



Title IX: The Department of Education’s Final Rule on Sexual Harassment

Presented by:

National Association of College and University Attorneys

in Cooperation with :

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NASPA, Student Affairs Administrators in Higher Education

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STATUS OF THE REGULATIONS



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- Released by ED informally on its website on May 6, 2020
- As of this morning, it is set to be published in the Federal Register on May 19, 2020
- Effective date: August 14, 2020



STATUS OF THE REGULATIONS

- *Will the regulations really go into effect on August 14, though?*
 - ED has publicly articulated an intent to begin enforcement on that date; no express “grace period”



STATUS OF THE REGULATIONS

- *Will the regulations really go into effect on August 14, though?*
 - But what about an injunction?
 - Likelihood?
 - Scope and effect?
 - (Nationwide injunction? Part of the rule or all?)
 - Duration?
 - *What would an injunction mean for compliance?*



JURISDICTION



GEBSER/DAVIS FRAMEWORK

OCR will use this three part framework to assess potential violations:

- Whether the institution had actual knowledge
- Definition of actionable sexual harassment
- Whether the institution's response demonstrated deliberate indifference



INSTITUTIONAL RESPONSE

- To a “report”
 - Offer of supportive measures
 - Explanation of formal complaint process
- To a “formal complainant”
 - Must investigate
 - Grievance process must be consistent with the regs
 - Unless circumstances requires (or permits) dismissal



JURISDICTIONAL ISSUES

1. When does the institution have “actual knowledge”?
2. What is a “program or activity”?
3. Who can be a complainant?
4. When a Title IX Coordinator must dismiss a formal complaint (and when they may)



ISSUE 1: “ACTUAL KNOWLEDGE”

- If one of these people know:
 - the Title IX Coordinator or
 - “any official...who has authority to institute corrective measures on behalf of the recipient”
- Information can come from any source
- Respondents don’t give you “actual knowledge” even if they are an official with authority (Title IX only, not Title VII)



WHO IS AN OFFICIAL WITH AUTHORITY?

- Institutions determine for themselves
- Supervisors and deans (*see* p. 344)
- Who else has authority to institute corrective measures? (check your list of sanctions)
- Not required to list OWAs in your policy (only have to list Title IX Coordinator)(p. 300)



WHAT ABOUT RESPONSIBLE EMPLOYEES?

- May still use this term
- May still require a broader set of employees to report, including all employees (and state law may require)
- But OCR will determine you have “actual knowledge” only when the person reporting is an “official with authority”
- Be mindful that your policy may create contractual liability



ISSUE 2: PROGRAM OR ACTIVITY

- Locations, events, or circumstances in which an institution exercises substantial control over both the respondent and the context in which the sexual harassment occurs
- Locations include buildings owned or controlled by officially recognized student organizations. §106.44(a)



PROGRAM OR ACTIVITY

- Decision:
 - Do you narrow the scope of your policy to exclude other student organizations (assuming the institution doesn't otherwise have substantial control over the event)?
- Will your community accept that?
- How will students know which organizations are which?



PROGRAM OR ACTIVITY

- Training Required:
 - Title IX Coordinator, investigator, decision-maker, those who facilitate informal resolution must be trained on “the scope of the recipient’s education program or activity”
- That training must be posted on the institution’s website



ISSUE 2: WHO CAN BE A COMPLAINANT?

- Student, employee or third party (including patients)
- A complainant must be participating in, or attempting to participate in, the institution's education program or activity at the time of filing a formal complaint.
- Attempting to participate –
 - Attending, on leave, graduated but intended return for another program/degree
 - Participation in alumni activities(?)



HOW ABOUT RESPONDENTS?

- [A]ny “individual” can be a respondent, whether such individual is a student, faculty member, another employee of the recipient, or other person with or without any affiliation with the recipient. p. 416



ISSUE 4: DISMISSAL

- Determined after formal complaint is received
- Sometimes dismissal is required
- Sometimes dismissal is permitted
- Dismissal can occur at any time during the investigation/hearing process



“MUST DISMISS”

- Complaint must be dismissed if conduct:
 1. Would not constitute sexual harassment even if proved
 2. Did not occur in institution’s program/activity
 3. Did not occur against a person in the United States



“MAY DISMISS”

1. If complainant requests to withdraw their complaint
2. If respondent is no longer enrolled or employed
3. When specific circumstances prevent gathering evidence sufficient to reach a determination



IF YOU DISMISS

- Parties must receive simultaneous written notice of dismissal with reason(s) to the parties
- Parties must have an opportunity to appeal the dismissal
- Dismissal does not preclude other institutional action



CONSIDERATIONS

- Do you want to use the same (Title IX reg) process for all sexual misconduct?
- Do you use parallel/branched processes?
- Serial processes:
 - Potential double jeopardy concerns for public institutions?
 - A subsequent process not based on sex discrimination/harassment may be retaliation



QUESTIONS?



