International Association of Campus
Law Enforcement Administrators

The Leading Authority for Campus Public Safety

Secretary Betsy DeVos
U.S. Department of Education
Washington, DC

January 28, 2019

Dear Secretary DeVos:

The International Association of Campus Law Enforcement Administrators (IACLEA) would like to thank you for the opportunity to give comment on the proposed changes to Title IX. As you recognize, Title IX is an important fixture in assuring equal access to education and an education system that is safe and non-threatening for all of our citizens.

Over the next several pages we outline the provisions we agree with and those that cause us some concern. If you or your staff would like to further discuss our comments and reactions, we would welcome the opportunity to do so.

Again, thank you for the opportunity to comment on this important rulemaking activity.

Sincerely,

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Executive Director

Attachment

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U.S. Department of Education

Proposed Title IX Regulation

IACLEA Comments

Background

According to the U.S. Department of Education (DoED), this is the first time that Title IX protections against sex discrimination (harassment and assault) have been codified in a regulation. Under the proposed regulation, sexual harassment includes harassment and assault.

The proposed regulation describes three things:

- What constitutes sexual harassment under Title IX.
- What triggers a school's legal obligation to respond to incidents or allegations.
- How a school must respond.

Section 34 CFR 106.44(e)(1)

Sexual harassment is defined as any of three types of behavior:

(1) A school employee conditioning an educational benefit or service upon a person's participation in unwelcome sexual conduct (quid pro quo); or
(2) Sexual conduct so severe, pervasive and objectively offensive that it denies a person equal access to the school's education program or activity; or
(3) Sexual assault as defined by the Clery Act regulations.

COMMENT:

(1) "Employee" is too narrow. This excludes other types of relationships within the institution's services or programs where one party has power over the other but does not meet the "employee" definition. (I.e. Student leadership of student organizations, contractors/vendors, volunteers, emeritus faculty.)

RECOMMENDATION:

(1) Do not limit the first definition to employees. The focus should be on the prohibited conduct without regard to the status of the person committing it, as long as it is

"conditioning an educational benefit or service upon a person's participation in unwelcome sexual conduct."

a. Suggested language: "Conditioning an educational benefit or service upon a person's participation in unwelcome sexual conduct (quid pro quo); or…"

Section 34 CFR 106.44(a)

What triggers a school's obligation to respond:

(1) The school must have actual knowledge of sexual harassment (or allegations), viz., it was reported to an official with the authority to take corrective action.
(2) The alleged sexual harassment must involve conduct that occurred within the school's own program or activity. These are fact-specific determinations that take into consideration geography and the school's control over the place or activity.
(3) The alleged sexual harassment must have been perpetrated against a person in the United States.

COMMENT:

(1) "The school must have actual knowledge of sexual harassment (or allegations), viz., it was reported to an official with the authority to take corrective action."
    a. "Actual knowledge" is too narrow and would provide an incentive for institutions to discourage employees, whom students may reasonably believe have the authority to take corrective action, from communicating reports of SH/SA to the Title IX Coordinator. Institutions can create a policy effectively shielding the Title IX Coordinator from reports and face no repercussions.
        i. "Authority to take corrective action" is too vague in the Title IX context because it would exclude numerous people from having "actual knowledge" even where they have authority to take corrective action in other disciplinary matters. Institutions often consolidate Title IX response authority in the office of Title IX coordinator, so notice to others, such as coaches or student affairs staff would counterintuitively not meet the actual knowledge threshold.
    b. Inconsistent with the Clery Act – For example, a student could report an on-campus rape to an athletic coach, who is a Campus Security Authority under the Clery Act, and the institution would then disclose the crime statistic, and may even issue a timely warning to the campus community, but then deny they had actual knowledge of the offence for Title IX purposes if the student doesn't then duplicate their initial report with the Title IX Coordinator.

