

Conducting Hearings in Title IX /Clery Act Cases: Lessons From the Trenches

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Advice from the Trenches: Conducting Hearings Under the Proposed Title IX Regulations



Title IX: A (brief) history lesson



Title IX. . . *The Beginning*

TITLE IX
40 YEARS OF CHANGE

Sports Illustrated

“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 Federal financial assistance....”

—JUNE 23, 1972

The Power of Play

TITLE IX'S IMPACT HAS REACHED WELL BEYOND THE PLAYING FIELD, FOREVER CHANGING THE ROLE OF WOMEN IN SOCIETY. AS THE 40TH ANNIVERSARY OF THE LAW APPROACHES, SI EXAMINES NINE STORIES THAT REFLECT THE SPIRIT OF IX.

HEAR THE ROAR
U.S. WOMEN WIN THE WORLD CUP
FEBRUARY 1999

Read the story of the women's soccer team's triumph in the final of the 1999 World Cup. The victory marked a historic moment for women's sports, and it was just the beginning of a new era.

Photograph by **WENDY KYLE**
Stylized by **MICHAEL WEBER**

The 2004 Olympics by **Julia Adams**
1500 Meters by **Michelle Berger**
Marla Fajos by **Michelle Berger**
The Title IX Babes by **John Soren**
Federal Football by **Julia Adams**
Battle of the Boats by **John Soren**
The 2000 U.S. Olympic Team by **Michelle Berger**
Football by **Michelle Berger**
Football by **Michelle Berger**



Title IX and the Women's World Cup in Soccer



Los Angeles Times

Between the year Title IX was passed (1972) and the first Women's World Cup (1991), the sport saw a 17,000% increase in U.S. girls playing on high school soccer teams, according to the National Federation of High School Assns.



Title IX. . .*From 2011—Through the Obama years...until September 2017*

- Title IX requires that university policies prohibit certain behaviors and requires that colleges and universities do their best to ensure a “harassment-free environment.”
- “When a school knows or reasonably should know of possible sexual violence, it must take immediate and appropriate steps to investigate or otherwise determine what occurred. Investigations must be prompt, thorough, fair, impartial and equitable.
- If the investigation reveals...a hostile environment, the school must then take prompt and effective steps reasonably calculated to end the sexual violence, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects.



2016....Then what happened?



- In September, 2017, Department of Education withdrew 2011 Dear Colleague Letter and 2014 Q&A and issued new 2017 Q&A
- In November, 2018, Department officially unveiled proposed Title IX regulations on sexual harassment (which includes sexual assault.)
- Proposed regulations require schools to put the rights of the accused on par with the rights of the complainant.
- Notable reversals, such as requiring schools to allow cross-examination, which was discouraged by the Obama Administration.



So What's Next?

The Department of Education's Notice of Proposed Rulemaking on Title IX



No Crystal Ball



Posted New Regulations...

New U.S. Sexual Misconduct Rules Bolster Rights of Accused and Protect Colleges



Michigan State University students demonstrate in support of sexual assault survivors in East Lansing, Mich., in January. Jake May/The Flint Journal-MLive.com, via Associated Press

By Erica L. Green

Aug. 29, 2018



WASHINGTON — Education Secretary Betsy DeVos is preparing new policies on campus sexual misconduct that would bolster the rights of students accused of assault, harassment or rape, reduce liability for institutions of higher education and encourage schools to provide more

Unless revised, new regs would require:

- Cross examination of parties by advisor
- Advisor must be provided if other party has one
- No time limit
- Choice between two standards of proof
- No more mandatory reporters
- Geographic limits on utilizing Title IX process



How are cases handled now?

- Reports from complainants and many mandatory reporters (“responsible employees”)
- Investigations
- Decisions by Investigators and/or Hearing Panels
- Appeals



Hearings Now

- Columbia
- Cornell
- Michigan



New Proposed Rules: Overall Requirement

An institution with **actual knowledge** of sexual harassment **in an educational program or activity** of the school against a person in the United States must respond in a manner that is not **“deliberately indifferent.”**



Key Definitions under these proposed rules:

- **Not deliberately indifferent:**
 - A school will be considered **deliberately indifferent** **only** if its response to sexual harassment is **clearly unreasonable** in light of the known circumstances.
- OCR won't find deliberate indifference:
 - “merely because [it] would have reached a different determination based on an independent weighing of the evidence”



Key Definitions in new Regulations

- If school has “Actual Knowledge,” it should **investigate**: i.e., Notice of sexual harassment or allegations of sexual harassment to Title IX Coordinator or any official of the University who has the authority to institute corrective measures on behalf of the University.
- Proposed Regulations:
 - *Mere ability or school policy-based obligation to report does not meet threshold.*
 - *How will this impact the rules around mandatory reporting??*



Compared to....

