



Final Title IX Regulations: What You Need To Do By August 14

Speakers: Craig Wood
Abbie Golden
Micah Schwartz
Heidi Siegmund

McGUIREWOODS

www.mcguirewoods.com

Road Map

- Changes to overall program requirements and handling of complaints up to filing of formal grievance
- Changes regarding formal grievances and beyond
- 26 pages of regulations, embedded in over 2000 pages of “preamble” explaining rationale for changes
- Stated goal is to limit the areas over which schools have accountability, ensure due process protections for respondents, eliminate implicit bias through training, and provide support and informal processes to resolve all but most serious cases

Goals for today

- August 14 effective date – do you need Board approval for policy changes?
 - Need to factor that into timing
- Not going over every change
- Focus on legal questions and major changes
- Putting aside political considerations and focusing on compliance
- Participant questions

Regulations

- Why it is different from Obama-era guidance (2011 and 2014)?
 - Formal Rulemaking
 - Can't simply be “rescinded”
 - This is going to be the law for a long time regardless of who wins the November election

OVERALL CONSIDERATIONS

Standard for Liability

- “Deliberate Indifference”
- “Clearly unreasonable in light of the known circumstances”
- Likelihood of liability is reduced, but equity will still be an issue

- Actions:
 - Well-documented policies
 - Clear reporting routes
 - Responsiveness to complaints
 - Don’t have an “agenda” (implicit bias will result in litigation)
 - Training of Title IX officials and panel members

Jurisdictional Issues

Heidi Siegmund

“Program or Activity”

- Conduct that occurs within a recipient’s **“educational program or activity”**
 - Final rule includes locations or events where the school exercised “substantial control”
 - Drafted to cover off-campus Greek life
 - Does not include study abroad

- Issues:
 - What is “control” over an event? What about “control” over a building?
 - Study abroad – do you want to voluntarily cover?

“Sexual Harassment”

- Defines “**sexual harassment**” as any one of:
 - “Quid pro quo”
 - Conduct that a “reasonable person” would find “severe, pervasive, and objectively offensive”
 - Dating violence, domestic violence, stalking

- Issues:
 - Overlap with employment investigations
 - Again – how broad is voluntary coverage?

“Actual Knowledge”

- No major change from NPRM:
 - Notice to Title IX coordinator or “any official of the recipient who has authority to institute corrective measures on behalf of the recipient”
 - Any employee for K-12 schools, because they all have the power to discipline

- Issues for Higher Ed:
 - Who should remain as required reporters?
 - Who has authority to institute corrective measures?

Bifurcated Response Process

- “Formal complaints” versus “reports”
- Any person can report sexual harassment to a Title IX coordinator by phone, e-mail, or mail
 - Any report triggers duty to respond AND provide supportive measures
- A formal complaint is a document, filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent about conduct within the school’s educational program or activity, and requesting an investigation
- Requirement to file based on multiple complaints about the same respondent removed from the final rule

Supportive Measures

- Goals:
 - Restore or preserve access to education without unreasonably burdening the other party
 - Protect safety of all parties
 - Deter sexual harassment

- Main update: required as part of “general response”
 - No more safe harbor
 - Still defined as non-disciplinary, non-punitive individualized services
 - Free of charge
 - Maintain confidentiality

Informal Resolution

- Only available after filing of a formal complaint

- Options
 - Mediation/Restorative Justice
 - Meet with parties together or apart?

- Mediation
 - Who will act as a mediator
 - Training
 - New conflicts of interest/bias prohibitions

Informal Resolution

- Relatively few changes from proposed rule
 - Prior to engaging in informal resolution, obtain parties' voluntary, written consent
 - Voluntary means no conditions on admission or employment
 - Provide parties in writing:
 - Allegations
 - Requirements of informal resolution process
 - What will be confidential (or not)
 - At any time, parties can revert to formal complaint process

The Grievance Process

Abbie Golden

How a School Must Respond to Formal Complaints: Equitable, predictable process

- In response to a formal complaint, a recipient must follow a grievance process that complies with §106.45 of the Final Regulation.
- The section codifies general principles aimed at ensuring that “grievance procedures treat complainants and respondents equitably” and calls for a predictable process that **presumes** that the respondent is not responsible for the alleged conduct – the respondent does not have to prove “innocence” – the implicit bias problem that has led to hundreds of lawsuits by male respondents against colleges and universities
- Must provide description to complainants and respondents about the process, standard of evidence, possible sanctions, appeal rights, and supportive measures available
- Note that the Proposed Rules created “safe harbors” for schools who implement specific grievance structures consistent with the regulations. **The Final Rule removed the safe harbor provisions.**

The Investigation

- Written notice of the complaint must be provided to both parties that outlines the allegations and informs them of their right to select an advisor.
- Nothing prohibits an institution from immediately removing a respondent from the education program if the institution determines that the respondent poses an immediate threat to health and safety.
- Institution bears the burden of gathering evidence, but must also provide an equal opportunity for the parties to present witnesses and evidence.
- New provision regarding privacy of medical and psychiatric records.

