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# U.S. Secretary of Education Releases Final Title IX Regulations Governing Sexual Misconduct

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Earlier today, the U.S. Department of Education (the "Department") published the unofficial version of the Final Title IX Regulations ("the Final Rule") governing how schools must address allegations of sexual harassment in accordance with Title IX of the Education Amendments of 1972 ("Title IX"). According to U.S. Secretary of Education Betsy DeVos, the Final Rule "comes after years of wide-ranging research, careful deliberation, and critical input from survivors, advocates, falsely accused students, school administrators, Title IX coordinators, and the American people, including over 124,000 public comments." Higher education institutions and elementary and secondary schools that receive federal funding are subject to Title IX which prohibits sex discrimination in education programs or activities.

Historically, the Department had addressed sexual harassment through guidance documents, which are not legally binding and do not have the force and effect of law. In 2017, however, Secretary DeVos revoked Title IX guidance issued under the Obama administration, which had called for greater enforcement of Title IX, and in November 2018, issued proposed Title IX regulations. After proceeding through a formal notice and comment period, the Final Rule will have the force of law and educational institutions will need to be in compliance by **August 14, 2020**.

The Final Rule encompasses several prominent changes. First, it recognizes that sexual harassment, including sexual assault, dating violence, domestic violence, and stalking, is unlawful sex discrimination. The Final Rule, however, narrows the scope of complaints that institutions are required by law to investigate. According to the Department, sexual harassment is defined as: "unwelcome conduct…that a reasonable person would determine is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school's education program or activity." This definition represents a narrower one that had been used under the previous Obama guidance, which had defined sexual harassment more broadly as "unwelcome conduct of a sexual nature." The definition of harassment also explicitly now covers dating violence, domestic violence, and stalking, as defined in the Violence Against Women Act (VAWA), a change from the proposed Title IX regulations.

Additionally, the Final Rule requires schools to adopt a grievance process that incorporates due process principles in order to investigate and adjudicate formal complaints of sexual harassment. Among the requirements outlined for this process, the single investigator model, in which an investigator writes a report and recommends a finding, but no hearing takes place, is no longer permitted. Additionally, institutions are required to hold live hearings and allow cross-examination by party advisors. (Students, however, cannot personally cross-

examine one another.) Statements made by parties that are not cross-examined cannot be relied on to determine responsibility, according to a summary of major provisions in the Final Rule. Schools may use either the preponderance of the evidence standard or the clear and convincing evidence standard during the process, though the same standard must be used for formal complaints against students and employees. Institutions must also ensure that both parties retain an advisor without fee or charge to that party.

Importantly, the complaints that schools must investigate are now limited to those filed through a formal complaint by a complainant or a school's Title IX Coordinator, and if the alleged conduct is not within the scope of Title IX, then the school may respond to the allegations under its own code of conduct and provide supportive measures. The Final Rule also requires schools to provide free supportive measures to every alleged victim of sexual harassment. Additionally, the Final Rule departs from using two categories of "responsible employees" with regard to higher education institutions, and therefore, such institutions will no longer have to designate most employees as "mandatory reporters."

Another distinction pertains to the responsibility of schools in overseeing sexual misconduct. The Final Rule holds schools responsible for intervening only in regard to misconduct that takes place on campus or within the school's own education programs or activities. According to the Final Rule, however, an institution "may address sexual harassment affecting its students or employees that falls outside Title IX's jurisdiction in any manner the school chooses." The Final Rule also restricts the circumstances requiring school intervention in another way, in that a school would only be required to act where it has "actual knowledge" of allegations of sexual misconduct. This is a significant departure from the previous standard which required intervention where a school "knew or reasonably should have known" about the alleged misconduct.

Therefore, a school is obligated to address sexual harassment allegations when: (1) it has actual knowledge of sexual harassment; (2) that occurred within its education program or activity (such as school-owned buildings and school-sponsored trips, but not in off-campus apartments or during study abroad); (3) against a person in the United States. The Final Rule states that a school's "education program or activity" includes situations over which the school exercised substantial control, as well as buildings owned or controlled by student organizations officially recognized by a higher education institution. Off-campus housing for recognized Greek life organizations or events (i.e., many fraternity and sorority houses) are considered "educational programs" if they are recognized by the institution. Under the Final Rule, and in accordance with Supreme Court precedent, a school is in violation of the Title IX regulations when it acts with "deliberate indifference." Further, a school acts with deliberate indifference only if its response to sexual harassment is "clearly unreasonable in light of the known circumstances."

With the release of the new Title IX regulations, which take effect on August 14, 2020, the Department of Education has also provided various sources to help schools navigate the amendments. These sources include: (1) an overview of the Final Rule; (2) a summary of the major provisions of the Final Rule; (3) a comparison to the NPRM; and (4) an OCR Webinar.

In addition to the Final Rule, many institutions are bound by state laws, particularly New York State's Article 129-B ("Enough is Enough" law), to respond to, investigate and prevent sexual misconduct.

At this time, institutions are advised to review their sexual misconduct policies and update them, if necessary, to ensure compliance with all federal and state laws. Additionally, institutions can use the knowledge and experience they have gained from transitioning over to remote learning to determine the best way to meet the new Title IX standards if campuses are still limited to remote learning in the fall. Institutions should consider developing policies for both remote semesters as well as in-person semesters so that they are prepared to handle either scenario moving forward. We also encourage institutions to provide regular training to students, educators and all members of the school community on how to properly recognize, prevent and respond to allegations of sexual misconduct in light of the Final Rule. Institutions are advised to pay close attention to this area of the law, as it has the potential to have significant practical as well as legal implications and perhaps challenges in the near future.

Cullen and Dykman is here to assist you in adapting your policies and procedures to comply with the new Title IX regulations and provide training to students, educators and all members of the community. This is a preliminary overview of the Final Rule and we will continue to update alerts in order to keep you informed of the latest developments surrounding Title IX. If you have questions regarding any aspects of higher education law and any implications the Final Rule will have on your institution, feel free to contact Kevin P. McDonough at (516) 357-3787 or via email at kmcdonough@cullenllp.com and Dina L. Vespia at (516) 357-3726 or via email at dvespia@cullenllp.com.

Please note that this is a general overview of developments in the law and does not constitute legal advice. Nothing herein creates an attorney-client relationship between the sender and recipient.

## Practices

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