- Previous OCR guidance required schools to **investigate any “unwelcome conduct of a sexual nature”**
- New Proposed regulation:
 - If this becomes law, only must investigate “unwelcome conduct of a sexual nature” that is “severe, pervasive and objectively offensive”
 - Intended to “promote protection of free speech and academic freedom”
- New Proposed regulation defines sexual harassment as:
 - Employee’s conditioning aid, benefit, service on participation in sexual conduct (i.e., *quid pro quo*)
 - Sexual assault (as defined by Clery Act)
 - “Unwelcome conduct that is so severe, pervasive and objectively offensive that it denies a person access to the University’s education program or activity” (new definition of a “hostile environment)



What is a “hostile environment?”

- Seemingly technical changes could have a profound impact. One is a new definition for what constitutes a “hostile environment.”
- The standard legal formula, from the Supreme Court case of Meritor Savings Bank v. Vinson, from 1986, defines it as unwelcome “conduct of a sexual nature” that is “sufficiently severe or pervasive to alter the conditions” of the opportunity at stake.
- New regs would replace “severe *or* pervasive” with “severe, pervasive, *and* objectively offensive.”
- More bad behavior required to reach threshold for investigation....



Given this “flexibility”, schools **will have to decide:**

- Whether to narrow definition of prohibited sexual behavior to higher threshold of sexual harassment adopted in proposed regulation
- Whether to investigate only reports that, if established by evidence, would meet higher threshold, OR
- Whether to continue to prohibit and investigate “unwelcome conduct of a sexual nature” as defined in many current policies



Key Definitions

- Proposed regulations suggests factors to consider in determining whether to get involved by whether or not the conduct occurred **as part of “University’s education program or activity.”**
- School’s “education program or activity”:
 - Not simple “artificial bright-line” on/off campus distinction
 - Does not simply depend on geographic location of activity
 - Examples given: Did conduct occur in location/context where school:
 - Owned premises
 - Exercised oversight, supervision or discipline, or
 - Funded, sponsored, promoted or endorsed event
- **Question: If incident does not occur as a part of a “University’s education program or activity,” must a school do anything?**
- **What about an act that occurs in a fraternity off campus, or at a conference in Antarctica?**



Termination of Grievance Procedure

- Unless changes are made in proposed regulations, if the conduct alleged by the complainant would not constitute “sexual harassment,” even if proven, or did not occur **within the University’s program or activity**, the school must terminate its Title IX grievance process with regard to that conduct.
- School could however choose to address the misconduct through student/employee conduct code or another process.



Key Definitions

- **Person in the United States:** would eliminate a University's responsibility to investigate sexual harassment against a person outside the U.S. (e.g. in a study abroad program).



Can schools figure out a way to investigate these cases anyway?

- “Importantly, nothing in the proposed regulations would prevent [a school] from initiating a **student conduct proceeding** . . . [regarding reported] sexual harassment that occurs outside the [school’s] education program or activity.”
 - Given this “flexibility”, schools **will have to decide** whether to prohibit and investigate sexual misconduct that occurs outside more narrowly-defined “education program or activity”
 - Given this “flexibility”, schools **will have to decide** whether to prohibit and investigate sexual misconduct that occurs outside the U.S.



- Clery Act procedural requirements for sexual assault, dating violence, domestic violence and stalking will not be affected by new Title IX regulations
- How will this affect investigations?
 - Will we be doing investigations of sexual assaults differently, and with different rights accorded, depending upon **where** they happened?
 - Will we handle sexual assaults differently than dating violence, domestic violence and stalking?
 - To the extent permitted by the final regulations, schools will have to decide how many different disciplinary processes they wish to maintain



What will Trigger College/University Obligations to Investigate?