(2) "The alleged sexual harassment must involve conduct that occurred within the school's own program or activity. These are fact-specific determinations that take into consideration geography and the school's control over the place or activity."
    a. Too narrow:
        i. Would exclude circumstances where a faculty member rapes a student off campus and outside the scope of any school event, but the student then has to go to that faculty member's class 3 times a week. The rape would effectively deny the person access to the program (sitting through classes taught by their rapist), but the actionable offense happened beyond the allowable reach of the institution.
        ii. Many sexual assaults that occur involving members of the campus community occur off campus in off campus student housing. This would limit the institution's ability to address these types of sexual assaults. If a victim reports that they were raped by someone that they take classes with, this would impact the victim's ability to participate in the academic program of the institution.
    b. Unfairly and arbitrarily restricts schools' response to sexual harassment in a manner inconsistent with all other disciplinary actions.
        i. Sexual assault would be the only crime response restricted in this manner by the federal government. If a student robbed someone, committed a hate crime, stole a car, sold drugs off-campus, or even committed murder, those actions would be covered under the institution's disciplinary processes even though they happened outside the scope of the school's programs or activities.
        ii. Effectively denies institutions the option to discipline off-campus sexual assault when they can discipline all other off-campus crimes. No other criminal acts are protected from institutional response in such a manner.
(3) The alleged sexual harassment must have been perpetrated against a person in the United States.
    a. Adopting the same concerns in (2) immediately above.
    b. Unfairly and arbitrarily restricts schools' response to conduct that occurred within the school's own program or activity and is inconsistent with all other disciplinary policies/actions.
        i. Institutions often maintain programs and activities abroad, all of which otherwise fall within the scope of institutional disciplinary procedures. The Department should not prohibit institutions from addressing sex discrimination in their own programs.
    c. Inconsistent with the Clery Act
        i. The Clery Act requires institutions respond to reports of sexual assault, domestic violence, dating violence and stalking that occur on property

they control in a certain manner without regard to international boundaries.

d. This statement basically means that if a student is experiencing sexual harassment from someone outside the U.S., the student is protected under Title IX. If the student is outside the U.S. in a study abroad program and they experience sexual harassment from a student that attends the same institution but is still in the U.S., the victim would not be protected under Title IX.

RECOMMENDATION:

(1) Expand "actual knowledge" to include anyone who otherwise has the duty to report crimes to the institution for state and/or federal law purposes.
(2) Expand an institution's allowable scope of response to include conduct that occurred off-campus but still denies a person equal access to the school's education program or activity.
(3) Remove geographic limitation to allow institutions the option to respond to sex discrimination in all their own programs or activities outside the United States.

Section 34 CFR 106.44(a)-(b)

Schools will only be held liable under Title IX when the school knows of sexual harassment allegations and responds in a way that is "deliberately indifferent," which is defined as clearly unreasonable in light of the known circumstances.

Schools must respond meaningfully to every report of sexual harassment (of which the school has actual knowledge and that concerns conduct within the school's program or activity). However, schools are only required to activate their grievance process when a formal complaint is filed.

Where no formal complaint is filed, and the school is therefore not required to conduct an investigation, the school must offer the complainant supportive measures.

To address possible serial predators or repeat offender situations, the Title IX Coordinator must file a formal complaint to investigate a possible pattern of harassment even when no accuser wants to file a formal complaint.

COMMENT:

This is already in line with general practice. Deliberately indifferent is a fair standard. As stated previously, actual knowledge is to narrow and should be taken out of this statement and replaced with broader standard.

RECOMMENDATION:

Generally, support this particular provision. Eliminate actual knowledge from paragraph two and replace with broader standard.

Section 34 CFR 106.45(a)-(b)(1)

Schools must have grievance procedures to handle each formal complaint of sexual harassment. School grievance procedures must contain certain protections for the parties including:

- A presumption of innocence.
- The school must objectively evaluate all relevant evidence.
- All Title IX Coordinators, investigators and decision-makers must not have any conflicts of interest or bias for or against complainants or respondents.
- Training materials for Title IX Coordinators, investigators and decision-makers must foster impartial determinations.
- The grievance process must establish and adhere to reasonably prompt timeframes where extensions are allowed for good cause.
- A respondent cannot face discipline without due process protections.
- Where a respondent is found responsible the complainant must be given remedies designed to restore or preserve equal access to education.

COMMENT:

(1) Clarification about how the Department defines “conflict of interest.”
(2) “Presumption of innocence” conflates criminal proceedings and criminal standards with a school disciplinary process. Disciplinary processes do not make a determination as to whether a person is “innocent” or “guilty,” they determine whether or not someone is responsible for a code violation. Adopting the language of criminal proceedings should be avoided.
(3) Clarification about how the Department will determine that training materials “foster impartial determinations”.

RECOMMENDATION:

Generally, support this section and request clarification regarding “conflict of interest,” and training materials.

Suggest that “presumption of innocence” be removed or replaced with “presumed not responsible for code violation(s).” Include statement about supporting due process.

Section 34 CFR 106.45(b)(2)-(b)(3)

Upon the filing of a formal complaint the school must give written notice to the parties containing sufficient details to permit a party to prepare for any initial interview and proceed with a factual investigation. The investigation must:

- Ensure the burden of proof and burden of gathering evidence rest on the school, not the parties.
- Provide equal opportunity for both parties to present witnesses and evidence.
- Not restrict the ability of either party to discuss the allegations or gather relevant evidence (no gag orders).
- Provide both parties with the same opportunity to be accompanied at all phases of the grievance process by an advisor of the party’s choice (who may be an attorney).
- Give written notice of any interview, meeting, or hearing at which a party is invited or expected to participate.
- Provide equal access to review all the evidence that the school investigator has collected, including the investigative report, giving each party equal opportunity to respond to that evidence before a determination is made.
- Require that a final determination must be made at a live hearing, and cross-examination must be allowed (with rape shield protections) and must be conducted by each party’s advisor (no personal confrontation allowed).