Investigation Report

- Institution must create a written report that fairly summarizes relevant evidence
- The parties must have an equal opportunity to inspect the investigative report and the evidence (inculpatory or exculpatory) at least 10 days prior to the hearing
- The parties must be allowed to provide a written response to anything in the record

Single investigator model rejected

- A key element of the Obama-era guidance
- The decision maker at a hearing cannot be the same person(s) who served as the Title IX Coordinator or investigator
- Okay for Title IX Coordinator to serve as investigator
- Cost issue for smaller institutions

Adequate and unbiased training: Investigators and decision makers must be free from bias or conflicts of interest

- There is a heavy emphasis in the regulations on training the individuals involved in the investigation and the hearing process
- A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process receive training on the definition of sexual harassment, the scope of the recipient's education program or activity, how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.
- Where will your decision-makers come from? How will you ensure they are “free from bias” or do not have a conflict? How will you ensure they know how to make good judgments about when to dismiss cases because of lack of jurisdiction? Do decision-makers understand what “relevance” means as applied to evidence? Who will do your training?

Dismissal of Formal Complaints

- Mandatory: lack of jurisdiction
- Discretionary:
 - At the request of complainant
 - Respondent is no longer enrolled/employed
 - Specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination regarding actions alleged in the formal complaint.
- Both parties must be simultaneously notified
- Dismissal does not preclude action under another provision of the recipient's code of conduct.

The Formal Hearing

Micah Schwartz

The Formal Hearing – A New Paradigm

- For the first time, colleges and universities will have to provide trial-like procedures to resolve formal complaints

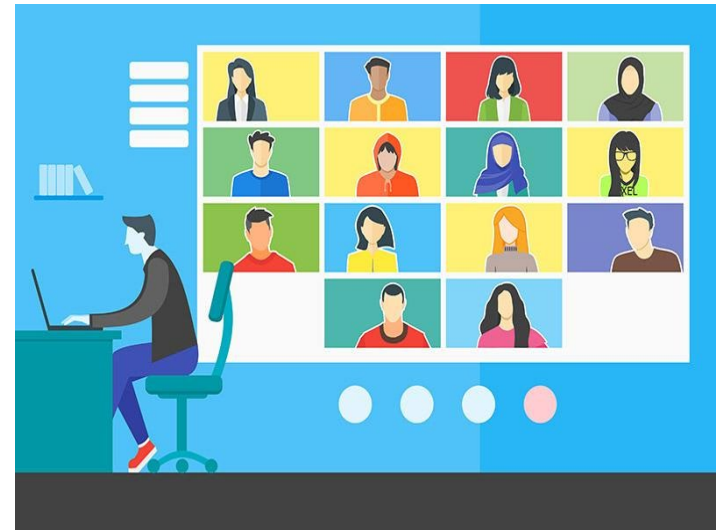


The Formal Hearing – Basics

- Colleges and universities must provide “live” hearings
 - Elementary and secondary schools may provide live hearings, but do not have to – so most of the remaining hearing procedures are not required for these schools – best approach for K-12 is to use existing informal investigation and resolution processes except in sexual assault cases, which are rare
- Institutions must provide parties with advisors of their choice, who may be, but do not have to be, lawyers
- Advisors must be allowed to conduct live cross-examinations of parties and other witnesses

“Live” Hearings

- Hearings must be “live”
 - Parties’ advisors must have an opportunity to pose questions directly to the witnesses – not through the tribunal
 - Both parties must be present when witnesses provide testimony
- But – parties may be located in separate rooms, and attend the hearing “virtually”
- This could be valuable during this Covid-19 era



Cross-Examinations

- Parties' advisors must be allowed to conduct cross-examinations – parties may not conduct the cross-examinations themselves
- Cross-examinations must be conducted “directly, orally, and in real time”
- If a party/witness refuses to be cross-examined:
 - Decision-maker may not determine responsibility based *solely* on respondent's refusal to face cross-examination
 - Decision-maker may not rely on a statement that wasn't cross-examined
 - Does not prevent the decision-maker from considering a statement against interest because such a statement would not require cross-examination (e.g. a respondent admits certain sexual behavior during the investigation, or a complainant admits consensual sexual behavior to the investigator)

Cross-Examinations

- Decision-makers must make relevancy determinations
 - Before every question is answered?
 - With an explanation?
- “Rape shield” principles still apply – advisors cannot ask about a party’s “sexual predisposition” or “prior sexual behavior,” except in very limited circumstances
- Treatment records are not relevant

Responsibility Findings

- Schools may apply either a “preponderance of the evidence” or a “clear and convincing” standard
 - Whichever standard school selects must apply to sexual misconduct allegations against both employees and students
 - Can be problematic if faculty standard is a collective bargaining issue – you either bargain again with the faculty, or adjust the student standard accordingly
- Determinations must be made in writing. Must also include:
 - Findings of facts
 - Application of policy to facts
 - If respondent is responsible: sanctions

Appeals – When Available

- Parties must be able to appeal if:
 - Procedural irregularity
 - New evidence
 - Conflict of interest or bias (reasonable person standard)
- But only if issue affected the outcome – no “harmless error” appeals
- Schools may offer appeals for other reasons, if provided equally to both parties

Appeals – Procedures

- Appeals must be heard by new decision-maker(s)
- Parties must be allowed to submit appeal briefs
- Appeal panel must issue written decisions



Questions or Comments?

www.mcguirewoods.com