FORMAL GRIEVANCE PROCESS



EMERGENCY REMOVALS

§106.44(c): May remove respondent from *education program or activity* if:

- Conduct an individualized safety and risk analysis,
- Determine that respondent poses an immediate [imminent] threat to the *physical* health or safety of *anyone* justifying removal,
- The threat arises from the allegations of sexual harassment, and
- Provide opportunity for respondent to challenge removal immediately thereafter.



EMERGENCY REMOVALS

Preamble:

- Not limited to instances of sexual assault.
- Removal cannot be based on generalized, hypothetical or speculative concerns.
- Recipient can determine the scope of removal.
 - Only certain aspects of the institution’s programs or activities?
 - To suspend or not?
- No specific timeframes – may (not required to) reassess.



EMERGENCY REMOVALS

Other Points to Consider:

- Who will conduct the assessment?
- Who will make the decision?
- Beyond verbalized threats, what information will be considered?
- Where is the line between suspension and accommodating ongoing participation?
- What about removal from other programs and activities?
- What will respondent’s ability to challenge it look like?



CROSS-EXAMINATION / ADVISORS

§106.45(b)(6)(i): Cross-examination must:

- Be conducted by each party's advisor – directly, orally and in real time.
 - Allow all relevant questions and follow-up questions, including those challenging credibility.
 - If the party does not have an advisor, recipient must provide one at no cost.

Preamble:

- May not require that questions be in writing.
- May require advance notice of advisor.



CROSS-EXAMINATION / ADVISORS

- Advisor provided by institution need not be an attorney.
 - Need not be of “equal competency.”
 - Role is to relay the party's questions (per Briefing).
- May remove disruptive advisors ... *carefully*.
- Decision-maker should evaluate cross-examination responses in context, including consideration of stress.
 - “Because decision-makers must be trained to serve impartially without prejudging the facts at issue, the final regulations protect against a party being unfairly judged due to inability to recount each specific detail of an incident in sequence”



CROSS-EXAMINATION / ADVISORS

Other Points to Consider:

- Require parties to provide advance notice of their advisor's attendance?
 - What if they are a no-show?
- Who will serve as advisors provided by the recipient?
 - Attorneys?
 - How will they be trained?
- To what extent should the recipients “prepare” parties for cross-examination?



RELEVANCY DETERMINATIONS

§106.45(b)(6)(i): Decision-maker must determine whether questions are relevant and explain any decision to exclude.

- Questions and evidence about complainant's sexual predisposition or prior sexual behavior, unless to prove that someone other than respondent committed the conduct alleged or, if concerning specific incidents of complainant's conduct with respondent, offered to prove consent, are not relevant.
- Decision-makers [and investigators] must be trained on relevance.



RELEVANCY DETERMINATIONS

Preamble:

- May only exclude questions based on relevance.
 - Not because unduly prejudicial, concerning prior bad acts, or constituting character evidence.
 - May be deemed not relevant when duplicative of other evidence.
 - Exclude medical, etc. records without written consent and statements not subject to cross.
- May have rules or providing training on how to assign weight to a given type of relevant evidence.



RELEVANCY DETERMINATIONS

Preamble (con'd):

- Enough to say the question is not probative of any material fact.
- May have rules:
 - Precluding parties from challenging decision during the hearing.
 - Allowing decision-maker to revise explanation post-hearing.



RELEVANCY DETERMINATIONS

Other Points to Consider:

- Who will be (and advise) the decision-maker?
- How will the decision-maker be trained to navigate relevancy issues?
- What will it look like in practice?



STATEMENTS/ADMISSIONS

§106.45(b)(6)(i): If a party is not subject to cross-examination, then:

- No reliance on their statement in determining responsibility.
- No inference as to responsibility.

Preamble:

- Doesn't matter if it's a statement against interest.
- Doesn't matter if the witness is unavailable due to death or disability.



STATEMENTS/ADMISSIONS

Preamble (con'd):

- May not rely on an account of the statement from a friend.
- May not rely on police or SANE reports to the extent they include statements not subject to cross-examination.

Other Points to Consider:

- How can you work with a witness to get them there?
- How will you train decision-makers to deal with developments concerning statements?
- What if the statement is the alleged harassment?



