The Interplay Between Title IX and Title VII, Title IX and VAWA, and New Title IX Rules on Hearings and Informal Resolution

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Topics:

- Intersection of Title IX and VAWA
- Intersection of Title IX and Title VII
- Live Hearings under the New Rules
- The Informal Resolution Process under the New Rules
Background on the New Rules
• The 2016 Republican platform devoted an entire section to Title IX, charging that the Obama administration’s “distortion of Title IX to micromanage the way colleges and universities deal with allegations of abuse contravenes our country’s legal traditions and must be halted.”

• In a tweet, former secretaries of Education Arne Duncan and John King argued that the regulations “unnecessarily burden victims and deepen trauma for students by increasing the chance of victims being exposed to their accused assailants.”
Four lawsuits have been filed against Department of Education to stay implementation of the new Title IX regulations.

The American Council on Education (ACE) and more than 24 other higher education associations have asked the Education Department for more time to restructure campus policies and procedures.

The associations have also asked a federal court to halt implementation of the changes.
“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.

The new Title IX sexual harassment rule is: a school must respond when: (1) the school has actual knowledge of sexual harassment; (2) that occurred within the school’s education program or activity; (3) against a person in the United States.
Overview of New Requirements

• a formal complaint must be filed before an investigation begins

• There is a requirement of actual knowledge and a new, narrower definition of what constitutes “actual knowledge” of sexual harassment.

• Colleges and Universities must publish all training materials for Title IX officials on their websites. This was not in the proposed rule and lawsuits argue did not have an appropriate amount of public notice or comment.
Overview of New Requirements

• The policy must include an express statement that the respondent is presumed “not responsible”

• Limits emergency removals from campus

• Provides parties absolute right to inspect “any evidence . . . directly related” to the allegations, including both inculpatory and exculpatory evidence, and regardless of whether the institution intends to rely on the evidence in making a determination of responsibility.

• **BUT** includes protections for medical treatment records and information subject to a privilege.
Overview of New Requirements

• Institutions can continue to address sexual misconduct falling outside the scope of Title IX under their own codes of conduct

• Institutions must provide all parties equal opportunities to appeal.
Overview of New Requirements

• The new Title IX regulations include new requirements for faculty and staff processes.

• Institutions must maintain all records of Title IX proceedings for seven years—up from three years in the proposed rule.

• Prohibits the use of a “single-investigator” model, where the investigator and decision-maker are the same person.
Overview of New Requirements

• Redefines “Responsible Employees”

• Requires extensive training for Title IX coordinators, investigators, decision-makers, and those involved in any informal resolution process

• Allows institutions to choose either the “clear and convincing” or “preponderance of the evidence” standard for determining responsibility in Title IX proceeding provided that the same standard is used regardless of whether the respondent is a student or employee.
Overview of New Requirements

• Requires campuses to provide supportive measures to the complainant, regardless of whether a formal complaint is filed.

• Requires an institution to state in its notice of a formal complaint that the respondent is “presumed not responsible.”

• Prohibits institutions from imposing “gag orders” that restrict the ability of either party to discuss the allegations or to gather relevant evidence.
Overview of New Requirements

• Prohibits institutions from imposing “gag orders” that restrict either party from discussing the allegations or gathering relevant evidence.

• Requires an institution to have “actual knowledge” of the alleged misconduct before it is obligated to respond under Title IX.

• “Actual knowledge” is defined as notice to the Title IX coordinator or any other official with the “authority to institute corrective measures.”
THE HEARING PROCESS
Prehearing Considerations

• A copy of the investigative report must be given to the parties at least ten days prior to the hearing.

• Institutions must provide the parties an equal opportunity to inspect and review “any evidence... directly related” to the allegations, including both inculpatory and exculpatory evidence.

• Schools can offer informal resolution options such as mediation, but both parties must give written consent.
For Hearings: Evidence “Directly Related”

- Evidence must be provided and sent in electronic form or hard copy to the parties and their advisors.

