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Legal Sidebar

Title IX and Sexual Harassment: Education Department Proposes New Regulations

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This past November, the U.S. Department of Education (ED) issued a notice of proposed rulemaking to amend current regulations that implement Title IX of the Education Amendments of 1972 (Title IX). Title IX prohibits discrimination on the basis of sex in education programs or activities receiving federal financial assistance. While neither the statute nor its current implementing regulations explicitly address sexual harassment, courts and ED have both determined that a school's response to sexual harassment allegations brought by a student must conform to Title IX's bar on sex discrimination. ED has mainly addressed schools' responsibilities when responding to sexual harassment allegations through a series of guidance documents. These directives, some of which were later withdrawn, have sparked debate about the proper role of schools in addressing sexual misconduct. Some procedures adopted by schools in response to these directives have generated legal challenges by students accused of sexual harassment. The proposed Title IX regulations diverge from prior guidance documents in several ways, imposing a number of new substantive and procedural requirements for schools. The comment period for the proposed regulations has ended, although it is unclear when the agency will release a final rule.

To place this proposed regulation in context, this Legal Sidebar provides a brief overview of how Title IX has been applied by ED and interpreted by reviewing courts in the context of allegations of sexual harassment at educational institutions. The Sidebar also discusses constitutional challenges brought by students against the procedures used by schools to comply with Title IX. Finally, the Sidebar considers the major changes that the proposed regulations would have, if adopted, upon schools' policies for responding to allegations of sexual harassment, including the procedures used to investigate and resolve complaints. A forthcoming CRS Report will examine these and related matters in more comprehensive detail.

Title IX Background

Like a number of other federal civil rights statutes, Title IX makes nondiscrimination on the basis of sex a condition for receiving federal financial assistance. Title IX is mainly enforced in two ways: (1) through private rights of action directly against educational institutions that receive federal funds and (2) by federal agencies that provide funding to educational programs. ED is the lead agency responsible for the administrative enforcement of Title IX and its Office of Civil Rights (OCR) monitors schools' compliance with Title IX. When violations are found, OCR may seek to reach an informal resolution agreement with

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the school, under which the school agrees to take specific steps to resolve violations or compliance issues. OCR may, however, seek to terminate or suspend a school's funding if agreement is not reached.

The Supreme Court has recognized that a school's insufficient response to incidents of sexual harassment may violate Title IX's prohibition on sex discrimination. While proposed ED regulations under Title IX would specifically address sexual harassment, existing regulations do not, though they do require schools to appoint a Title IX Coordinator and adopt and publish grievance procedures for responding to complaints of discrimination based on sex. Thus far, ED has mainly addressed sexual harassment through interpretive guidance documents discussed below.

Administrative Enforcement: Guidance from OCR

ED has issued several guidance documents that direct schools to remedy and respond to allegations of sexual harassment. Although these guidance documents do not purport to be legally binding themselves, they explain in detail what ED specifically expects schools to do in order to comply with Title IX.

For instance, in 2001, OCR issued guidance that described sexual harassment as "unwelcome sexual conduct of a sexual nature" and articulated two types of harassment that could violate Title IX: (1) harassment where a teacher or employee conditions a benefit or educational decision on a student's submission to unwelcome sexual conduct (i.e., quid pro quo harassment); and (2) hostile environment harassment, in which the conduct of students, teachers, or third parties limits or denies a student's ability to benefit from or participate in an academic program because of sex. In general, when sexual harassment has occurred, ED explained that educational institutions must take "prompt and effective action calculated to end the harassment, prevent its recurrence, and, as appropriate, remedy its effects." But if the "school, upon notice of the harassment, responds by taking prompt and effective action to end the harassment and prevent its recurrence, the school [will have] carried out its responsibility under the Title IX regulations."

According to the 2001 Guidance, in certain situations of harassment by a teacher or employee, schools may be responsible for the conduct whether or not they were aware the harassment had occurred. Otherwise, the Guidance applies a constructive notice standard: schools are responsible for sexual harassment when a "responsible employee" knew or should have known of the harassment. Responsible employees include those who have authority to take action to remedy the situation, those who have a duty to report the misconduct, or someone who a student could reasonably believe has this authority.

While the 2001 Guidance appears to remain in place, the Trump Administration rescinded two other guidance documents issued by ED during the Obama Administration that addressed sexual harassment. The first, a 2011 Dear Colleague Letter (2011 DCL), focused on student-on-student sexual harassment and explained that Title IX's requirements on sexual harassment apply to sexual violence. The second, a 2014 Question and Answer document (2014 Q&A), outlined in more detail schools' responsibilities under Title IX and provided examples of efforts schools could take to deter sexual harassment proactively on campus.