COMMENT:

(1) “Upon the filing of a formal complaint the school must give written notice to the parties containing sufficient details to permit a party to prepare for any initial interview and proceed with a factual investigation.”

a. Providing a respondent with sufficient details to prepare for any initial interview is not in keeping with any known investigatory procedure. Giving the respondent details may lead to a destruction of evidence, creating fabrication, witness intimidation and other undesirable consequences.
b. An institution may inadvertently interfere with or damage an ongoing law enforcement investigation if the institution contacts a respondent or witnesses before law enforcement has had a chance to do so.
c. At the request of law enforcement, institutions should be able to allow a temporary delay of notice to the respondent.

(2) "Require that a final determination must be made at a live hearing, and cross-examination must be allowed (with rape shield protections) and must be conducted by each party's advisor (no personal confrontation allowed)."
a. Higher education institutions should have the option to exercise the processes available to elementary and secondary schools, where respondent and complainants may respond in writing the investigative report and submit questions to the other party via written responses.
b. Live hearings may inhibit victims from coming forward.
c. Institutional disciplinary processes are civilian administrative actions. It takes trial attorneys years of education and practical experience to become proficient at cross examination, and there are highly complex rules of evidence and procedure in place to ensure that this process is carried out effectively. Institutional disciplinary processes have none of these safeguards and are not equipped to create or maintain them. Providing an adequately trained person to conduct competent cross examination will be extremely burdensome for most institutions, and especially so for small or under-resourced institutions. It is also unclear what credentials a cross examination advisor must have or what recourse, if any, a respondent or complainant would have if the advisor provided is not competent.
d. It is unclear what role the "cross-exam advisor" would play in the rest of the hearing or whether they are the same person as the advisor that the parties are entitled to have present throughout the rest of the process.

RECOMMENDATION:

(1) Clarify that institutions *may* provide notice to a respondent upon receipt of the complaint. Clarify that institutions *must* provide notice to a respondent upon initiation of an institutional grievance proceedings. Clarify that institutions may allow for a temporary delay of notice to the respondent at the request of law enforcement after receipt of a complaint, but before initiation of grievance proceedings.
(2) Remove the requirement for live cross examination. If this is to remain, then allow institutions to have advisors submit questions to the panel, and the panel may ask the

questions at their discretion. Remove the provision requiring institutions to provide advisors.

(3) Support the remaining provisions.

Section 34 CFR 106.45(b)(4)

After investigation and at the conclusion of the grievance process, a written determination must be sent to both parties explaining for each allegation whether the respondent is responsible or not responsible including the facts and evidence on which the conclusion is based. Further requirements include:

- The determination must be made by a decision-maker who is not the Title IX Coordinator or investigator.
- The determination must be made by applying either the preponderance of the evidence standard or the clear and convincing evidence standard. The lower preponderance standard can only be used if the school uses that standard for other conduct violations not involving sexual harassment and carrying the same maximum disciplinary sanction. Schools must use the same standard for student respondents that it uses in cases against employee respondents.
- Where a finding of responsibility is made against the respondent, the written determination must describe what remedies the school will provide to the survivor, and any sanctions imposed on the respondent.

COMMENT:

(1) "The determination must be made by a decision-maker who is not the Title IX Coordinator or investigator."
    a. Support the provision that investigator should not determine the outcome.
    b. Prohibiting the Title IX Coordinator from being a decision maker (assuming they are not also the investigator) will cost institutions money by requiring additional personnel to engage in the process. Title IX Coordinators are highly trained professionals who take their responsibility to be impartial seriously. Additionally, some schools use multiple Title IX coordinators/deputy coordinators, and sometimes these people work in areas that would traditionally be decision makers for student or employee misconduct. This would potentially limit their ability as well.

(2) "The determination must be made by applying either the preponderance of the evidence standard or the clear and convincing evidence standard. The lower preponderance standard can only be used if the school uses that standard for other conduct violations not involving sexual harassment and carrying the same maximum disciplinary sanction.

