Legal Update Article

Department of Education has Drafted Long-Awaited Title IX Regulations on Sexual Misconduct

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The Department of Education (DOE) reportedly has drafted proposed Title IX regulations on sexual misconduct on college and university campuses. Although the Department has yet to officially publish the proposed regulations, on August 29, 2018, *The New York Times* reported on the unofficial draft. The draft, which subsequently began to circulate on the internet, provides a preview of what the official proposed regulations may include.

Enacted in 1972, Title IX of the Education Amendments is a federal law that prohibits discrimination based on sex at any educational institution that is a recipient of federal funds. This includes protection from sexual harassment, including sexual violence.

Colleges and universities have been in limbo since the DOE rescinded Obama-era guidance that outlined responsibilities under Title IX for handling allegations of sexual misconduct on college campuses. The DOE said in September 2017 that it found the guidance had "led to the deprivation of rights for many students." At the same time, the DOE issued interim guidance as a placeholder until the Department could engage in a formal rulemaking process, including promulgating proposed regulations and completing a notice-and-comment period. (For more, see our article, Education Department Rescinds Obama-Era Guidance on Campus Sexual Assault Investigations, Issues Interim Guidance.) Once adopted, these would be the first regulations issued under Title IX since 1975.

Highlights

According to the draft proposed regulations, the regulations are "intended to promote the purpose of Title IX by requiring recipients to address sexual harassment, assisting and protecting victims of sexual harassment and ensuring that due process protections are in place for individuals accused of sexual harassment."

Many provisions in the interim guidance issued in 2017 are included in the draft regulations. For example, institutions would be able to choose the applicable evidentiary standard (either "preponderance of the evidence" or "clear and convincing" evidence) in determining responsibility. The draft regulations also preserve the interim guidance's use of informal resolution processes to resolve sexual misconduct cases if the parties agree. Further, they continue to allow institutions to decide whether to have an appeals process and, if so, whether to limit appeals to the responding party only.

Other notable provisions of the draft proposed regulations include the following:

- "Sexual harassment" is defined as "unwelcome conduct on the basis of sex that is so severe, pervasive and objectively offensive that it denies a person access to the school's education program or activity." This is a narrower definition than that used by the Obama Administration. Sexual harassment also would include sexual assault and *quid pro quo* harassment.
- For purposes of administrative enforcement, colleges and universities would be held to

a "deliberately indifferent" standard, which is the same standard used by the U.S. Supreme Court in *Gebser v. Lago Vista Independent Sch. Dist.,* 524 U.S. 274 (1998), and *Davis v. Monroe County Board of Educ.,*526 U.S. 629 (1999). Thus, a college or university with "actual knowledge" of sexual harassment in an educational program or activity must respond in a manner that is not "deliberately indifferent." An institution would be found deliberately indifferent "only if its response to sexual harassment is clearly unreasonable in light of the known circumstances."

- "Actual knowledge" is defined in the draft regulations as notice of sexual harassment or allegations of sexual harassment provided to an official of the institution "who has the authority to institute corrective measures on behalf of the [institution]." This would be a departure from prior guidance and enforcement practices. According to the draft proposed regulations, this is designed to ensure an institution can be found liable only for its own misconduct.
- Institutions would be required to respond only to allegations of sexual harassment reported to have taken place on their campuses or within institutional programs or activities. Institutions would not be required to investigate allegations of sexual harassment that occurred solely at an off-campus, private setting.
- Upon receipt of a formal complaint, an institution would be required to provide written notice to the parties of its grievance procedures and of the allegations. The written notice also must include a statement that the responding party is presumed not responsible for the alleged conduct and that a determination regarding responsibility will be made at the conclusion of the grievance process. Further, it must inform the parties that they may request disclosure of the evidence upon which the institution intends to rely in reaching a determination regarding responsibility.
- Grievance procedures must (1) treat both parties equitably, (2) require an investigation of the allegations that includes an objective evaluation of all relevant evidence, (3) require that coordinators, investigators, and adjudicators be free from bias or conflicts of interest and are properly trained, (4) include a presumption that the responding party is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process, (5) include reasonably prompt timeframes that allow for extensions for good cause, (6) list all of the possible sanctions that may be imposed, (7) describe the standard of evidence to be used to determine responsibility, (8) include any allowed appeal procedures, and (9) describe the range of supportive measures available to both parties.
- In institutions of higher education, if grievance procedures provide for a hearing, the institution must permit cross-examination of any party or witness. If an institution's grievance procedures do not provide for a hearing, the institution must permit each party to submit written questions for the investigator to ask the other party and witnesses.

The draft regulations address other topics such as the intersection between Title IX and Title VII of the Civil Rights Act and constitutional issues. They also clarify that, just as an institution's treatment of a complaining party may constitute discrimination based on sex, the institution's treatment of the responding party may constitute discrimination based on sex as well.

According to the DOE, the draft proposed regulations would substantially decrease the number of investigations into complaints of sexual misconduct and save institutions millions over the next decade.

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The draft proposed regulations may not be a final draft. They may be revised before formal publication. Once the final version has been published, the public will be asked to submit comments before the regulations can go into effect. We will continue to monitor and provide updates on developments in this area.

The Department's regulations will apply only to enforcement of federal law requirements. Colleges and universities must continue to comply with all applicable state laws regarding sexual misconduct and sexual misconduct investigations.

Please contact a Jackson Lewis attorney with any questions about this development and Title IX.