- The grievance process may not require, allow, rely upon, or otherwise use questions or evidence that constitute or seek disclosure of information protected by a legally recognized privilege, unless the holder of the privilege waives it.
Prehearing Considerations

• Evidence must be provided and sent in electronic form or hard copy to the parties and their advisors.

• The new rules authorize discretionary consolidation of formal complaints when allegations of sexual harassment arise out of the same facts or circumstances.
Requirements for Live Hearings

• Presumes the non-responsibility of respondents until the conclusion of the grievance process;

• The standard of evidence may be preponderance of the evidence or clear and convincing, but must be the same for formal complaints against students and employees.

• Live hearings are required, but can include use of technology

• Institution must provide a virtual hearing, if requested by either party.

• Cross-examination must be conducted by advisors, not parties.
Requirements for Live Hearings

• Hearing must be done in “real-time” and must allow both parties to see and hear questioning of the parties and witnesses.

• Decision-makers must make relevance decisions for each question.

• Institutions must provide an equal opportunity for the parties to present witnesses including fact and expert witnesses.

• A recording of the live hearing must be made available for the parties’ inspection and review.
Requirements for Live Hearings

• Institutions must permit cross-examination of the parties (and any witnesses) by the parties’ advisor of choice.

• The decision-maker at the hearing must determine whether each question asked during cross-examination is “relevant” and whether it violates rape shield law protections—before it is answered.

• The decision-maker also must provide on-the-spot explanation for any decision to disallow a question.

• Decision-makers are barred from considering any statements of a party who refuses to sit for cross-examination.
Requirements for Live Hearings

• If a party does not have an advisor, the institution must provide one for free.

• When an institution provides an advisor, the advisor does not need to be an attorney.

• Prohibits institutions from considering, disclosing, or otherwise using medical treatment records without written consent from the party.
Requirements for Live Hearings

• Protects any legally recognized privilege from being pierced during a the grievance process.

• If there is a hearing, statements by parties as part of an investigation who are not cross-examined at a hearing may not be used as evidence.
Post-Hearing Processes

• Send both parties a written determination regarding responsibility explaining how and why the decision-maker reached conclusions;

• Implement remedies for the complainant if a respondent is found responsible for sexual harassment
Determination

There must be a written determination by the decision maker(s) that includes:

(A) the allegations potentially constituting sexual harassment;
(B) the procedural steps taken from the receipt of the formal complaint through the determination;
(C) findings of fact supporting the determination;
(D) conclusions regarding the school's code of conduct;
(E) a statement of, and rationale for, the result as to each allegation;
(F) procedures and bases for appeal
Appeal

• Institutions must provide both parties equal opportunities to appeal.

• Institutions must at a minimum allow appeals on three grounds:

  1. procedural irregularity
  2. new evidence
  3. bias/conflict of interest
Training for the Hearing Process

34 C.F.R. § 106.45(b)(1)(iii).
Training requirements

Persons involved in the investigation, informal resolution, hearing process, or acting as an advisor must receive training on topics including:

• The definition of sexual harassment for Title IX purposes;

• The scope of the institution’s education “program or activity” under Title IX;
Training requirements

• How to conduct an investigation and grievance process, including
  ➢ hearings
  ➢ appeals, and
  ➢ as applicable, the informal resolution process;

• How to serve impartially including avoiding prejudgment of facts at issue, conflicts of interest, and bias;
Training requirements

• Hearing participants must be trained on and understand how to operate any technology to be used at a live hearing;

• Issues of relevance of questions and evidence, including rape-shield limitations;

• Issues of relevance to create an investigative report that fairly summarizes relevant evidence;
• How to serve impartially, including by avoiding prejudgment of the facts at issue; and

• That there is a presumption that the respondent is not responsible for the alleged conduct

• Training materials must not rely on sex stereotypes and must promote impartial investigations and adjudications.
• The new regulations also require that all training provided by the Title IX coordinator be “gender neutral,” and free of any “sex bias” or “sex stereotyping.”