The 2011 DCL explained that sexual harassment "is unwelcome conduct of a sexual nature," including "unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature." Sexual harassment also includes sexual violence, which refers to "physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent due to the victim's use of drugs or alcohol." According to the letter, sexual harassment creates a hostile environment where "the conduct is sufficiently serious that it interferes with or limits a student's ability to participate in or benefit from the school's program." When a school "knows or reasonably should know about student-on-student harassment that creates a hostile environment," the letter explained that "Title IX requires the school to take immediate action to eliminate the harassment, prevent its recurrence, and address its effects." The letter also made clear that incidents of sexual harassment off-campus or outside a school's programs could create a hostile environment at school.

The 2011 DCL also articulated expectations for the procedures schools should use in responding to allegations of sexual harassment. It cautioned schools about the use of mediation to resolve complaints, and instructed that the practice was never appropriate in cases of sexual assault. As for a school's grievance procedures for resolving allegations of sexual harassment, the letter instructed schools to use the "preponderance of the evidence" standard to adjudicate complaints. Finally, the 2011 DCL strongly discouraged schools from allowing the parties in a hearing to cross-examine one another personally.

The 2014 Q&A outlined in more detail schools' responsibilities under Title IX and provided examples of efforts schools could take proactively to deter sexual harassment on campus. The document clarified that Title IX requires schools, upon notice of an allegation, to protect complainants and ensure their safety through interim steps before an investigation is complete. When a law enforcement investigation of student-on-student sexual violence is occurring, the 2014 Q&A instructed that a school should conduct its own Title IX investigation. But because the standards for criminal liability and Title IX investigations are distinct, under the 2014 Q&A, "the termination of a criminal investigation without an arrest or conviction [did] not affect the school's Title IX obligations." The 2014 Q&A also explained that schools did not have to conduct hearings to assess allegations of sexual violence, but if they did so, they could not require the complainant to attend. Finally, the document instructed schools to "ensure that steps to accord any due process rights do not restrict or unnecessarily delay the protections provided by Title IX" to an individual lodging a complaint.

In 2017, the Trump Administration rescinded the 2011 DCL and the 2014 Q&A based on the view that "those documents led to the deprivation of rights for many students," failed to provide clarity to educational institutions about their responsibilities, and were issued without following notice and comment rulemaking procedures. However, ED left the 2001 Guidance in place and issued an interim Q&A that departed from previous ED guidance. The interim Q&A explains, among other things, that mediation is allowed to resolve complaints and schools are not required to apply a preponderance of the evidence standard in determining responsibility for allegations.

Due Process Challenges to Procedures Used by Schools in Title IX Investigations

In light of the guidance issued by OCR on Title IX requirements, schools adopted a variety of procedures to comply with the OCR's expectations. Some policies adopted by institutes of higher education in responding to allegations of sexual harassment between students have prompted legal challenge. In particular, a number of students faced with disciplinary action by public universities have raised constitutional challenges to the Title IX procedures used to find them responsible for sexual misconduct, arguing that universities violated the Due Process Clause in the handling of their case.

The Due Process Clause of the Fourteenth Amendment requires state actors, including public universities, to observe certain procedures when depriving individuals of their interests in life, liberty, or property. A number of federal appellate courts have ruled that students enrolled in public universities are entitled to the protections of due process when facing expulsion or suspension, on the theory that such disciplinary decisions implicate liberty and property interests. In the context of proceedings used by public universities to handle allegations of sexual harassment, some courts have ruled that certain procedures may violate the Due Process Clause (due in part to the length of time litigation requires, some courts have only so far addressed whether a stated claim is enough to survive a motion to dismiss).

In general, courts have rejected due process challenges to universities' procedures so long as they have observed certain minimal protections: (1) providing students accused of sexual misconduct with adequate notice of the charges against them and a meaningful opportunity to prepare for a disciplinary hearing; (2) giving the accused students access to the evidence used against them; and (3) allowing the students to make a case on their own behalf. In addition, courts have generally found that universities are not automatically required to permit the direct cross-examination of witnesses. But courts have sometimes upheld constitutional challenges (or rejected motions to dismiss) when universities have:

Failed to provide adequate notice of the charges against the accused student and/or the evidence used against the student;

Allowed biased decisionmakers to oversee the proceedings;

Refused to permit an accused student to challenge the credibility of witnesses where credibility is critical to the outcome of the proceedings;

Employed unfair review processes when rehearing an allegation; or

Not allowed an accused student to present evidence on his own behalf.

Further, some courts have questioned the use of the "preponderance of the evidence" standard given the gravity of penalties students found responsible for sexual misconduct can face (e.g., expulsion from school), although others have rejected this argument.

ED's Proposed Regulations

In its notice of proposed rulemaking about the responsibilities of educational institutions when responding to allegations of sexual harassment, ED explained that new regulations are necessary to provide "clear legal obligations" to schools. In addition, according to ED, the proposed regulations would afford greater control over the process to those complaining of sexual harassment and ensure that a school's procedures for investigating complaints are fair and impartial.

