



PREPARING FOR THE OCR PROPOSED REGULATIONS: WHAT STEPS TO BE TAKING NOW?

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YOUR PRESENTERS



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2019 PROPOSED REGULATIONS

WE HAVE TAKEN THE PROPOSALS AND GIVEN EACH PROVISION ONE OF THREE BULLETS – THUMBS UP, THUMBS DOWN, AND A MONKEY COVERING ITS EYES:

- 👍 DO NOW – THESE ARE ITEMS ATIXA RECOMMENDS ACTING ON BEFORE THE REGS ARE FINALIZED BECAUSE THEY REPRESENT A BEST OR INEVITABLE PRACTICE
- 👎 LET IT WAIT – THESE ITEMS SHOULD WAIT UNTIL THE REGS ARE FINALIZED, AT LEAST (OR UNTIL ALL THE LAWSUITS ARE RESOLVED)
- 🙈 IT DEPENDS -- WILL BE DISCUSSED DURING WEBINAR

RECIPIENTS

Grievance Procedures

Notice to Institution/Parties

Jurisdiction

Appropriate Response

Supportive Measures

Neutrality

Training

WHEN ARE THE NEW REGS COMING?

WE DON'T REALLY KNOW, BUT...

- SOME PROVISIONS ARE THE RIGHT THING TO DO, NO MATTER WHAT
- SOME PROVISIONS ARE ALREADY MANDATED BY COURTS IN SOME JURISDICTIONS, SO THERE IS NO REASON TO WAIT ON OCR
- SOME PROVISIONS WILL LIKELY GO INTO EFFECT WITH SUCH A SHORT IMPLEMENTATION TIMELINE THAT YOU SHOULD PREPARE NOW AND BEGIN TO MAKE SOME CHANGES IN ADVANCE

DEFINITIONS: SEXUAL HARASSMENT



- Proposed regulations

- 👎 Conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct (QpQ)
- 👎 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 (HE)
- 👎 Sexual assault, as defined in 34 CFR 668.46(a)

GRIEVANCE PROCEDURES



- 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

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/respondeat 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
- 👍 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

Jurisdiction

- *Davis* standard – control over the harasser and the context of the harassment
- “occurs **within** its education program or activity”

 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

SUPPORTIVE MEASURES



- 👍 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



- 👍 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 (but of course it depends on how you define due process)
- 👍 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



- 👍 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

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
 - 🙇 But if informal resolution means mediation, the jury is still out
- 👍 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

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

PROMPTNESS



- 👍 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.

EVIDENCE



- 👍 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

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

ADVISORS



- 🙄 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”

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 (assuming a complex case and timeline is not waived by the parties)

LIVE 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

APPEALS



- 👍 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

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


OTHER ELEMENTS IN THE PROPOSED REGS



- 👉 Institutions may presume religious exemption
 - If under OCR investigation, may then be required to submit exemption justification in writing

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

RECORD KEEPING



👍 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

QUESTIONS?



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