- **Formal Complaint:** a document **signed by the complainant, or by the Title IX Coordinator** alleging sexual harassment against a respondent about conduct within its education program or activity and requesting initiation of the University's grievance procedures.

What impact will this have on investigations?



So, how will this affect school's obligations to investigate sexual harassment and discrimination?

- Schools **will have to decide** whether to:
 - Adopt narrower definition as threshold for encouraging reporting and taking action, OR
 - Continue to
 - define “responsible employees” broadly (e.g., to include faculty)
 - encourage reporting broadly, and
 - take action based on reports to faculty and others

QUESTION: Will Respondents sue if University does not have to act, but does so anyway, by going beyond what the federal government requires?



College and University Obligations (cont.)

Actual Notice but No Formal Complaint:

- Unless revised, under proposed regulation:
 - When a University has actual knowledge of reports by multiple complainants of conduct by the same respondent that could constitute sexual harassment, the Title IX Coordinator must file a formal complaint.



College and University Obligations (cont.)

Actual Notice but No Formal Complaint:

- For institutions of higher education, a college or university is not deliberately indifferent when in the absence of a formal complaint the school offers and implements supportive measures designed to effectively restore or preserve the complainant's access to the school's education program or activity.



Informal Resolution In ANY CASE

Alternative to Investigation:

At any time prior to reaching a determination regarding responsibility, in any type of case, a college or university may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication.



Informal Resolution

Informal Resolution:

- Written notice requirements
- Parties must voluntarily consent in writing to informal resolution
- University and the parties will determine whether the matter is appropriate for informal resolution
- Permissible even in sexual assault cases



In Sum,

- Colleges and universities are only required to respond when they have:
 - “Actual knowledge”
 - of ”sexual harassment” (as newly defined)
 - that occurred within the school’s “education program or activity”
 - against a “person in the United States”



**New Hearing Procedures as well....wait.
We are not a courtroom, are we?**



Standard of Evidence

- Must apply either the **preponderance of the evidence** or clear and convincing evidence standard.
- May use **preponderance of the evidence standard** only if that standard is used for other conduct code violations that carry the same maximum disciplinary sanction.
- Must apply the same standard for complaints against students as it does for complaints against employees.
- Can a school use **clear and convincing evidence** standard for sexual assault and require less proof for other types of cases? Bad optics.



Title IX Coordinator's Obligation to Initiate Formal Grievance Proceeding:

Obligation to initiate formal grievance proceeding under regulations as proposed:

Multiple Reports Against Same Respondent: “[W]hen a University has actual knowledge of reports by multiple complainants of conduct by the same respondent that could constitute sexual harassment, the Title IX Coordinator must file a formal complaint.”

So what happens if the complainants refuse to come in, or refuse to submit to cross?



Right to Inspect and Review Evidence During Hearing

“The University must...[p]rovide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, **including the evidence upon which the University does not intend to rely in reaching a determination of responsibility...**”

The University must make all such evidence subject herein to the parties’ inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination.”

As proposed, this would include medical evidence, and non-redacted records.



New rules that would impact current procedures

- “To achieve fairness and reliable outcomes, the proposed regulation would require **due process protections**, including:
 - A **presumption of innocence** throughout the grievance process, with the **burden of proof on the school**
 - **Live hearings** in the higher education context
 - A **prohibition of the single-investigator model**, instead **requiring a decision-maker separate from the Title IX Coordinator or investigator”**



Live Cross-Examination must be provided:

- “Such cross examination at a hearing must be conducted by the party’s advisor of choice, notwithstanding the discretion of the University . . . to otherwise restrict the extent to which advisors may participate in the proceedings.”
- Unless revised, if party doesn’t have advisor, school must provide the party an advisor “aligned with that party” to conduct cross examination
- Training the advisor re: cross examination?



Hearing Procedures-Cross Examination

- Proposed regulation:
 - “At the hearing, the decision-maker must
 - permit each party to ask the other party and any witnesses
 - all relevant questions and follow-up questions,
 - including those challenging credibility.”



Hearing Procedures-Cross Examination

- Proposed regulation:
 - Department comment: “Cross-examination is the ‘greatest legal engine ever invented for the discovery of truth.’”
 - Citing *Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018) (“Not only does cross-examination allow the accused to identify inconsistencies in the other side’s story, but it also gives the fact-finder an opportunity to assess a witness’s demeanor and determine who can be trusted.”)



