programs and off-campuses locations that are not within an education program of activity are not covered by the final Title IX regulations.

The final regulations also require that, in order for a college or university to have a Title IX obligation to respond, it must have received "actual notice" of sexual harassment. This requires that an individual (or individuals) bring allegations or provide other notice of sexual harassment to the Title IX coordinator or any school official "who has the authority to institute corrective measures on behalf of the [school]." This is in contrast to previous OCR policy that required schools to designate a larger group of employees as "responsible employees," who were responsible for reporting sexual harassment that they knew or should have known about to the university for official response.

When the sexual misconduct is within the scope of Title IX and the school has actual notice, a college or university has a Title IX obligation to respond by offering "supportive measures." These measures, previously called interim measures, must be made available to the complainant as appropriate, as

reasonably available, and without fee or charge.

In general, these measures are defined as nondisciplinary, nonpunitive individualized services designed to restore or preserve access to the school's education program or activity, without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the educational environment or deter sexual harassment.

For example, these measures may include 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, and other similar measures.

Investigation and Adjudication Requirements

For "formal complaints" of sexual harassment, the final Title IX regulations include a detailed set of requirements about how colleges and universities must investigate and adjudicate the alleged sexual harassment. Formal complaints are those that fall within the scope of Title IX and are filed (or agreed to) by complainants in writing with the Title IX coordinator.

The final rules provide that a formal complaint may only be filed by a complainant who is participating or attempting to participate in the education program or activity, and the rules permit the school to dismiss formal complaints against a respondent who is no longer enrolled or employed. The final rules also continue to allow schools to use informal resolution (such as mediation), except now informal resolution cannot be used for complaints that an employee sexually harassed a student.

The final regulations also require that schools choose to use either the preponderance of the evidence standard or the clear and convincing standard for sexual harassment complaints, providing that the same standard applies to all student and employee sexual harassment complaints.

The final Title IX regulations include numerous procedural requirements intended to provide greater "due process" and fairness for both parties to the entire process. Schools may not discipline individuals accused of sexual assault or other conduct within the scope of Title IX without complying with the new requirements.

The most significant and controversial is the final regulatory requirement that colleges and universities must provide for live hearings for formal complaints of sexual harassment. This means that schools may no longer use the "single-investigator model" for their sexual harassment cases. Hearings may be conducted with all parties physically present in the same geographic location or virtually, with technology that enables participants simultaneously to see and hear each other.

At the hearing itself, the school must allow direct cross-examination by the parties' advisers, not the parties or the hearing officer(s). The regulations state that if a party does not have an adviser present at the hearing, the school must provide that party with an adviser of the school's choice to conduct cross-examination on behalf of the party and the adviser may or may not be an attorney. Schools are required to create audio or audiovisual recording or transcript of any live hearing.

The final Title IX regulations also include other new responsibilities for colleges and universities: to prepare and provide the investigative report to the parties at least 10 days prior to a hearing (if a hearing is required) for their review and written response, to provide an opportunity for appeal to both

parties, and to maintain records relating to the sexual harassment process for seven years (up from three years in the proposed regulations). Colleges and universities must also post their training materials on their websites.

Litigation Risks Going Forward

Colleges and universities will need to quickly identify and make the necessary changes to their Title IX policies and procedures and organizational structures in order to comply with the new Title IX regulations by mid-August. These policies and procedures must include the new and revised definitions and heightened procedural protections specified in the final regulations for conduct that is within the scope of Title IX.

Schools that have not been providing hearings as part of their processes will need to appoint and train new hearing officers or members of the hearing panel. Schools will have to clearly identify the individuals "with the authority to take corrective action" at their institutions, decide whether to make any changes relating to "responsible employees," provide appeal options, and be ready to provide complimentary advisers for any party that does not have an adviser for a hearing. Schools will also need to update their training and outreach programs to include information about any changes to their policies and procedure.

As colleges and universities decide how best to move forward, and how broadly to spread their "sexual misconduct" nets, they must also be mindful that their legal obligations relating to sexual misconduct are not limited to the nondiscrimination requirements in Title IX. Other state and federal laws may apply, including the federal Clery Act and the Violence Against Women Act (also enforced by the department, with heavy fines possible), as well as state and local sexual harassment regulations.

Some schools will also need to comply with other rules relating to campus sexual misconduct set by outside organizations such as the National Collegiate Athletic Association.

In addition, the culture on college campuses relating to sexual misconduct has fundamentally changed in the past decade. Today, students, their parents and college communities expect that their institutions will have robust, fair and effective sexual misconduct policies and procedures, and these expectations may go beyond the final Title IX regulations.

The legal landscape in this area is still evolving. We will likely hear in the next few months whether any court challenges to the new Title IX regulations convince a judge to enjoin the implementation any or all parts of the final Title IX regulations. Further, the pace of litigation relating to how schools handle sexual misconduct, already bursting at the seams, is not likely to let up even when the new Title IX regulations are in effect.

At the administrative level, we are likely to see more OCR complaints from accused students and employees that an institution has failed to comply with the listed new procedural requirements or that there has been some bias or unfairness in the process.

There may also be more OCR cases from complainants alleging that supportive services offered or provided by a school are not adequate under the final regulations. It remains to be seen, though, whether the OCR will find a technical procedural violation alone sufficient to support a finding of deliberate indifference under the final Title IX regulations.

Schools found out of compliance with Title IX generally will be required to enter into a multiyear resolution agreement with the OCR, although, of course, the OCR has the ultimate authority to terminate a school's federal financial assistance for noncompliance.

The new Title IX regulations may embolden even more plaintiffs to use private litigation to try and get monetary damages from a college or university. Respondents will likely seek to tie noncompliance with the specific requirements in the Title IX regulations to a failure to provide due process or fundamental fairness.

Complainants may try to use disputes about the adequacy of supportive measures to assert that a school has acted with deliberate indifference. It is not clear that courts will agree with these claims, but it will take time for the issues to be sorted out.

And, at the same time, colleges and universities need to be careful that any changes in their current sexual policies and procedures do not expose them to greater potential liability on breach of contract and tort "duty of care" claims.

Moving forward, until the dust settles more in the Title IX landscape, the best and less risky strategy for colleges and universities may be to use a "Title IX+" approach where sexual misconduct is addressed in a broad manner that covers sexual misconduct both within and outside the scope of the final Title IX regulations.

Using such a "Title IX+" approach should allow colleges and universities to ensure their compliance with the final Title IX regulations and other applicable laws and build upon the substantial resources they have devoted to sexual prevention and response in recent years and align with their institutional values and commitments relating to campus safety.

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[1] https://www.ed.gov/news/press-releases/secretary-devos-takes-historic-action-strengthen-title-ix-protections-all-students.

[2] Davis v. Monroe County Bd. Of Ed, 526 U.S. 629 (1999) and Gebser v. Lago Vista Independent School Dist., 524 U.S. 274 (1998).

[3] For purposes of this article, "school" refers only to higher education institutions, including colleges and universities.