Education

Analysis of the Department of Education's New Title IX Regulations

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On May 6, 2020, the Department of Education released its long-awaited regulations under Title IX of the Education Amendments of 1972. The rule, entitled *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*,[1] comes over two years after the Department rescinded Obama-era guidance, issued interim policies and pledged to remake how colleges and universities handle complaints of sexual assault and harassment. The Department issued a notice of proposed rulemaking more than a year ago previewing some of the changes, and received over 124,000 comments in response.

Although many schools will have to make substantial changes to their sexual misconduct investigation and adjudication procedures in light of the new regulations, they do not have much time to put new compliance regimes in place. The new policies take effect in just three months, on August 14, 2020, despite repeated pleas from higher education groups to delay implementation in light of the ongoing COVID-19 crisis. The Department suggests its August rollout "[t]ak[es] into account this national emergency," but what it demands of schools is substantial, complex and costly.[2] The challenges it presents are all the more significant in the current environment.

The New Title IX Rules

The new model's centerpiece is its requirement that postsecondary schools conduct a "live hearing" with cross-examination.[3] Colleges and universities *must* use this process to adjudicate student complaints of harassment and assault before disciplining a respondent. The new rule prohibits the single-investigator (or inquisitorial) model that is used by the majority of schools nationwide, in favor of an adversarial, trial-like procedure. A neutral decision-maker—a school employee who cannot be the same person as the Title IX Coordinator or the investigator—must preside over the hearing. The parties must be represented by "advisors," who must be provided by schools if the parties have not secured representation on their own. Cross-examination must be conducted directly, orally and in real time although, upon request, the parties can be located in separate rooms with questioning taking place through a video link.[4] Responding to safety concerns, the Department of Education modified an earlier proposal to permit cross-examination by a party directly; instead, the party's advisor must conduct the questioning.

At the hearing, the decision-maker must make technical evidentiary rulings on-the-spot—a fraught task, even for experienced trial judges. For example, "[b]efore a[ny] witness answers a cross-examination or other question, the decision-maker[] *must first determine* whether the question is relevant and *explain* any decision to exclude a question as not relevant."[5] The consequences of making the wrong decision—allowing inadmissible testimony or improperly excluding critical evidence—could be highly significant and susceptible to challenge by any party. Decision-makers will need to make other, highly technical and sensitive evidentiary rulings in real time. For example, the rule incorporates a criminal law concept called "rape shield" protections, which limit the admission of evidence about a victim's sexual history to certain specific circumstances.[6] The rule also directs schools to produce to the parties before the hearing "*any* evidence obtained as part of the investigation," including evidence that

will not be relied upon, and provide opportunity for the parties to respond.[7] Making these decisions about what sensitive student information can, should or must be released to a party is a difficult and onerous task implicating students' privacy and safety.

At the close of the hearing, the decision-maker must issue a written determination that includes findings of fact, conclusions about whether *each* allegation occurred, reasoning explaining these conclusions, any resulting punishment and any remedies for the complainant.[8] Once the decision is issued, the rule requires that schools provide an appeal process—both from final determinations and from a school's dismissal of a complaint.[9] These appeals may raise a host of issues, including procedural irregularity, newly discovered evidence and charges of "bias" or "conflict of interest" by Title IX personnel.[10]

Another highly significant aspect of the rule is its redefinition of sexual harassment. Departing from other civil rights laws and prior policy under Title IX—even the Department's own 2017 guidance—the rule changes the definition of sexual harassment from conduct that is "severe *or* pervasive" to conduct that is so "severe *and* pervasive *and* objectively offensive that it effectively denies a person" equal access to education.[11] Because schools "must dismiss" allegations of harassment or assault that do not meet this tri-partite definition,[12] they may be less able to control situations, for example by being unable to impose discipline as a result of conduct that is "severe" and "offensive," unless it has persisted long enough to become "pervasive." On the other hand, potentially broadening Title IX's reach, the rule recognizes "dating violence," "domestic violence" and "stalking" as sexual harassment under the statute.[13] At a minimum, all of these definitional changes are likely to increase litigation about what conduct schools should and should not be punishing. The rule also raises the standard of proof required to mete out discipline—from the existing preponderance standard (which requires, simply, that the allegations are more likely than not true), to the more stringent "clear and convincing" standard. The rule does not do this directly, but rather requires that sexual harassment and assault proceedings adopt the same standard of proof used for employees, including faculty.[14] Most contracts and collective bargaining agreements, in turn, require use of the clear and convincing standard.