Hearing Procedures-Cross Examination

- *Doe v. Baum* is Sixth Circuit's interpretation of Constitutional requirements applicable to public institutions
 - Department is proposing to impose that interpretation of the Constitution on all colleges and universities, public and private
- Recently, First Circuit held in *Haidak v. UMass Amherst* (1st Cir. August 6, 2018) that Constitutional due process at public institutions is satisfied by inquisitorial model, in which hearing panel chair asks questions of parties



Evidentiary Issues

- Cross examination must exclude evidence of the complainant's sexual behavior or predisposition, unless
 - Offered to prove someone other than respondent committed the conduct or
 - It concerns specific incidents of sexual behavior and is offered to prove consent.



Evidentiary Issues

- Decision-maker must explain to the party's advisor asking cross-examination questions any decision to exclude questions as not relevant.
- In other words, decision-maker must give a rationale on the spot.
 - Judges do not have to do that in court.
- Other evidentiary issues



Biggest change...

- *“If a party or witness does not submit to cross-examination at the hearing, the decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility”*
- *Impact on investigations?*
 - Rationale taken from *Doe v. Baum* and other Sixth Circuit precedent.



Ramifications of live hearings with cross examination by attorney advisors would be enormous, e.g.:

- Decision-maker: (Hearing chair) will have to control attorneys
- Beyond “relevance” and “rape shield” controls, there are no explicit parameters as to what decision-maker can do to control hearings
- Unless revised, cost of providing advisors for parties will be significant
- Likely to have significant impact on willingness of complainants to participate
- Other evidentiary issues



- Impact of live hearing/cross examination requirements to existing employee procedures could be very significant



Separate Rooms

- “At the request of either party, the University must provide for cross-examination to occur with the parties located in separate rooms with technology enabling the decision-maker and parties to simultaneously see and hear the party answering questions.”



Training of Panel Members

- Panel members will need to be trained in obligations under new regulations
- Will they participate in questioning witnesses?
- Will they be trained in fair, trauma-informed adjudication approaches?
- Proposed regulations:
 - “Any materials used to train coordinators, investigators, or decision-makers may not rely on sex stereotypes and must promote impartial investigations and adjudications of sexual harassment”



Training materials available to both sides

- “Any materials used to train coordinators, investigators, or decision-makers may not rely on sex stereotypes and must promote impartial investigations and adjudications of sexual harassment”
- School must create, make available to parties, and maintain for three years records of
 - Each sexual harassment investigation
 - Any appeal and the result therefrom
 - All materials used to train coordinators, investigators, and decision-makers regarding sexual harassment
- Must also create and maintain records of any actions, including supportive measures, taken in response to report or formal complaint of sexual harassment



Emphasis on fairness to both parties

- When asked to clarify remarks made during a September 28, 2017 NACUA Briefing about whether the concept of trauma-informed training and awareness continues to be meaningful to OCR in light of the 2017 Q&A, Acting Assistant Secretary of Education Candice Jackson responded in part as follows:
 - *While trauma-informed approaches that are grounded in science benefit sexual violence investigations, trauma-informed techniques should be undertaken contemporaneously with a rigorous commitment to a fair process for all parties. Trauma-informed investigation techniques that bleed over into a presumption of bias [for complainants] detract from the fundamental tenets of fairness and impartiality that are hallmarks of student disciplinary proceedings.*

Nolan, J., NACUANOTE “Promoting Fairness in Trauma-Informed Investigation Training” (Feb. 8, 2018)



How will we conduct hearings if proposed regulations become law?

- Changes for schools with single investigator model, investigator reaches conclusion and determines sanction
- Changes for schools where hearing allows only the parties to speak.
- Changes for schools where investigators make recommendations to hearing panel.
- Changes for schools where panels hear witnesses.



Recommendations if proposed rules become law

- Hearing panel chair
- Hearing logistics
- Protecting parties
- Handling requirement for advisors for parties that do not have one
 - Law school programs
 - Bar associations
 - Non-profit victims advocacy organizations



Deliberations and decisions

- Managing deliberations
- Communicating decisions



How will reporting, investigations, and hearings change?

- How can we encourage reporting under these new rules?



So, where does this leave us?

- Questions and Answers

