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Department of Education Releases Title IX Final Rule

Last week, the Department of Education released its Final Rule setting forth updated Title IX regulations. This Legal Update will summarize the new regulations impacting K-12 schools. The new regulations go into effect on August 14, 2020. Even during the COVID-19 Emergency and during periods of virtual learning, it will be important to ensure that staff enforce Title IX policies, and students should be made aware that these rules apply.

Definition of Sexual Harassment

First, school districts should be aware of the broadened definition of sexual harassment for Title IX purposes that the Final Rule sets forth. Under the Final Rule, sexual harassment means “conduct on the basis of sex that satisfies one or more of the following: (i) a school employee conditioning education benefits on participation of unwelcome sexual conduct (i.e. quid pro quo); or (ii) unwelcome conduct that a reasonable person would determine is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school’s education program or activity; or (iii) sexual assault (as defined in the Clery Act), dating violence, domestic violence, or stalking as defined in the Violence Against Women Act.” Based on this definition, schools must respond to sexual harassment that occurs in school education program or activity, which includes locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurred, whether on or off-campus.

Designation of a Title IX Coordinator

The recent changes require schools to designate and authorize at least one employee to coordinate compliance with Title IX. That employee should be referred to as the Title IX Coordinator. The school must notify all applicants for admission and employment, students, parents or legal guardians of students, employees, and all unions of the Title IX Coordinator’s name, address, email address, and phone number, and display this information on the school’s website. Any person may report sex discrimination or sexual harassment to the Title IX Coordinator in person, or via mail, email, or telephone at any time of the day. The Title IX Coordinator also is responsible for ensuring proper record keeping related to a complaint and investigation.

Response and Investigation

Once the Title IX Coordinator has received a report of sexual harassment, the school must promptly respond in a manner that is not clearly unreasonable in light of the known circumstances. The Final Rule requires schools to execute a number of mandatory response obligations, including offering supportive measures to the victim, following a grievance process before any disciplinary actions are taken against the respondent, investigating any sexual harassment allegations while respecting the wishes of the victim, and dismissing any allegations for purpose of Title IX, that do not meet the definition of sexual harassment under the rule. Any allegations that do not meet the definition may still be investigated by the school pursuant to its code of conduct. Also, schools may not restrict the rights protected under the U.S. Constitution when responding to allegations.

During investigations of allegations of sexual harassment, the parties should have the opportunity to obtain an advisor of their choosing. Throughout the investigation, schools must provide an equal opportunity for the parties to present witnesses and evidence, send all evidence to the parties and provide 10 days to respond to the evidence, send written notice of any investigatory interviews, and send all parties an investigative report summarizing the evidence with 10 days to respond. Further, schools must not restrict the parties' ability to discuss the allegations or gather evidence.

The recent changes also provides rape-shield protection for complainants, which deems any questions or evidence about the complainant's prior sexual behavior to be irrelevant, unless offered to prove someone other than the respondent committed the conduct or for purposes of proving consent. Additionally, the school cannot access, disclose, or use any party's records that are maintained by a physician, psychiatrist, psychologist or other recognized professional or paraprofessional, unless it receives the party's voluntary, written consent to do so.

If the school dismisses the complaint for Title IX purposes, it must give the parties a written notice of dismissal and provide the reasoning for the dismissal.

Grievance Process

The new changes to Title IX articulate the grievance procedure that schools must engage in when resolving formal complaints of sexual harassment. The procedure requires schools to objectively evaluate all evidence; properly train all Title IX personnel; properly train all decision-makers on technology to be used at hearings and any issues of relevance; provide reasonably prompt time frames for completion of the grievance process; describe the possible remedies for complainants and disciplinary sanctions for respondents; describe the school's appeal procedure; and determine whether the school uses a preponderance of the evidence standard or a clear and convincing evidence standard. Under the process, schools must treat complainants equitably when providing remedies and treat respondents equitably by following the grievance process before imposing disciplinary actions, and any rules or procedures that the school adopts outside of the Title IX grievance process must apply equally to both parties. Finally, a school's grievance

procedure may not use or rely on information protected under a legally recognized privilege, unless that privilege has been waived.

Hearings

The Final Rule requires live hearings with cross-examination only for postsecondary institutions as part of the grievance process. These hearings are optional for K-12 schools. Regardless of whether a school opts to conduct a hearing, the decision-maker must afford each party the opportunity to submit written, relevant questions to any party or witness, and subsequently provide the answers to those questions and other follow-up questions to the necessary party.

Appeals

Schools must offer the opportunity for the parties to appeal a determination of responsibility or a dismissal of a formal complaint, equally to both parties.

Informal Resolution

The Final Rule allows schools to offer an informal resolution process in lieu of a formal investigation and grievance process, if both parties agree. The school must allow any party the right to withdraw from the informal resolution process and resume the formal investigation and grievance process. Schools may not offer informal resolution processes to resolve allegations of an employee who sexually harassed a student.

Retaliation

Under the Final Rule, retaliation is prohibited. The exercise of rights under the First Amendment and the charging of individuals against the code of conduct for making a materially false statement in bad faith during a Title IX grievance do not constitute retaliation. Retaliation complaints may be filed according to the school's equitable grievance procedures.

This Legal Update is a summary of the changes to Title IX. The complete version of the Final Rule can be found at the following link:

<https://www2.ed.gov/about/offices/list/ocr/docs/titleix-regs-unofficial.pdf>

An additional summary of the main provisions of the Final Rule is available here: <https://www2.ed.gov/about/offices/list/ocr/docs/titleix-summary.pdf>

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