



Deadline Approaching Quickly for Schools to Update Title IX Policies

The Department of Education released the long awaited Title IX regulations focusing on sexual misconduct on May 6. The regulations were initially proposed in November, 2018. It is the first time that the Department has issued regulations dealing with sexual harassment or sexual assault. Previously, the Department has issued Dear Colleague letters setting forth guidance to covered entities.

The August 14, 2020 effective date gives institutions only three months to make necessary changes to their existing policies and procedures at a time when most are devoting huge amounts of time and resources to COVID-19. Most institutions will have to make significant changes to existing policies and procedures.

Highlights of the regulations include:

- Definition of “sexual harassment” sets a higher bar—only conduct that is so *severe and pervasive and objectively offensive that it denies a person equal educational access*
- *Quid pro quo* harassment and Clery Act/VAWA offenses (sexual assault, dating violence, etc.) are not subject to the “severe, pervasive, offensive” evaluation
- Schools are to balance Title IX enforcement with 1st Amendment rights—must be respect for free speech and academic freedom
- The “single investigator” model can no longer be used by schools; the decision maker must be separate from the investigator
- Colleges and universities no longer have to designate most employees as mandatory reporters; the negative side of this is that athletic directors, coaches and trainers were formerly mandatory reporters; in order to prevent Michigan State type situations schools should be advised to continue to have these

personnel be mandatory reporters

- All employees in K-12 settings are mandatory reporters
- Sets forth specific, detailed requirements regarding training for Title IX personnel
- There are some commentators suggesting that there is now somewhat of a barrier to the use of “trauma informed” interview and investigative techniques
- Schools must investigate off-campus sexual misconduct that occurs in educational activities, such as college owned buildings or college sponsored trips, but *not* in off-campus apartments or study abroad programs—data indicates that a very high percentage of sexual assaults occur in off-campus housing settings
- Schools must ensure that each party has an advisor, who may be an attorney
- Requirement of statement of presumption that respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process
- Rule sets out in detail the requirements for filing a formal complaint, notice to all parties, and other aspects of required procedures related to initiation of a case and the investigation thereof
- Sets forth the requirement to provide remedies and resources to a complainant in order to ensure their equal access to education
- Hearings in higher education cases must be live, although they can be virtual; K-12 schools do not have to provide live hearings
- At the hearing, each party’s advisor must be allowed to ask the other party and any other witnesses all relevant questions and follow-up questions, including challenges to credibility; this cross-examination must be conducted in real time, but never by a party
- At the request of either party, the parties must be provided separate rooms for participating in the hearing through the use of technology which enables the parties to see and hear each other
- Rape Shield protection must be provided to complainants
- School’s policies and procedures must set forth whether the standard of proof is “preponderance of the evidence” or “clear and convincing”—standard selected must be used for all formal complaints of sexual harassment including those where employees and faculty are respondents
- Decision-maker must issue a written determination regarding responsibility with findings of fact, conclusions about whether the alleged conduct occurred,

rationale for the result, any disciplinary sanctions imposed on the respondent, and whether remedies will be provided to the complainant

- School must offer an opportunity to both parties to appeal a decision regarding responsibility, including a dismissal of a formal complaint
- Schools may offer and facilitate informal resolution options, but are not required to offer them
- Retaliation is expressly prohibited

This blog post was drafted by [Peter Goplerud](#), an attorney in the Spencer Fane LLP St. Louis, MO office. For more information, visit www.spencerfane.com.