HEARING DECORUM

Preamble: May have rules that:

- Require advisors be respectful.
- Prohibit abusive or intimidating questioning.
- Deem repetition of the same question irrelevant.
- Specify any objection process.
- Govern the timing and length of breaks to confer.
 - Prohibit loud or disruptive conferring.
- Allow for the removal of advisors.
- Require that *parties* make any openings and closings.



HEARING DECORUM

Other Points to Consider:

- Require parties and advisors to acknowledge the rules of decorum?
- Who will enforce the rules of decorum?
 - How will you train decision-makers?



PROCESS – STANDARD OF EVIDENCE

- A recipient's grievance process must—
 - State whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard **or** the clear and convincing evidence standard;
 - Apply the **same standard of evidence** for formal complaints against students as for formal complaints against employees, including faculty; and
 - Apply the same standard of evidence to all formal complaints of sexual harassment.

§ 106.45(b)(1)(vii)



PROCESS – STANDARD OF EVIDENCE

- Simpler than the NPRM, but watch out for:
 - State laws setting standards of evidence
 - CBAs or faculty handbooks that set standards of evidence
 - These may have dispositive effect if not renegotiated
 - Collateral faculty processes (especially re tenure revocation)
 - Do these resolve conduct falling into the definition of Sexual Harassment?
 - Potential issues re procedures used in those processes and whether the standard of evidence ratchets into Sexual Harassment resolutions
 - “These final regulations only prescribe a recipient’s mandatory response to conduct that does meet the[ir] definition of sexual harassment[.]”



PROCESS – APPEALS

- A recipient must offer both parties an appeal from
 - a determination *regarding responsibility*, and
 - from a recipient’s *dismissal of a formal complaint* or any allegations thereinon the following bases:
 - *Procedural irregularity that affected the outcome of the matter;*
 - *New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter;* and
 - *The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias*
 - for or against complainants or respondents generally or
 - the individual complainant or respondent that
 - affected the outcome of the matter.
- A recipient may offer an appeal on additional bases so long as it does so equally to both parties, e.g. as to severity of the sanctions.



PROCESS – APPEALS – BIAS

- The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias *for or against complainants or respondents generally* or the individual complainant or respondent that affected the outcome of the matter.
- What does bias mean here?
 - OCR recognizes that our Title IX staff have careers prior to working at institutions, and often those careers may involve advocacy work;
 - *But ED* also has essentially told us we’re on our own to figure this out:
 - “The Department further notes that the Clery Act regulations do not further elaborate on what may constitute a conflict of interest or bias and further declines to do so in these final Title IX regulations. Recipients of Federal student financial aid have been able to determine what constitutes a conflict of interest or bias without definitions in the regulations implementing the Clery Act.”
- Some suggestions:
 - Focus on the “that affected the outcome of the matter” language
 - Simply having authored an op-ed will not be enough in most cases
 - Nevertheless, there is some risk tolerance involved in staff members or third-party personnel with outspoken backgrounds



PROCESS – OTHER

- Institutions are free to adopt additional processes so long as they are offered on an equal basis
 - *E.g.* to help streamline the relevancy determinations during questioning
- Obligation to create and maintain a recording or transcript of the hearing





PROCESS – OTHER

- Outcome notification must be simultaneous, in writing, and must:
 - Identify the allegations potentially constituting sexual harassment;
 - Describe the procedural steps taken from the receipt of the formal complaint through the determination;
 - Contain findings of fact;
 - Describe conclusions regarding the application of the institution’s code of conduct to the facts;
 - Make a determination as to responsibility, remedies, and sanctions; and
 - List the available bases for appeal.



PROCESS – VIRTUAL HEARINGS

- Live hearings may be conducted with all parties physically present in the same geographic location or, **at the recipient’s discretion**, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants **simultaneously to see and hear** each other.
 - *Audio only does not pass muster*
 - *In theory, an institution could transition to a virtual-only hearing process (within the bounds of state and circuit-specific federal law)*
 - *What about access issues for students or employees who do not have access to hardware to participate virtually?*





THE REGS AND EMPLOYEES



EMPLOYMENT

- Applies to:
 - At will employees
 - Union employees
 - Employees in state employment systems
 - Patient complaints against medical professionals
- HR and labor and employment attorneys should be involved ASAP



EMPLOYMENT

1. Title IX vs. Title VII – knowledge and definition
2. Addressing a “formal complaint” (or lack of “formal complaint”) in the employment context
3. Extraterritoriality
4. Patient complaints against employees
5. The “confidentiality” aspect of retaliation



