

U.S. Department of Education: New Title IX Protocols Required By August 14, 2020

Final Rule Includes Significant Changes to Grievance Procedures and Requires Live Hearings in all Formal Complaints of Sexual Harassment at Post-Secondary Institutions

May 8, 2020

The United States Department of Education's Office for Civil Rights (OCR) released a final rule implementing Title IX of the Education Amendments of 1972 ("Title IX"). Title IX prohibits discrimination on the basis of sex in education programs and activities by recipients of federal funds, which includes nearly all colleges, universities, and K-12 schools. The **final rule** was released on May 6 and takes effect August 14, 2020. Key provisions of the new regulations are below.

- **The Definition of "Sexual Harassment"**

The final rule clarifies that sexual harassment shall include (i) any incident of sexual assault, dating violence, domestic violence, and stalking as defined under federal law, including the Clery Act and the Violence Against Women Act; (ii) *quid pro quo* harassment perpetuated by an educational institution's employee; and (iii) all other forms of sexual harassment, where the conduct is "so severe, pervasive, and objectively offensive" that it denies the victim equal access to education, as set forth by the Supreme Court in *Davis v. Monroe County Board of Education*.

- **Institutions Responsible for Equal Access to Education at Any "Program or Activity"**

Title IX contains broad definitions of an educational institution's "program or activity." The final rule states that an education program or activity includes locations, events, or circumstances over which the institution exercises substantial control over the parties and the context in which the sexual harassment occurred. This includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution (such as a fraternity or sorority house). Notably, Title IX only provides protection against sexual harassment that occurs in the United States. A covered entity may also address sexual harassment affecting its students or employees that falls outside Title IX's reach in any manner the entity chooses, including providing supportive measures or pursuing discipline.

- **Ensuring Accessible Channels for Reporting Sexual Discrimination and Harassment**

The final rule reaffirms that educational institutions must designate a Title IX Coordinator, post a non-discrimination policy and reporting procedures promptly on its website, and post the Title IX Coordinator's contact information prominently on its website to ensure accessible channels for reporting sex discrimination (including sexual harassment) at any time.

- **Actual Notice Standard and Mandatory Response Obligations**

Educational institutions must respond promptly upon receiving actual notice of sexual harassment or an allegation of sexual harassment. Notice can be provided by any individual. A K-12 institution shall be deemed to have actual notice once **any** employee has notice. Post-secondary institutions shall be deemed to have actual notice once the Title IX Coordinator has knowledge, or any other official who has the authority to institute corrective measures on behalf of the

Continued

institution has notice. While post-secondary institutions can create a policy obligating its employees to report allegations of sexual harassment to the Title IX Coordinator, “the mere ability or obligation to report sexual harassment” does not qualify an individual as one who has authority to institute corrective measures on behalf of the institution and thus is not considered actual notice and will not trigger a mandatory response.

Upon receiving notice of an allegation of sexual harassment, educational institutions must respond promptly and in a manner that is not “deliberately indifferent,” *i.e.* in a manner that is not clearly unreasonable in light of the known circumstances. At a minimum, the Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures, with or without filing a formal complaint, and to explain the process for filing a formal complaint. A formal complaint is defined as a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the institution investigate the allegations.

Where allegations do not meet the definition of Title IX sexual harassment or when an incident did not occur within the institution’s program or activity, the institution is required to dismiss the allegations for Title IX purposes; but it may still address allegations in any manner the institution deems appropriate under its code of conduct or policies.

- **Support Measures for Complainant and Respondent**

Educational institutions must offer free supportive measures for any complainant or respondent, even where the complainant does not wish to initiate or participate in a formal grievance process. These services must be non-punitive, non-disciplinary, and not unreasonably burdensome to the other party, but are designed to ensure equal educational access, protect safety, or deter sexual harassment. Some examples include counseling, extensions of course-related deadlines, modification to work or class schedules, campus escort services, restrictions on contact between the parties, and other similar measures.

- **Grievance Process**

The final rule requires all educational institutions to investigate and adjudicate formal complaints of sexual harassment using a grievance process that must:

- Give all parties written notice of the allegations, an opportunity to select an advisor, and an opportunity to submit and review evidence throughout the investigation.
- Provide parties at least 10 days to inspect, review, and respond to all evidence directly related to the allegations prior to the completion of the investigative report.
- Utilize trained Title IX personnel to objectively investigate all reports of sexual harassment.
- Create an investigative report that summarizes the relevant evidence.
- Provide parties at least 10 days to review and provide a written response to the investigative report.
- Provide for a live hearing, as set forth below.
- Apply a presumption of innocence on the respondent during the grievance process and utilize **either** a preponderance of the evidence or a clear and convincing evidence standard in making findings. The institution must use the same standard for all formal complaints of sexual harassment.

Continued

- Keep the burden of proof and the burden of gathering evidence on the institution, not the parties.
- Ensure the investigator is a different person than the final decision maker in a formal complaint.
- Prohibit any inappropriate questioning about prior sexual history and protect the privacy of a party's medical, psychological, or similar treatment records.
- Provide a written determination with an analysis as to how the conclusion was reached.
- Offer an opportunity to appeal a final determination. An appeal can be filed on the following bases: procedural irregularity, newly discovered evidence, and/or bias of the Title IX personnel that affected or could affect the outcome of the matter. A covered entity may also add other rights to appeal, so long as the other bases are available to all parties.
- Provide protection from retaliation for any individual that participates in a Title IX grievance process.
- Post all Title IX training materials on the institution's website.

Covered entities may, in their discretion, dismiss a formal complaint or allegations therein if the complainant informs the Title IX Coordinator in writing that the complainant desires to withdraw the formal complaint or allegations therein, if the respondent is no longer enrolled or employed by the institution, or if specific circumstances prevent the institution from gathering evidence sufficient to reach a determination as to the formal complaint. Further, if the conduct alleged would not constitute sexual harassment under Title IX if proved, did not occur as part of an education program or activity, or did not occur in the United States, the institution must dismiss the formal complaint for the purposes of sexual harassment under Title IX, but the dismissal does not preclude the institution from taking action under its code of conduct or policies.

- **Live Hearing Requirement**

Post-secondary institutions must "provide for a live hearing," which can be conducted in person or virtually. A recording or transcript of the hearing must be created. At the hearing, both parties must be provided an advisor for the purposes of conducting cross-examination "directly, orally, and in real time." Cross-examination must not be conducted directly by the party. If a party does not have an advisor present at the live hearing, the institution must provide an advisor free of charge. At the request of either party, the parties shall be separated with the utility of technology to enable the parties to see and hear one another as needed from different rooms.

During the hearing the final decision maker or hearing officer will have the right to determine the relevancy of any questions asked on cross-examination and can exclude any irrelevant questioning. If a party or witness "does not submit to cross-examination," the final decision "must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw any inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions."

K-12 educational institutions need not hold a hearing but must provide the parties the opportunity to submit written questions to be answered by the opposite party.

Continued

- **Informal Resolution Options**

An educational institution may, in its discretion, choose to offer and facilitate resolution options, such as mediation or restorative justice, in any formal investigation with the parties' voluntary, informed, written consent. Waiver of the right to a formal investigation or adjudication of a formal complaint of sexual harassment as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, is prohibited. Informal resolution is not available to resolve allegations where an employee sexually harassed a student.

The DOE has also posted a fact sheet, an overview, and a review of the changes between the Notice of Proposed Rulemaking and the final rule. Additionally, the Office of Civil Rights has released a webinar describing the new regulations and their features.

If you have any questions about the final rule or how to ensure compliance, please contact your Miller Canfield attorney or any of the authors of this alert.