The proposed regulations diverge from the standards established in previous guidance documents by the Obama Administration. In several ways, they would tether the requirements expected of schools to those set by the Supreme Court in its two seminal cases about private rights of action for damages under Title IX, *Gebser v. Lago Vista Independent School District* and *Davis v. Monroe County Board of Education*.

The proposed regulations would appear to codify a standard for hostile environment harassment narrower than that applied by ED in the past. For example, while the 2011 DCL deemed "hostile environment" harassment to constitute a Title IX violation when it is "sufficiently serious that it interferes with or limits a student's ability to participate in or benefit from the school's program," the proposed regulations would adopt the Supreme Court's standard in *Davis*, which defines harassment as conduct "that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity."

The proposed regulations would only require schools to respond to sexual harassment allegations (defined as quid pro quo, hostile environment, or sexual assault) when given actual, rather than constructive, notice. ED would require only that a school's response not be deliberately indifferent to comply with Title IX, rather than the reasonableness standard ED has applied previously, under which, according to the 2001 Guidance, schools are expected to "take prompt and effective steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from" reoccurring. Again, both proposed provisions mirror the standards set by the Court in *Gebser* and *Davis*.

The proposed regulations would instruct schools to respond to sexual harassment within a school's "education program or activity." This differs from past ED guidance, which said that schools sometimes must respond to harassment that occurs "outside a school's education program or activity."

The proposed rule would also alter the obligations of school employees when sexual harassment occurs. Under the 2001 Guidance (as well as the 2014 Q&A), a school has notice of sexual harassment when a "responsible employee" knew or should have known of the harassment. A responsible employee someone who has "the authority to take action to redress the harassment, who has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees, or an individual who a student could reasonably believe has this authority or responsibility." In contrast, the proposed regulations do not appear to require such employees to report allegations of sexual harassment. Instead,

they provide that a school has "actual knowledge" of sexual harassment that gives rise to Title IX obligations when an employee who "has authority to institute corrective measures," or "a teacher in the elementary and secondary context with regard to student-on-student harassment" has notice. Otherwise, the school will not be held responsible for sexual harassment.

The proposed regulations also alter the obligations of a school to respond to sexual harassment allegations. Previously, when a school knew or reasonably should have known of possible sexual violence ED required it to investigate. And when an investigation revealed that sexual violence created a hostile environment, ED also required the school to "take prompt and effective steps reasonably calculated to eliminate the hostile environment, prevent its recurrence, and … remedy its effects." In contrast, as mentioned above, under ED's proposed rule a school's response would violate Title IX when the school has actual knowledge of harassment and responds in a way that is deliberately indifferent. For certain circumstances, the proposal establishes what a school's response must entail. When a formal complaint of sexual harassment is filed, a school must apply specific grievance procedures. And a formal complaint must be filed when a school has actual knowledge of multiple complaints about the same person. In both circumstances, as long as a school applies these grievance procedures, its response will not be considered deliberately indifferent. The proposal also specifies that, for institutions of higher education, when a student declines to lodge a formal complaint, schools may offer "supportive measures" short of investigation and adjudication. If a school does so, its response would satisfy Title IX requirements.

Several procedural requirements that a school must follow in its grievance procedures would also be altered. There would be a presumption that a student accused of sexual harassment "is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the … process." The rule would eliminate the earlier requirement that schools use a preponderance of the evidence standard for establishing culpability, and generally require use of a more exacting, clear and convincing evidence standard (the preponderance of evidence standard could still be used if also applied to school violations not involving sexual harassment that carry the same maximum disciplinary sanction). Schools would need to allow for cross-examination by both parties, and bar the person who conducted the investigation or the Title IX Coordinator from deciding the case. Institutions of higher education, but not secondary and elementary schools, would need to conduct a live hearing. At any time before resolution of the matter, the parties could agree to resolution through informal mediation. Finally, the regulations would establish that just as a school's treatment of a complainant in response to a formal complaint of harassment can give rise to a Title IX violation, a school's treatment of the respondent can do so as well.

While the comment period for the proposed rulemaking has closed, as of the date of this Sidebar, ED has not yet published a final rule.

Conclusion

The responsibilities of schools in responding to allegations of sexual harassment under Title IX have shifted significantly during the past few administrations. And they may alter again if ED adopts its proposed regulations. Aside from the changes in policy priorities at ED, the variable nature of what ED has required of schools may in part reflect the terms of Title IX itself. As mentioned above, the law does not explicitly mention sexual harassment. Instead, the statute simply bars discrimination on the basis of sex in education programs or activities that receive federal funds. Subsequent case law and administrative practice arising in the following decades have construed the statute to bar sexual harassment in certain circumstances, although differing administrations have varied in their view of what precisely Title IX requires schools to do to address that harassment. Of course, Congress could eliminate much of the potential for such shifts by amending Title IX to, for example, explicitly bar sexual harassment at schools that receive federal funds and establish clear requirements for schools in responding to such allegations.

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