



# OCR PROPOSED REGULATIONS

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Title IX of the Education Amendments of 1972 is a federal law intended to end sex discrimination in all areas of education

Ensures sex (and gender?) equity in all institutional programs, events, operations involving employees, faculty, students, visitors, and others

Applies to sexual harassment, sexual assault, and sex- (and gender-?) related relationship violence, stalking, bullying, etc.

- Laws passed by Congress (e.g.: Title IX) - enforceable by courts and OCR
- Case law established by courts (jurisdictional implications)
- Regulations - enforceable by courts and OCR
- Guidance from OCR
  - Regulatory guidance - 2001 Guidance
  - Sub-Regulatory guidance - 2011 Dear Colleague Letter

# 2018 PROPOSED REGULATIONS

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Procedural Aspects  
Substantive Aspects  
Terminology

# PROPOSED REGULATIONS: PROCEDURAL ASPECTS



- November 29, 2018: OCR published proposed amendments to Title IX regulations.
  - Provided 60 days for public comment
    - **Comments must be received on or before January 28, 2019**
      - Via postal mail, hand delivery, commercial delivery, Federal eRulemaking Portal
  - OCR reviews comments, finalizes regulations
  - Final versions amends Code of Federal Regulations
  - Proposed amendments: legalistic, very due process-heavy
  - Likely to go into effect 30 days from publication in the Federal Register.

# PROPOSED REGULATIONS: SUBSTANTIVE ASPECTS OVERVIEW



- Terminology
- Recipients
  - Notice
  - School Officials
  - Jurisdiction
  - Appropriate Response
  - Supportive Measures
  - Neutrality
  - Training
- Informal/Formal Resolution
  - Requirements/Considerations
  - Remedies
  - Investigation Report/Evidence
  - Standards of Evidence
  - Credibility
  - Hearing
- Intersection of Laws

- **Actual Knowledge** - notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to a teacher in the elementary and secondary context with regard to student-on-student harassment.
- **Complainant** - an individual who has reported being the victim of conduct that could constitute sexual harassment, or on whose behalf the Title IX Coordinator has filed a formal complaint.
- **Respondent** - an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.
- **Formal Complaint** - a document signed by a complainant or Title IX Coordinator alleging sexual harassment against a respondent about conduct w/in education program or activity & requesting initiation of recipient's grievance procedures

- **Sexual Harassment**

1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;

2) Unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or

3) Sexual Assault

- **Supportive Measures** - non- disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed.



# RECIPIENTS

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Grievance Procedures

Notice to Institution/Parties

Jurisdiction

Appropriate Response

Supportive Measures

Neutrality

Training

- Must include:
  - Presumption that responding party is not responsible until determination is reached
  - “Reasonably prompt” timeframes
  - Range of possible sanctions and remedies
  - Description of standard of evidence
  - Bases and procedures for appeal
  - Range of supportive measures available to both parties
- Recipients will want to also incorporate procedural protections defined in proposed Regs, in order to claim Safe Harbor from OCR enforcement

# NOTICE TO INSTITUTION



- Proposed regulations would not require a Title IX investigation unless the institution has **actual knowledge**
  - Actual knowledge: notice of sexual harassment/allegations of sexual harassment to TIXC or appropriate official who has authority to implement corrective measures
- Constructive notice/respondent superior - insufficient
- When there is actual knowledge of multiple reports involving same responding party, TIXC MUST file a formal complaint on behalf of reporting party
  - “Formal complaint” means a document signed by the complainant or by the Title IX Coordinator alleging sexual harassment by a respondent

# APPROPRIATE SCHOOL OFFICIALS



- Report must go to Title IX Coordinator or any official of the recipient who has the authority to institute corrective measures on behalf of the recipient
- Teachers at PK-12 schools **have** sufficient authority
- Faculty in higher education **do not** have sufficient authority, according to OCR
- Mere obligation to report does not constitute authority
- Knowledge by employee who is harasser does not constitute actual knowledge by employer/recipient

# NOTICE TO PARTIES



- Upon receipt of formal complaint, must provide written notice to the parties:
  - Relevant grievance procedures
  - Allegations with sufficient details: identity of parties, implicated policies, date, location if known
  - Statement that responding party is not presumed responsible - responsibility determination will be made at end of process
  - Parties may request to inspect & review relevant evidence
  - Sufficient time to prepare a response
- Ongoing notice
  - Any reasonable delay for good cause
  - Any additional allegations
  - All hearings, interviews, and meetings requiring attendance with sufficient time to prepare
- Upon determination of responsibility, including sanctions

- Jurisdiction
  - *Davis* standard – control over the harasser and the context of the harassment
  - “occurs **within** its education program or activity”
- Geography should not be conflated with the Clery Act – education programs or activities can be off-campus, online
- Proposed regulations specify “harassment...against a person in the United States”
- Off-campus conduct, study abroad programs, or school-sponsored international trips – “nothing in the proposed regulations would prevent...”