The rule imposes additional requirements that may make basic on-campus administration more difficult in other ways. For example, the rule forbids schools from placing limits on what complainants or respondents may publicly discuss about ongoing investigations—even though such restrictions may be important to student safety and confidentiality.[15] And the rule's new procedural requirements are likely to slow down resolution of complaints. The rule also forbids schools from putting in place interim accommodations for students experiencing harassment where those measures "unreasonably burden[] the other party," but does not define what protections cross that line.[16]

Implementation Challenges

For many institutions, these new requirements represent a major change to existing procedures. Coming into compliance by August will require writing and publishing new policies and hiring and training new personnel.[17] In formulating new policies, schools will have to make judgment calls regarding the ambiguities in the regulations, while also observing requirements to comply with applicable state law.

The rule mandates substantial changes in the way many schools currently resolve allegations of sexual harassment and assault, and those changes will need to happen rapidly and in one of the most challenging times in the history of higher education. The Supreme Court has long recognized that "[a] school is an academic institution, not a courtroom or administrative hearing room,"[18] yet the rule takes a significant step towards turning sexual misconduct hearings into a process resembling traditional litigation. In this transition, in-house counsel will need to work closely with campus officials to minimize litigation risk over how complaints are resolved.

Potential Litigation

The rule will likely face a legal challenge, and some stakeholders are already gearing up for that fight. As with a traditional procedural challenge under the Administrative Procedure Act, litigants will argue that the agency did not take account of thousands of comments presenting evidence and arguments that the new requirements are difficult or impossible for schools to meet. As a matter of substance, the Department repeatedly invoked constitutional notions of due process as a justification for the new procedures. Yet the due process clause does not apply to private schools, and even for public schools, courts have never previously determined that due process mandates these procedures in all cases—indeed, they have held to the contrary. The rule is also in tension with longstanding federal policies, under Title IX and the Clery Act, that emphasize the importance of flexibility in disciplinary proceedings, while still providing for fairness. Any legal challenge will also, of course, invoke the current national emergency. Some schools will have compelling arguments that it is impracticable—even impossible—to fully comply with all of the rule's mandates by August 14, and courts may be sympathetic to this argument, particularly because the challenged policies are not yet in effect.

The rule states that its terms are severable, so the rule does not rise or fall together.[19] Practically speaking, this means that a legal challenge could target some but not all of the new terms, and the unchallenged terms could stand. This may be particularly relevant to schools contemplating a challenge, as they could target some provisions while leaving untouched other aspects of the rule (such as the rule's clarification of the "deliberate indifference" standard).[20]

Jenner & Block has a large higher education practice and extensive experience representing colleges and universities in Title IX litigation. In addition to representing clients in court, we regularly counsel institutions on Title IX compliance issues and have reformulated sexual misconduct policies for our clients in light of the ever-changing legal landscape on these questions. Finally, we have deep experience in litigating APA cases against government agencies arising out of the promulgation of new rules.

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[1] *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, to be codified at 34 C.F.R. Part 106 (May 6, 2020), https://www2.ed.gov/about/offices/list/ocr/docs/titleix-regs-unofficial.pdf.
[2] *Id.* at 13.
[3] *Id.* § 106.45(b)(6)(i).
[4] *Id.*
[5] *Id.* (emphasis added).
[6] *Id.*
[7] *Id.* § 106.45(b)(5)(vi).
[8] *Id.* § 106.45(b)(7)(ii).
[9] *Id.* § 106.45(b)(8)(i).
[10] *Id.*
[11] *Id.* § 106.30(a)(2) (emphasis added).
[12] *Id.* § 106.30(b)(3)(i).
[13] *Id.* § 106.30(a).
[14] *Id.* § 106.45(b)(1)(vii).
[15] *Id.* § 106.45(b)(5)(iii).
[16] *Id.* § 106.30(a).
[17] *See id.* § 106.8 ("Designation of coordinator, dissemination of policy, and adoption of grievance procedures.").
[18] *Board of Curators v. Horowitz*, 435 U.S. 78, 88 (1978).
[19] *See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, to be codified at 34 C.F.R. §§ 106.9, 106.18, 106.24 106.46, 106.62, 106.72, 106.82.
[20] *Id.* § 106.44(b)(2).

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