

Higher Education

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DEPARTMENT OF EDUCATION REQUESTS COMMENTS ON PROPOSED TITLE IX REGULATIONS

By Karen Baillie

On Friday, November 16, 2018, the U.S. Department of Education released a Notice of Proposed Rulemaking regarding how schools must respond to allegations of sexual harassment and sexual misconduct. The Department's press release and links to the proposed rules are [online here](#).

The proposed rules would apply to elementary, secondary, and postsecondary schools receiving federal financial assistance. This Alert addresses the provisions affecting institutions of higher education.

The current regulations offer almost no detailed standards, providing only that schools must designate a responsible employee and must publish a grievance procedure. Under the Obama Administration, the Department of Education issued a number of guidance documents that seemingly created a wide range of procedural requirements, which led to many lawsuits against institutions of higher education.

Last fall Secretary Betsy DeVos withdrew most of the Obama-era guidance because critics complained that the guidance was not promulgated through proper administrative procedures. The newly released proposed regulations will be considered through the rulemaking requirements of the Administrative Procedure Act and will be open for public

comment for 60 days from the date of publication in the Federal Register.

Responding to sexual harassment and sexual misconduct is certainly a crucial priority for all schools. However, the proposed regulations may create a variety of new procedural and technological challenges for colleges and universities. If finalized, these complications could result in difficulties with implementation and potential litigation for years to come. Institutions of higher education may want to take advantage of the opportunity to provide their comments to the Department of Education before the regulations are finalized.

The significant changes would include the following mandates for schools hoping to take advantage of the Department's new safe harbor to avoid a finding of gender discrimination under Title IX. Institutions of higher education would be required to:

1. Conduct live hearings of formal complaints.
2. Allow for cross examination of witnesses on all relevant matters, including credibility.
3. Allow cross examination by the advisor of each party's choice, which would include attorneys.
4. Provide an advisor aligned with a party, if the party does not have an advisor at the hearing.

5. Provide, at the request of any party, technology to enable live cross examination with the parties located in separate rooms.
6. Provide for decision makers who are not also the investigator.

In addition, institutions of higher education would be responsible for meeting the burden of proof for responsibility, rather than either the complainant or the respondent (accused). Institutions could choose to meet either the “clear and convincing evidence standard” or the “preponderance of the evidence standard,” with several caveats. Institutions would be required to use the same standard for determining responsibility both in cases involving complaints against students and in cases involving complaints against employees (including faculty) who are accused of sexual harassment. And institutions would only be permitted to use the preponderance of the evidence standard if the institution uses the same standard for other disciplinary infractions that lead to similar sanctions.

The proposed rules would also impose specific requirements for investigators, including that they receive training, are unbiased, and do not serve as the decision makers who assess the sanctions on respondents. Investigation reports would be mandated to set forth the institutions’ procedures in the specific case, including the date the complaint came in, the formal notice that was provided to the parties, and any support measures that were offered. At the opening of the investigation, and prior to the initial interview with the respondent, the institution would have to provide formal notice of the allegations against the respondent with important details and the specific conduct code violations. The notice would have to recite that respondents are presumed not responsible unless found responsible at the conclusion of the grievance process. If the scope of investigation changes and additional charges are added, the investigator must provide additional formal notice. And where the allegations, even if true, would not constitute a violation of the

institution’s code of conduct, the institution would have to dismiss those allegations.

Further, the investigator would be required to allow each party to gather and present relevant evidence and would be prohibited from advising any party that they should keep the investigation confidential. The investigator would be required to share all evidence with all parties, including inculpatory and exculpatory evidence, and would be required to make the investigation report available to both parties to allow them to have meaningful input prior to any grievance procedure/hearing. Notably, the Department of Education would require that prior to the finalization of the investigation report, the institution must use technology to share all evidence in a format that restricts downloading and copying and allows each party at least ten days to submit a written response.

Schools may welcome some of the many proposed changes, such as allowing institutions to designate informal and formal complaints, thus giving more flexibility in responding to informal complaints. The Department has proposed a new definition of sexual harassment that for the most part aligns with case law. Safe harbors are provided for institutions, so that if a school complies with the proposed regulations regarding formal grievance procedures, its response will not constitute a violation of Title IX. Although prior Department guidance had prohibited mediation for sexual harassment complaints, the proposed rules would allow mediation in some circumstances.

In short, the Department of Education is requesting comments and feedback before these proposed regulations become final. Now is the time to offer your thoughts and suggestions. ◆

For more information about Schnader’s Higher Education Practice Group or to speak with a member of the firm, please contact:

Karen Baillie, Partner
Co-Chair, Higher Education Practice Group
412-577-5118
kbaillie@schnader.com

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