# APPROPRIATE RESPONSE



- A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States must respond in a manner that is **not deliberately indifferent**
- If the conduct alleged by the complainant would not constitute sexual harassment even if proved or did not occur within the recipient's program or activity, the recipient must terminate its grievance process with regard to that conduct

- Safe Harbors
  - If the school follows OCR procedures (including implementing any appropriate remedy as required), then not deliberately indifferent.
  - Reports by multiple complainants of conduct by the same respondent, Title IX Coordinator must file a formal complaint. If the school follows procedures (including implementing any appropriate remedy as required), not deliberately indifferent.
  - For IHEs, if no formal complaint and school offers and implements supportive measures designed to effectively restore or preserve the complainant's access, not deliberately indifferent. Must inform of right to file formal complaint later.
  - No deliberate indifference merely because OCR would come to different determination based on the evidence.



# SUPPORTIVE MEASURES



- Non-disciplinary, non-punitive individualized services
- Must not unreasonably burden other parties, must protect the safety of all parties and educational environment, must deter harassment
- May be offered before, after, or in lieu of the filing of a formal complaint
- May include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of campus, and other similar measures

# NEUTRALITY, CONFLICT OF INTERESTS, OBJECTIVITY



- Treatment of reporting OR responding party(ies) may constitute discrimination
- Grievance procedures must treat parties “equitably”
  - Must be designed to restore or preserve access to education programs.
  - Must include due process protections before disciplinary sanctions imposed
- Prohibit conflicts-of-interest or bias with coordinators, investigators, and decision-makers against complainants or respondents generally or an individual complainant or respondent
- All relevant evidence obtained must be **objectively** evaluated

- Training materials may not rely on sex stereotypes and must promote impartial investigations and adjudications of sexual harassment
- Training mandates apply to PK-12 as well as higher ed
- Training materials must be maintained for three years and made available for inspection by the parties

# INFORMAL RESOLUTION

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Considerations

Requirements

# CONSIDERATIONS FOR INFORMAL RESOLUTION OPTIONS



- School and parties will determine when informal resolution is appropriate.
- “[I]n responding to sexual harassment, it is important to take into account the needs of the parties involved in each individual case, some of whom may prefer not to go through a formal complaint process.”

# REQUIREMENTS OF INFORMAL RESOLUTION OPTIONS



- Informal resolution allowed at any time prior to a final determination
- Must provide detailed notice to the parties:
  - Allegations
  - Requirements of the process
  - Circumstances which would preclude formal resolution
  - Consequences of participation
- Must obtain voluntary, written consent

# FORMAL INVESTIGATION & RESOLUTION

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Standard of Proof

Presumption of Innocence

Promptness

Emergency Removal

Evidence

# STANDARD OF PROOF



- Must apply either the preponderance of the evidence standard or the clear and convincing evidence standard
- May use the preponderance of the evidence standard only if the recipient uses that standard for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction
- Must also apply the same standard of evidence for complaints against students as it does for complaints against employees, including faculty



# “PRESUMPTION OF INNOCENCE”



- Published grievance procedures must include a presumption of innocence for the responding party
- Determination of responsibility is made at the conclusion of a grievance procedure
- Ensures impartiality until determination

- Reasonably prompt timeframes for the conclusion of the grievance process, including reasonably prompt timeframes for filing and resolving appeals if school offers an appeal
- Concurrent law enforcement investigation does **not** relieve the burden of the school to investigate
- Temporary delays for “good cause” and with written notice of the delay to parties
  - Complexity of the investigation
  - Concurrent law enforcement investigation with time-dependent release of evidence
  - Delays for administrative needs are insufficient

# EMERGENCY REMOVAL



- May remove a respondent from a recipient's education program or activity on an emergency basis, provided that the school undertakes an individualized safety and risk analysis, determines that an immediate threat to the health or safety of students or employees justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal.
- May place a non-student employee respondent on administrative leave during the pendency of an investigation.

