

An Early Read on the New Title IX Regulations

Phil Catanzano

Jeff Nolan

May 13, 2020

Holland & Knight

The Debate is Likely to Continue...

DeVos's Rules Bolster Rights of Students Accused of Sexual Misconduct

Education Secretary Betsy DeVos released final regulations for schools dealing with sexual misconduct, giving them the force of law for the first time and bolstering due-process rights.



BREAKING: Education Dept. issues new Title IX regs with crucial campus due process protections, adopts Supreme Court sexual harassment definition

by FIRE
May 6, 2020



Victim Rights Law @VictimRightsLaw · 2h

Victims of sexual assault need attorneys now more than ever to maintain equal access to their education. The **VRLC** stands with survivors.
[#KnowYourIX](#)



The Chronicle of Higher Education @chronicle · 23m

The pandemic was not a reason to delay the new Title IX rules, Education Secretary Betsy DeVos said: "It's actually an ideal time for campus administrators to begin implementing this when students are not on college campuses."

U.S. Department of Education Retweeted



Secretary Betsy DeVos @BetsyDeVosED · May 6

Two years ago, I promised to address the scourge of sexual misconduct on our nation's campuses. The new [#TitleIX](#) regulation delivers on that promise. It treats all students fairly and holds all schools accountable if they fail to protect their students:

POLITICO

EDUCATION

Biden vows 'quick end' to DeVos' sexual misconduct rule

Biden disavowed Education Secretary Betsy DeVos' Title IX rule.

The Long Road to the New Regulations...

- **September 7, 2017:** Department of Education Secretary Betsy DeVos announces notice and comment process
- **September 22, 2017:** OCR issued:
 - Dear Colleague Letter (“2017 DCL”) withdrawing 2011 DCL and 2014 Q&A
 - Q&A on Campus Sexual Misconduct (“2017 Q&A”)
- **November 16, 2018:** Proposed Regulations Posted
 - Officially published in Federal Register later in November, 2018
 - Fact Sheet and Summary also posted
- **May 6, 2020:** Final Regulations Posted
 - Officially published in Federal Register later in May 2020
- **August 14, 2020:** Final Regulations Effective

So What Does “Title IX” Mean Now?

Significant Substantive Changes

Prohibited Conduct

- Prohibited “sexual harassment” means conduct on the basis of sex that satisfies one or more of the following:
 - An employee conditioning the provision of an aid, benefit, or service on an individual’s participation in unwelcome sexual conduct (i.e., quid pro quo);
 - Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to an education program or activity (i.e., hostile environment); or
 - Sexual assault (as defined by Clery Act), or “dating violence,” “domestic violence,” and “stalking” (as defined by Violence Against Women Act).
- Care taken to protect First Amendment issues (a big OCR issue) and claims to give institutions more autonomy in terms of what to investigate.

Decision Point: Sexual Harassment Definition

- Preamble:
 - “[N]othing in these final regulations prevents a [school] from addressing conduct that is outside the Department’s jurisdiction” because it:
 - does not meet the Title IX definition of sexual harassment, or
 - occurred outside the school’s education program or activity, or
 - occurred against a person outside the United States
 - School can address such misconduct through provisions in its own code of conduct

Scope of Institutional Responsibility

- Institution must respond when it has:
 - “Actual knowledge”
 - When “an official of the recipient who has authority to institute corrective measures” has notice, e.g., Title IX Coordinator
 - of “sexual harassment” (as newly defined)
 - that occurred within the school’s “education program or activity”
 - “includes locations, events, or circumstances over which the recipient exercised substantial control” over the respondent and the context in which the sexual harassment occurred
 - Fact specific inquiry focused on control, sponsorship, applicable rules, etc.
 - against a “person in the United States” (so, not in study abroad context)

Decision Point: “Actual Knowledge”

- Given the narrowing of responsibility to respond to reports to officials with “authority to institute corrective measures”
- Schools **will have to decide** whether to:
 - Adopt narrower definition as threshold for encouraging reporting and taking action,
OR
 - Continue to
 - define “responsible employees” broadly (e.g., to include faculty)
 - encourage reporting broadly, and
 - take action based on reports to faculty and others

New Regulation: School's "education program or activity"

- School's "education program or activity":
 - "includes locations, events, or circumstances over which the recipient exercised substantial control" over the respondent and the context in which the sexual harassment occurred.
 - Not a simple artificial bright-line on/off campus distinction
 - Does not simply depend on geographic location of activity
- Examples: Did conduct occur in location/context where school:
 - Owned premises (or officially recognized student organization that owned or controlled the premises): including fraternities
 - Exercised oversight, supervision or discipline, or
 - Funded, sponsored, promoted or endorsed event

Decision Point: School's "education program or activity"

- “[N]othing in the final regulations prevents recipients from initiating a student conduct proceeding or offering supportive measures to students affected by sexual harassment that occurs outside the recipient’s education program or activity.”
- Given this change, schools **will have to decide** whether to prohibit and investigate sexual misconduct that occurs outside more narrowly-defined “education program or activity”

New Regulation: “person in the United States”

- New regulation limits Title IX to discrimination occurring “against a person in the United States”
- While the Department acknowledged “the impact that this jurisdictional limitation might have on the safety of students participating in study abroad programs . . . by its plain text, the Title IX statute does not have extraterritorial application.”