ISSUE 1: TITLE IX VS. TITLE VII

- Title VII defines sexual harassment as “severe or pervasive” not “severe and pervasive.”
- Title VII “knew or should have known” versus “actual knowledge”
- Title VII vicarious liability for acts of supervisors, no exception when the supervisor is the one engaging in the harassment



ISSUE 2: “FORMAL COMPLAINT” (OR NOT)

- No “formal complaint” is required under Title VII. You must address the matter if you “knew or should have known.”
- Ensure your policies and procedures:
 - Allow you to address matters when you learn of them, regardless of whether a “formal complaint” is received
 - If you prefer, to use a different procedure (e.g, no cross-examination, etc.) when no formal complaint is received or a formal complaint is dismissed



“FORMAL COMPLAINT” (OR NOT)

- Ensure that your training programs are synced to give a consistent message

orking abroad are protected by Title VII

ISSUE 3: EXTRATERRITORIALITY

- Title IX – “must dismiss” a formal complaint if conduct is not against a person in the United States
- Title VII – applies to United States citizens working abroad
- Ensure your policies appropriately address employees working outside of the United States (and consider whether you should expand to include students and employees who are not US citizens), but your process does not have to comply with the Title IX regs.

ISSUE 4: ACADEMIC MEDICAL CENTERS

- Academic medical centers are not postsecondary institutions, even if affiliated with or considered a part of the same entity as the postsecondary institution (p. 1538)
- Patients may be offered informal resolution (p. 1540)
- Academic medical centers can use the live hearing process, but it is not required, and may use the written questions process established for K-12
- Applies to all complainants, not just patients



ISSUE 5: RETALIATION & CONFIDENTIALITY

“The recipient must keep confidential the identity of...any individual who has been reported to be the perpetrator of sex discrimination, any respondent...except as may be permitted by...FERPA...or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.” §106.71(a)



RETALIATION AND CONFIDENTIALITY

- Employment references?
- Obligations under NSF, NASA (and Simons Foundation) grant terms and conditions?
- Obligations to report to licensing boards?
- Other obligations that may not be “required by law”?





ADDITIONAL ISSUES

- Cannot use informal resolution for concerns brought by students against employees
- You can place non-student employees on administrative leave
- Some initial indication that a referral to tenure revocation process will be considered a remedy, versus removal of tenure (i.e., you may not have to rewrite your tenure revocation process)



TECHNICAL ASSISTANCE

- Via email: OPEN@ed.gov
- OCR blog:
www2.ed.gov/about/offices/list/ocr/blog/index.html



QUESTIONS?



IMPLEMENTATION



COMMUNICATING WITH STAKEHOLDERS

- Current students
- Prospective / incoming students
- Parents
- Board
- Faculty and staff
- Advocacy groups
- Development staff



IMPLEMENTATION

- We are more consumed with *other* issues surrounding core functions, safety, re-opening to students, financial distress (and so on) than we have *ever* been
- Addressing COVID is a full time job for everyone, but there are only eighty-eight days from today until August 14



IMPLEMENTATION – RECOMMENDATIONS

1. Convene a working group comprised of stakeholders necessary to make changes that are as broad reaching as those required by the regulations. A start at suggested representation on the working group:

- OGC and/or outside counsel
- TIXC and Office of Institutional Equity staff
- Student affairs, student conduct
- Human resources, labor relations
- Provost's office

If you are on a large campus, consider creating sub-working groups for discrete issues like labor, faculty, etc.



IMPLEMENTATION – RECOMMENDATIONS

2. Gather all materials that may need to be revised or considered:

- CBAs
- Student and faculty handbooks
- State laws that bear on investigations, adjudications, including the standard of evidence and limitations/prescriptions regarding the role of advisors and outcome notification
 - If you identify conflicts with state law, bring on government relations, and, depending on your state, consider looping in your state AG's office



IMPLEMENTATION – RECOMMENDATIONS

3. Identify community stakeholders that must, or should, weigh in on the new policy prior to implementation, and develop a communications plan with respect to each. *E.g.:*

- Governing board
- Office of the President
- Faculty senate
- Student government/press
- Campus advocacy groups



IMPLEMENTATION – RECOMMENDATIONS

4. As a working group, draft and adopt a timeline:

- To have a final policy on August 14, when must key steps be accomplished to make sure drafting, input, revisions, and a final draft are rolled out?
- Communicate with all of the groups you identified on the prior slide
- Let them know *now* when to expect to be asked for feedback and that you will be on a tight schedule.



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