- Burden of proof and burden of gathering evidence rests with the school, not the parties
- Parties may be able to request certain evidence be obtained by school
- Evidence collected by law enforcement is admissible
- Contracted investigators do not absolve the school of responsibility for this provision

# DUE PROCESS ELEMENTS

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- Advisors
- Due Process: Evidence
- Parties' Access to Evidence/Report
- Live hearing
- Appeals

- Advisors can be anyone – no restrictions in proposed regulations
- If a party does not have an advisor to conduct cross-examination, the school must provide one
- Must allow advisor to be present at all meetings, interviews, hearings
- Advisor must be “aligned with the party”
- No prior training required, no mandate for school to train
- ED presumes no financial impact because parties retain counsel; recipient not expected to do so

# DUE PROCESS: EVIDENCE



- **All** relevant and reasonably available evidence must be considered – inculpatory and exculpatory
- No restriction on discussing case or gathering evidence
- Equal opportunity to
  - Present witnesses
  - Present evidence
  - Inspect all evidence, even if not used to support determination
- No limits on types/amount of evidence which may be offered
- Includes all evidence directly related to the investigation, even evidence that determination does not (or will not) rely on

# PARTIES ACCESS TO EVIDENCE/REPORT



- Prior to the completion of the investigative report, all evidence must be provided to parties in an electronic (non-duplicatable) format
- Proposed regulations mandate creation of an investigation report
  - Report fairly summarizes all relevant evidence
- Must provide report to parties and advisors at least 10 days before hearing or other determination
  - Parties must have at least 10 days to review and submit written responses to the report prior to any hearing



- Mandated live hearing for postsecondary institutions
  - Optional for PK-12
    - May elect to use administrative decision maker with indirect questioning
    - Decision-maker must ask each party/witnesses relevant & follow-up questions submitted by any party. If no hearing, each party must have opportunity to submit written questions, receive answers, & additional time for limited follow-up questions
- Parties must attend hearing, otherwise all testimony submitted by absent party must be excluded
- Hearing administrator may not be Title IX Coordinator or investigator
- Must allow live cross-examination to be conducted exclusively by each party's advisor (separate rooms still allowed)
- Questions not deemed relevant by hearing administrator may be excluded with rationale provided
- Must exclude reporting party's prior sexual behavior unless specifically relevant

- Schools may offer equitable appeals, but are not required
- All parties receive notification of any appeal
- Opportunity for all parties to support or oppose outcome
- Written decision with rationale delivered simultaneously to both parties
- Appeal decision-maker cannot have had any other role in the investigation or resolution process
- “Reasonably prompt” timeframe for rendering appeal decision

# ADDITIONAL ELEMENTS

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- Monetary Damages
- Religious Exemptions
- Conflicts of Law
- Clergy and PK-12
- Record Keeping

# OTHER ELEMENTS IN THE PROPOSED REGS



- Remedial action required by OCR for noncompliance with Title IX will not include monetary damages
  - Reimbursements or compensation do not fall within the meaning of this provision
- Institutions may presume religious exemption
  - If under OCR investigation, may then be required to submit exemption justification in writing
  - Allows institutions to avoid public assertion of exemption from certain civil rights protections

# OTHER ELEMENTS IN THE PROPOSED REGS



- Potential conflicts of law
- Recognition of Constitutional protections: 1<sup>st</sup>, 5<sup>th</sup>, 14<sup>th</sup> Amdts
  - Statement that proposed regulations do not “restrict or deprive rights” under articulated statutes.
- Clery/VAWA and FERPA considerations
  - Clery Act provisions do not apply to PK-12 – the proposed regulations extend several Clery Act requirements to PK-12
- Title VII considerations
  - Title VII definition of sexual harassment
  - Employee procedures for sexual misconduct
  - At-will employment relationship

# OTHER ELEMENTS IN THE PROPOSED REGS



- Application of Clery definitions and requirements to PK-12 schools
  - VAWA amendments create procedural due process protections for higher education institutions
  - Broad right to introduce evidence
  - Introduces advisor dynamics in PK-12 processes

- Below records must be created, retained, and available to the parties for three years
  - Sexual harassment investigation including any responsibility determination, any disciplinary sanctions imposed, and any remedies implemented
  - Any appeal and related result(s)
  - Any informal resolution implemented
  - Any supportive measures implemented
- For each conclusion, school must document the rationale(s) for its determination
- School must document measures taken to preserve/restore access to education programs/activity