Decision Point: “person in the United States”

- “We emphasize that nothing in these final regulations prevents recipients from initiating a student conduct proceeding or offering supportive measures to address sexual misconduct against a person outside the United States [such as a student participating in a study abroad program] . . . [through its] own code of conduct.”
- Given this change, schools **will have to decide** whether to prohibit and investigate sexual misconduct that occurs outside the U.S.

New Regulation: Selected Additional Issues

- “The Assistant Secretary will not deem a recipient’s determination regarding responsibility to be evidence of deliberate indifference by the recipient, or otherwise evidence of discrimination under title IX by the recipient, solely because the Assistant Secretary would have reached a different determination based on an independent weighing of the evidence.”
- “A recipient’s treatment of a complainant or a respondent in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under title IX.”

“Supportive Measures”

- Supportive measures “are designed to”:
 - Restore or preserve access to school’s education program or activity without unreasonably burdening the other party
 - Protect the safety of all parties and the school’s educational environment, and
 - Deter sexual harassment
- 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, etc.
- Should be “non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge” to the complainant or the respondent
 - Before or after the filing of a formal complaint or
 - Where no formal complaint has been filed

“Emergency Removal”

- Emergency removal may still be appropriate, provided that school:
 - Undertakes “individualized safety and risk analysis,”
 - Determines that an immediate threat to the health or safety of students or employees justifies removal, and
 - Provides respondent with notice and an opportunity to challenge the decision immediately following removal
- Administrative leave of non-students during investigations also permitted

Training

- Schools “must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on the definition of sexual harassment [], the scope of the [] education program or activity, how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, . . . and how to serve impartially”
- “Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of sexual harassment.”
- Training materials must be posted on website and should include:
 - How to conduct hearings virtually
 - Definitions of prohibited conduct, including harassment
 - How the processes – formal or informal – work
 - That the process is impartial, will be free of bias and conflicts, and will not prejudge the facts for either side

Once a Claim is Brought, What Happens Now?

Significant Procedural Changes

Summary of Procedural Changes

- **First response:** If report of sexual harassment is received from anyone, Title IX Coordinator must:
 - Promptly contact complainant to discuss the availability of supportive measures
 - Consider complainant's wishes with respect to supportive measures
 - Inform complainant of availability of supportive measures with or without filing a complaint, and
 - Explain to complainant the process for filing a formal complaint
- Department prefers that school defers to complainant's wishes as to whether to pursue an investigation, but if school determines that not pursuing an investigation would be deliberately indifferent (or that pursuing an investigation is necessary for community safety or similar reasons), Title IX Coordinator may sign complaint
 - Doing so will not be viewed as adversarial toward respondent
 - However, respondent must receive all process required by section 106.45, so:
 - Will be difficult (but not impossible, e.g., if third party witnesses participate) to adjudicate matter if complainant declines to be cross-examined at hearing as discussed below
 - Complainants must receive investigation information as parties even if they do not wish to

Summary of Procedural Changes

- A **presumption of innocence** throughout the process, with the burden of proof on the school
- A **prohibition of the single-investigator model**, instead requiring a decision-maker separate from the Title IX Coordinator or investigator
- The clear and convincing evidence **or** preponderance of the evidence standard
- **Live hearings** in the higher education context
- The opportunity to **test the credibility** of parties and witnesses through **cross-examination**, subject to “rape shield” protections
- Written **notice of allegations** and an equal opportunity to **review the evidence**
- Title IX Coordinators, investigators, and decision-makers **free from bias or conflicts of interest**
- **Equal opportunity for parties to appeal on specified grounds**

Procedural Changes

- Must investigate “formal complaints”
- Must satisfy certain notice and ongoing notice requirements
- Must produce investigation report with certain elements
- Must give parties and advisors opportunity to review all information “directly related to allegations”
 - Broader than:
 - “all relevant evidence” as otherwise used in Title IX regulations, and
 - “any information that will be used during informal and formal disciplinary meetings and hearings” as used in Clery Act

Procedural Changes

- New procedures require that schools:
 - (i) Ensure that burden of proof and burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the school and not on the parties
 - (ii) Provide equal opportunity for parties to present witnesses and other inculpatory and exculpatory evidence;
 - (iii) Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence

Procedural Changes

- New procedures require that schools:
 - (iv) give the parties equal opportunity to select an advisor of the party's choice (who may be, but does not need to be, an attorney)
 - (v) Provide written notice when a party's participation is invited or expected for an interview, meeting, or hearing;
 - (vi) provide both parties equal opportunity to review and respond to the evidence gathered during the investigation; and
 - (vii) send both parties the recipient's investigative report summarizing the relevant evidence, prior to reaching a determination regarding responsibility

“Live Hearings”

- “At the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker and parties to simultaneously see and hear the party or the witness answering questions.” (Requirements based on those in Doe v. Baum, 903 F.3d 575, 581 (6th Cir. Sept. 7, 2018))
- “At the live hearing, the decision-maker(s) must permit each party’s advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.”
- “If a party or witness does not submit to cross-examination at the hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility”
- The Single investigator model is dead: “The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility.”