Schools must use the same standard for student respondents that it uses in cases against employee respondents."

a. Tethering the standard of evidence to other disciplinary proceedings fails to take into account the reality that many institutions use differing standards of evidence for the same maximum penalty depending on the type of proceeding and the status of the person at issue. For example, faculty may have a clear and convincing standard in a research misconduct proceeding where termination is at risk, but an administrative staff member may have a preponderance of the evidence standard where termination is at risk for an issue of theft, while an at-will employee can be terminated without a hearing at all. In the absence of a consistent standard of evidence in non-Title IX cases, the Department's mandate that schools tether their standard of evidence to other processes with the same maximum penalty is unworkable.
b. The proposed regulations specially disfavor complainants by allowing institutions to adopt a clear and convincing standard for Title IX procedures even where all other processes use preponderance of the evidence (PoE). This is curious because the Department takes care to emphasize that the proposed regulations create "procedural safeguards to ensure reliability and fairness" in support of allowing institutions to use PoE. If PoE is inherently reliable and fair, then there is no need to single out sexual harassment/sexual assault, and inconsistently allow for a higher standard only for that type of allegation.
c. The proposed regulations note that the *complaint itself* carries a stigma for a respondent and then uses this assertion as a basis to allow institutions to single out SH/SA proceedings for a higher standard of evidence. The standard of evidence meant to protect a respondent only affects the outcome of a proceedings and is not applied to the filing of a complaint. The only practical effect a higher standard of evidence for outcomes could have on complaints is to discourage them.

RECOMMENDATION:

(1) Support the provision that the investigator be precluded from also being the decision maker. Remove the provision that limits the Title IX Coordinator from being the decision maker where they are not also the investigator.
(2) Allow institutions to choose which standard of evidence is appropriate for their processes without requiring it be identical to other non-related proceedings.
(3) Support the third provision requiring that written determinations must describe what remedies the school will provide to the survivor, and any sanctions imposed on the respondent.

Section 34 CFR 106.45(b)(5)

If the school chooses to offer any appeal, it must allow both parties to appeal. The appeal decision-maker cannot be the same person as the Title IX Coordinator, investigator or decision-maker. Further:

- Each party must have the opportunity to submit written arguments for or against the outcome.
- While the complainant cannot demand a particular disciplinary sanction, the complainant can challenge the adequacy of the remedies offered.

COMMENT:

(1) "While the complainant cannot demand a particular disciplinary sanction, the complainant can challenge the adequacy of the remedies offered."
    a. This provision unnecessarily interferes with institutions' proceedings. If an institution wants to allow this as a basis for appeal, they should not be restricted from doing so, especially if a respondent may appeal based on the sanction.

RECOMMENDATION:

Support provision that each party must have the opportunity to submit written arguments for or against the outcome.

Remove provision regulating the basis of a complainant's appeal.

Section 34 106.45(b)(6)

A school may facilitate informal resolution of a sexual harassment complaint so long as the process is voluntary for all parties and written consent is provided.

COMMENT:

"Informal resolution" is widely used on campuses to mean anything from a casual conversation with an alleged offender to support services for survivors to institutional no-contact orders – essentially everything short of initiating the institution's disciplinary processes.

It seems that in this context, "informal resolution" in meant to cover only structured, non-disciplinary actions, such as mediation or restorative justice sessions.

Using "informal resolution" in the proposed regulations' manner will be highly confusing for institutions and will require additional guidance from the Department.

RECOMMENDATION:

Clarify that “informal resolutions” is defined as structured, non-disciplinary actions, such as mediation or restorative justice sessions, or use an alternative phrase.

Section 34 CFR 106.45(b)(7)

Schools must create and maintain records documenting every Title IX sexual harassment investigation and determination of responsibility, including any informal resolution or appeal, and all materials used to train Title IX Coordinators, investigators and decision-makers. Parties may request copies of these records pertaining to their own case. Further:

- Schools must keep records of every response to a report of sexual harassment of which it becomes aware even if no formal complaint is filed, including the supportive measures offered and implemented for the complainant.

COMMENT:

Clery Act/VAWA requires records to be maintained for 7 years. As there will be some overlap with institutional response under VAWA, Title IX records should be maintained for 7 years.

RECOMMENDATION:

Generally, support provision. For consistency, recommend that records be kept for 7 years.

Section 34 CFR 106.3

The proposed regulations clarify that DoED will not assess damages against a school as a remedy for violation of these regulations. This recognizes that the Department is not a court of law equipped to assess damages to compensate a victim for harms such as emotional distress and will focus enforcement efforts on securing equitable relief to bring schools into compliance with Title IX.

COMMENT:

None.

RECOMMENDATION:

Support this provision.

Section 34 CFR 106.6

The proposed regulation expressly states that nothing in these regulations requires any school to restrict the rights that are protected under the First Amendment, the Due Process Clauses or any other constitutional provision, and that employee rights under Title VII are unaffected.

COMMENT:

None.

RECOMMENDATION:

Support this provision.

Section 34 CFR 106.12

Faith-based institutions will no longer be required to submit a statement to the Assistant Secretary in order to claim the religious exemption contained in the Title IX statute.

COMMENT:

None.

RECOMMENDATION:

None.