Department of Education’s Proposed Title IX Regulations

January 7, 2019
Agenda

- Introductions and brief background
- Overview of the proposed regulations
- Highlights of some key provisions
- How and when to submit comments
Speakers

• Moderator:
  o Sheri Schwab - Office for Institutional Equity and Diversity

• Panelists:
  o Betsy Lanzen – Office of General Counsel
  o Thomas Hardiman – Office of Student Conduct
  o Janine Kossen – Women’s Center
  o Dr. David Elrod – Office for Institutional Equity and Diversity
Title IX: 20 USC §1681(b)

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving financial assistance.”
Overview

• In November, as part of the federal rulemaking process, the Department of Education (DOE) released for public comment new proposed Title IX regulations.

• The 60-day official public comment period runs from November 29, 2018 to January 28, 2019.

• Because DOE must review all comments received before proceeding, it is unclear when the proposed rules could actually become law.
Highlights of Key Proposed Provisions

• Definition of Sexual Harassment
• Geography/Jurisdiction
• Obligated Response
• Live Hearing and Cross-Examination
• Standard of Evidence
• Informal Resolutions and Mediation
Definition of Sexual Harassment

Current:

• Sexual harassment is unwelcome conduct of a sexual nature that is sufficiently severe, persistent, or pervasive to limit a student’s ability to participate in or benefit from the education program or to create a hostile or abusive educational environment.

• Sexual harassment can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature.
Definition of Sexual Harassment

Proposed:
Defined to include these three categories:

(1) **Quid pro quo harassment** (university employee conditioning aid, benefit or service on individual’s participation in unwelcome sexual conduct)

(2) Unwelcome conduct on the basis of sex that is **so severe, pervasive, and objectively offensive** that it effectively denies a person equal access to the recipient’s education program or activity

(3) Clery definition of **sexual assault**: rape, statutory rape, fondling or incest
Geography/Jurisdiction

Proposed:

- Required to respond to harassment that occurred within the school’s **own program or activity**.
- The DOE Summary notes that this is **not** intended to create an artificial bright-line between harassment occurring “on campus” versus “off campus.”
- Will be a fact-specific inquiry and will consider factors like whether school owns the property; exercises oversight, supervision, or discipline over the location or participants; or funds, sponsors, promotes, or endorses event.
- Applies only to conduct in the US.
Obligated Response

Current:

- University obligated to respond to a Title IX complaint if a responsible employee “knew, or in the exercise of reasonable care should have known” about the harassment.

- Responsible employees include those with the authority to take action to redress the harassment, who have the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees, or individuals who a student could reasonably believe have this authority or responsibility.
Obligated Response

**Proposed:**
University’s obligation to respond to a Title IX complaint is limited to those situations in which:

- University has “**actual knowledge**” of allegations of sexual harassment (written and signed formal complaint describing allegations is given to the Title IX Coordinator or a University official with authority to initiate corrective measures on behalf of the University)
- Conduct occurred in education program or activity of the University
Cross Examinations

Current:
• Allowed, but not usually required
• Split among jurisdictions

Proposed:
• Must offer live hearing where parties have opportunity to present witnesses and evidence
• Must allow cross-examination of parties and witnesses
Cross Examinations

Proposed:

• Cross-examination must be conducted by the party’s advisor of choice (who may be an attorney)

• Cannot ask about survivor’s prior sexual history, except in some limited circumstances (such as establishing consent)

• Parties can be in separate rooms during cross
Standard of Evidence

Current:
May use either clear and convincing evidence standard OR preponderance of the evidence (more likely than not)

Proposed:
• May use either:
  o clear and convincing evidence standard, OR
  o preponderance of the evidence, but only if same standard used for all conduct charges which have the same maximum penalties/sanctions.
• Same standard of evidence must apply for students and employees, including faculty
Informal Resolutions

Proposal allows and encourages informal resolutions (such as mediation or restorative justice practices) if:

• Process occurs prior to a final determination at a hearing,

• Is voluntary,

• Indicates any consequences resulting from informal resolution (binding, preclude formal complaint for same conduct), and