“Live Hearings”

- “If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge . . . an advisor of the recipient’s choice, who may be, . . . an attorney, to conduct cross-examination on behalf of that party.”
- “Questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence . . . are offered to prove:
 - that someone other than the respondent committed the conduct alleged by the complainant, or
 - if the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent.”
- Privileged information (e.g., medical records, attorney-client privileged information) is not “relevant” or admissible without consent of party

“Live Hearings”

- “At the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker and parties to simultaneously see and hear the party or the witness answering questions.”
 - Rationale taken from Doe v. Baum (6th Cir. 2018)
- “Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.”

Standard of Evidence

- Schools may use either:
 - preponderance of the evidence standard or
 - clear and convincing evidence standard
- Must apply same standard of evidence in Title IX sexual harassment process for formal complaints against students as it does for formal complaints against employees, including faculty
- But, can choose to use clear and convincing for sexual harassment only (for all people), even if use preponderance for other types of misconduct

Decision Point: Standard of Evidence

- Schools **will have to decide** whether to use the clear and convincing evidence or preponderance of the evidence standard
- Schools **will have to decide** whether to use clear and convincing standard for sexual harassment only, even if it uses preponderance for other types of misconduct

Employment Issues

- New regulation states that: “A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part.” 34 CFR 106.8(b) (emphasis added)
- The preamble to the new regulations acknowledges that employees of a school may have rights under both Title IX and Title VII: “The Department acknowledges that Title VII and Title IX impose different requirements and that some recipients will need to comply with both Title VII and Title IX. . . . The Department’s view is that there is no inherent conflict between Title VII and Title IX, including these final regulations.”
- Section 106.8(c) clarifies that the school’s policy and grievance procedures apply to all student and employee complaints
- Impact of live hearing/cross examination requirements to existing employee procedures could be very significant

Informal Resolution

- School may facilitate informal resolution of formal complaints of all forms of sexual harassment if it:
 - Provides parties with written notice of:
 - The allegations
 - The requirements of the informal resolution process, including the circumstances that preclude parties from resuming formal complaint process arising from the same allegations, provided, that any party has the right to withdraw from the informal process and resume the grievance process of the formal complaint any time prior to agreeing to a resolution
 - Any consequences from participating, including records that will be maintained or could be shared
 - Obtains parties' voluntary, written consent to informal resolution process; and
 - Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

Appeals

- Schools must offer both parties an appeal from a determination regarding responsibility, and from a recipient's dismissal of a formal complaint based on grounds that:
 - Procedural irregularity that affected the outcome of the matter
 - New evidence that was not reasonably available at the time the determination was made that could affect the outcome of the matter; and/or
 - The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against one of the parties that affected the outcome of the matter.
- Schools may offer an appeal equally to both parties on additional bases (e.g., re sanctions)

Regulations Confirm Appropriateness of Fair, Trauma-Informed Practices



NACUANOTES

- **J. Nolan, “Promoting Fairness in Trauma-Informed Investigation Training”**
 - National Association of College and University Attorneys (“NACUA”) NACUANOTE, February 8, 2018, Vol. 16 No. 5
- Updated H&K white paper version available at:
<https://www.hklaw.com/en/insights/publications/2019/07/fair-equitable-trauma-informed-investigation-training>

Miscellaneous, but Still Important

- Evidence related to a Title IX investigation must be shared at least 10 days before any hearing
- No specific time frames as with the prior administration; now the result must be “reasonably prompt”
- There are many other details that could apply to specific policies
- Retaliation is broadly prohibited

Remedies

- An equitable resolution for a complainant must include remedies where a finding of responsibility for sexual harassment has been made against the respondent
 - “Remedies must be designed to restore or preserve equal access to the recipient’s education program or activity” and “may include . . . ‘supportive measures.’”
- An equitable remedy for a respondent must include “following a grievance process that complies” with the regulations before “before the imposition of any disciplinary sanctions or other actions that are not supportive measures”

New Regulation: Recordkeeping

- Schools must maintain for seven years records of
 - Each sexual harassment investigation
 - Any appeal and the result therefrom
 - Any informal resolution and the result therefrom
 - All materials used to train coordinators, investigators, decision-makers and persons who facilitate an informal resolution process, **and make such materials available on its website**
- Schools must also create and maintain for seven years hearing recordings/transcripts and records of any actions, including supportive measures, taken in response to report or formal complaint of sexual harassment

Preliminary Thoughts on Navigating New Regulatory Environment

- New regulations are effective August 14, 2020.
- Consider school's position on **decision points** now
- Recognize that substantial policy and process revisions will be necessary
- Recognize that training/professionalizing hearing officers will be required

Questions?

Thank You!



Jeffrey J. Nolan

617.854.1459

jeffrey.nolan@hklaw.com



Philip J. Catanzano

617.305.2126

phil.catanzano@hklaw.com