• The new rules reject the view that investigators and decision-makers should “believe the victim” or use “trauma-informed” training that “requires them to disregard inconsistencies in complainants’ stories.”

• According to the new rules, complainants should not be considered any more credible than respondents.
Selection and Training of Advisors (for cross examinations) and Hearing Officers; Preparation When Attorneys are Involved.
• Determine whether hearing advisors are going to be external contractors, employees, or a combination of both.

• If external, will the school retain attorneys?

• Does the school want to provide its own training or hire trainers for adjudicators, advisors, and mediators/persons involved in ADR?

• Who will advise the decision makers?
An advisor can be:

• A parent
• A friend
• A trusted faculty or staff member
• A counselor
• An attorney

• An advisor cannot be:

• A witness
• Someone who may influence the party’s account
• Only the advisor can attend the hearing with the parties, unless someone else is required to attend by law

• An advisor can appear even if the party they are advising does not appear

• If an advisor and party do not appear, another provided advisor must still cross-examine the other appearing party, resulting in consideration of the appearing party’s statement (without any inference being drawn based on the non-appearance)
Preparation when attorneys are involved?

• Have your own lawyer to provide advice.

• Cross examination/written cross questions must be relevant; if not, the decisionmaker/hearing officer can exclude them, but must say why on the record.

• It is up to the decisionmaker/hearing officer, not the advisor, to decide if a question is relevant.

• However, an attorney can help with articulating the reason for the decision.
Informal Resolution
Informal Resolution

• The new rules permit the use of informal resolution processes, such as mediation, provided that both parties voluntarily consent in writing.

• schools may offer informal resolution processes as alternatives to a full investigation and adjudication of the formal complaint,

• However, informal resolution is prohibited for student complaints against employees.
• There are varying models of informal resolution that a school may choose to offer. For example:

  • A mediation model may result in a mutually agreed upon resolution to the situation without the respondent admitting responsibility.

  • By contrast, a restorative justice model may reach a mutual resolution that involves the respondent admitting responsibility.
• Individuals mediating or facilitating informal resolution must be free from conflicts of interest, bias, and trained to serve impartially.

• Informal resolution processes must have a reasonably prompt time frame.

• The initial written notice of allegations sent to both parties must include information about any informal resolution processes the school has chosen to make.
• Schools cannot require students or employees to use informal resolution as a condition of enrollment or employment or enjoyment of any other right.

• Schools are explicitly prohibited from requiring the parties to participate in an informal resolution process.

• A school may not offer informal resolution unless a formal complaint is filed

• Either party has the right to withdraw from informal resolution and resume a grievance process at any time before agreeing to a resolution.
• Informal resolution does not equal no sanction.

• Expulsion can be a sanction proposed as part of an informal resolution process, as can lesser sanctions.

• Whatever the sanction, it can only be imposed if both parties agree to it as a part of the resolution.
Confidentiality Provisions

- Informal resolution agreements can contain confidentiality requirements.

- The final regulations include “robust disclosure requirements” to ensure that parties are fully aware of the consequences of choosing informal resolution, including the records that will be maintained or that could or could not be shared, and the possibility of confidentiality requirements as a condition of entering into a final agreement.
Questions?
Lisa Karen Atkins has over 25 years’ experience as legal counsel providing litigation defense, client counseling, and day-to-day legal advice to public and private colleges and universities, university boards, multi-campus systems, academic medical centers, clinical affiliates, vocational schools, private employers who partner with public and private institutions, clinical practicum programs, and internship, cooperative education (classroom-based education combined with practical work experience), and apprenticeship programs. She is co-lead and co-founder of the Ogletree Deakins Higher Education Practice Group and has served as general counsel for a mid-major, division I, Carnegie-classified doctoral/high research, land-grant university; as associate general counsel for the sixth-largest higher education system in the United States; and as an assistant general counsel for a major, division I, doctoral/very high research land-grant University and multi-campus system. She is also a former University Chief of Staff and a former Assistant Attorney General, a role in which she successfully defended numerous lawsuits against public higher education institutions, board members, officers, faculty, and staff.