• Is agreed to in writing by both parties.
Tips for Providing Public Comments

• Carefully review the proposed regulations and note any areas of concern.
• Write individual comments.
• Don’t worry about writing a dissertation.
• Use clear headings to organize your comments.
• Include personal stories and statements.
• Give specific examples of the impact the proposed regulations will have.
Tips for Providing Public Comments

- Submit your response electronically.
- Cite research and best practices.
- Offer recommendations.
- Don’t use inflammatory language.
- Mobilize others to write comments.
Make a difference. Submit your comments and let your voice be heard.

SEARCH for: Rules, Comments, Adjudications or Supporting Documents:
ED-2018-OCR-0064

What's Trending
- Oil and Gas Lease Sales: Outer Continental Shelf, Alaska Region, Beaufort Sea Program Area, Proposed 2019 Beaufort Sea...
  Closing on Jan 04, 2019
- Patient Protection and Affordable Care Act; Exchange Program Integrity CMS-9922-P
  Closing on Jan 08, 2019
- Requirements for Submissions Requesting Exclusions From the Remedies Instituted in Presidential Proclamations Adjusting...

Comments Due Soon
- Today (16)
- Next 3 Days (39)
- Next 7 Days (152)
- Next 15 Days (321)
- Next 30 Days (570)
- Next 90 Days (942)

Unable to submit a comment?
FAA Section 333
APIs for Developers

Newly Posted
- Today (71)
- Last 3 Days (237)
- Last 7 Days (405)
Title IX of the Education Amendments of 1972

Docket Folder Summary


Summary:
The Secretary plans to issue a notice of proposed rulemaking to clarify the obligations of recipients of Federal financial assistance in redressing sex discrimination, including complaints of sexual misconduct, and the procedures by which they must do so.

RIN: 1870-AA14  Impacts and Effects: None  CFR Citation: 34 CFR 106  Priority: Other Significant

Primary Documents

Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal...


Supporting Documents

No documents available.

Comments

The proposed changes would weaken Title IX and make campuses less safe. I strongly urge you to keep the current regulations regarding sexual harrassment and...
This Proposed Rule document was issued by the Department of Education (ED).

For related information, Open Docket Folder.

**Action**

Notice of proposed rulemaking.

**Summary**

The Secretary of Education proposes to amend regulations implementing Title IX of the Education Amendments of 1972 (Title IX). The proposed regulations would clarify and modify Title IX regulatory requirements pertaining to the availability of remedies for violations, the effect of Constitutional protections, the designation of a coordinator to address sex discrimination issues, the dissemination of a nondiscrimination policy, the adoption of grievance procedures, and the process to claim a religious exemption. The proposed regulations would also specify how recipient schools and institutions covered by Title IX (hereinafter collectively referred to as recipients or schools) must respond to incidents of sexual harassment consistent with Title IX’s prohibition against sex discrimination. The proposed 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.

**Dates**

We must receive your comments on or before January 28, 2019.

**Addresses**

Submit your comments through the Federal eRulemaking Portal or via postal mail, commercial delivery, or hand delivery. We will not accept comments by fax or by email, or comments submitted after the comment period closes. To ensure that we do not receive duplicate copies, please submit your comments only once. Additionally, please include the Docket ID at the top of your comments.

If you are submitting comments electronically, we strongly encourage you to submit any comments or attachments in Microsoft Word format. If you must submit a comment in Adobe Portable Document Format (PDF), we strongly encourage you to convert the PDF to “print-to-PDF” format, or to use some other commonly-used searchable text format. Please do not submit the PDF in a scanned format. Using a print-to-PDF format allows the U.S. Department of Education (the Department) to electronically search and copy certain portions of your submissions.

Federal eRulemaking Portal: Go to www.regulations.gov to submit your comments electronically. Information on using Regulations.gov, including instructions for finding a rule on the site and submitting comments, is available on the site under “How to use Regulations.gov” in the Help section.
Your Information

Information entered will be viewable on Regulations.gov

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