

Department of Education Proposes New Rules to Govern Title IX Compliance

November 16, 2018

The Department of Education has issued a Notice of Proposed Rule Making to amend the federal regulations governing Title IX compliance. The proposed rules would replace prior guidance and represent a radically different approach than that taken in the abandoned 2014 Dear Colleague Letter and related guidance. Because the most substantive changes affect the investigation and complaint resolution process, institutions will need to begin thinking about how to adapt their processes in anticipation of the rules becoming final.

The key changes in the proposal, issued on Friday, November 16, 2018, are:

- Adoption of a regulatory definition of sexual harassment, which arguably narrows prior definitions.
- Adoption of a "deliberate indifference" standard, rather than a reasonableness standard, to determine whether an institution has committed a violation.
- A requirement that the institution have "actual knowledge" of sex harassment before it is obligated to respond.
- Adoption of detailed requirements for an institution's grievance resolution process including:
 - Presumption of innocence must apply throughout the process.
 - Prior to any interview of the respondent, a detailed written notice of the charges, and the facts supporting the charges, must be provided to the respondent with adequate time to prepare.
 - Interim suspension is allowed only after an individualized threat analysis and if there is an immediate appeal available.
 - The process must include a live hearing, rather than merely a review of an investigative report.
 - The live hearing must permit direct cross examination of witnesses by the parties' respective advisors (and for a student without an advisor, an institutionally provided advisor who can conduct the cross examination).
 - Detailed statements of decision that recite all prior proceedings, findings of fact and a detailed rationale for the determination and any sanction imposed.
 - Allowing appeals from the hearing officer or board decision is optional.

Taken together, these changes will require institutions to follow a judicial process akin to a criminal court proceeding and much more formalized under than under the prior guidance. The requirement of cross examination, recently imposed on public institutions by the Sixth Circuit Court of Appeals, will likely present the most challenges in implementation. Questions that need to be considered include how much control the hearing officer may have to restrict questioning and whether the advisor can be required to demonstrate competence or have training in advocacy skills.

Other significant changes include:

- Adoption of a regulatory definition of sexual harassment, which arguably narrows prior definitions. It defines harassment as conduct which is "so severe, pervasive and objectively offensive" so as to deny equal participation. Most courts have adopted a "severe **or** pervasive" standard to allow that a single act of unwelcome offensive

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conduct can be sufficient to establish harassment. Whether the Department's omission of "or" is intended to eliminate single instances of unwelcome conduct from the definition, or is merely an oversight, is not clear.

- Adoption of the "deliberate indifference" standard to determine whether an institution will be found in compliance. While deliberate indifference has long been the standard for obtaining damages in a private lawsuit, administrative violations currently require only a finding that the institution acted unreasonably.
- A requirement that the institution have "actual knowledge" of sex harassment before it is obligated to respond. Actual knowledge is defined to require that there be notice of the harassing conduct to either the Title IX Coordinator or to an "official who has authority to institute corrective measures on behalf of the recipient." Persons who merely have an obligation or ability to report sexual misconduct to others are excluded. This significantly limits the range of institutional personnel whose knowledge will count as institutional knowledge, and may require revisiting the reporting requirements imposed on campus personnel.

The proposed regulations are now subject to a 60-day public comment period, at the conclusion of which the department may make modifications or simply place the proposed regulations into effect.

Because the regulations represent a sea change from prior guidance, virtually all institutions should begin the process of reviewing their current policies and procedures and considering how they can implement the required changes consistently with other campus policies and mission values. Please contact the authors or your Miller Canfield attorney to discuss this issue further.