

Feds Issue New Title IX Rule Addressing Sexual Harassment/ Assaults in Schools

May 7, 2020

There has been a lot of news in recent years surrounding allegations of sexual assaults in sports programs, so it is probably no surprise that the U.S. Department of Education has issued its final rule and mandatory steps to prevent and address reports of sexual abuse.

The final rule, including its summary, is over 2000 pages, so this article can only highlight some of its key provisions. There is a Department of Education webinar available that also provides guidance. The final rule takes effect on Aug. 14.

First, there is a shift in how sexual harassment and sexual assault are viewed. It is unlawful sex discrimination. As such, there are legal obligations, not just guidance, imposed on school districts (K-12), colleges and universities which require a prompt response when a report is made. There is more transparency to the process, more support for the complainant and more due process for the accused.

Complainants must be offered supportive measures (to ensure equal access to education, protection and deterrence of further harassment) even when the student decides not to initiate or participate in the formal complaint process. This may include such things as being reassigned to different classes or a different dorm and no contact orders. The complainant cannot be forced or coerced into participating in the process.

The final rule requires strong, clear, predictable and transparent grievance processes “to reach reliable outcomes.” The final rule defines all of the following conduct when based on sex as sexual harassment:

- Conditioning an educational benefit/service on a student's willingness to engage in sexual harassment (i.e., quid pro quo harassment);
- Unwelcome conduct that is so severe, pervasive and objectionably offensive that it would deny a “reasonable person” equal access to the educational program/activity; and

[Note: both of these seem reflective of Title VII employment law]

- Any sexual assault, dating violence, stalking or domestic violence (as defined under the Clery Act, 20 USC 1092(f) and the Violence Against Women Act, 34 USC 12291(a)).

The final rule follows Title IX and U.S. Supreme Court precedent and mandates that a school respond whenever it has actual knowledge of sexual harassment occurring within the education program/activity in the United States.

But the term “actual knowledge” is expanded to situations when notice is given to “any elementary or secondary school employee and can also be made to the Title IX Coordinator by the student or a third party by email, phone, mail or in person.” This is a change from the proposed rules (which required notice to a teacher in elementary or secondary schools) may create liability when a lower level employee fails to convey the information.

Significantly, a school’s education program/activity now also includes “situations over which the school exercised substantial control, and also buildings owned or controlled by student organizations officially recognized by a post secondary institution, such as many fraternity and sorority houses.” This is a significant expansion from the proposed language. Given the misconduct that sometimes occurs at such places, this may raise serious concerns for educational institutions.

A Title IX violation will be found if the school’s response is unreasonable given the known circumstances. The final rules require mandatory response obligations including the offering of supportive measures to the complainant even when there is no formal complaint. However, the final rules also require the grievance process to be followed before the imposition of any disciplinary action against the accused (with the exception of imposing “supportive measures” for the complainant).

Every formal complaint must be investigated and the grievance process must include all of the following:

- Written notice of the allegations to both parties
- An opportunity for each party to select an advisor (which may or may not be an attorney)
- An opportunity for both parties to submit and review all evidence during the investigation
- Trained Title IX personnel to evaluate the evidence objectively, free from bias and conflicts
- Privacy protections requiring written authorization before the use of any medical, psychological or similar records during the process
- Voluntary written consent before the use of any informal resolution process (and no informal process can be used where an employee has been accused of the sexual harassment)
- A presumption of innocence given to the accused, with the burden of proof on the school
- The uniform application of either a preponderance of evidence or clear and convincing evidence standard (which is a higher burden of proof) whether it is a student or an employee accused
- Separate decision makers and investigators

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- Live hearings (which may be conducted “virtually”) with cross-exam required for post-secondary schools (K-12 may hold live hearings or may allow parties to submit written questions to be posed to the other party/witnesses)
- Prohibition of questions to the complainant concerning prior sexual history
- Written decision with an analysis of reasoning
- Effective remedies for the complainant if sexual harassment is found
- An equal opportunity to appeal the decision
- Prohibition of retaliation against parties and participants
- Maintenance of records of reports/investigations
- The public disclosure of Title IX training records

In addition, the final rules provide for the affirmation of sex discrimination regulations and updates to policies, etc. There are a lot of details provided in the final rules. The above just touches upon some of the highlights.

Academic institutions are encouraged to have their policies and procedures reviewed by legal counsel to ensure compliance.