



Introduction to Proposed Title IX Regulations

Jeffrey J. Nolan
November 19, 2018



Agenda

- Historical vs. Proposed Guidance/Regulation
- Significant substantive and procedural changes that institutions would have to consider and/or make if regulations are finalized as proposed
- **Decision points** schools will face
- Preliminary thoughts on how institutions could successfully navigate new regulatory landscape
- Next steps in notice and comment process
- Note: "School" throughout this presentation refers only to colleges and universities; different rules for K-12 schools are not addressed here

2



Historical vs. Proposed Guidance/Regulation

- 2001: OCR issues *Revised Sexual Harassment Guidance*, available at: <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html> ("2001 Guidance")
- 2006: OCR issues Dear Colleague Letter on Sexual Harassment, available at: <https://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html> ("2006 DCL")

3



Historical vs. Proposed Guidance/Regulation

- **April 2011** Office for Civil Rights (OCR) "Dear Colleague" letter ("2011 DCL") (**WITHDRAWN**)
- **April 2014** OCR Q&A on Title IX and Sexual Violence ("2014 Q&A") (**WITHDRAWN**)

4



Historical vs. Proposed Guidance/Regulation

- **September 7, 2017** Department of Education Secretary Betsy DeVos announces notice and comment process
- **September 22, 2017**: OCR issued:
 - Dear Colleague Letter ("2017 DCL") withdrawing 2011 DCL and 2014 Q&A
 - Q&A on Campus Sexual Misconduct ("2017 Q&A")

5



Historical vs. Proposed Guidance/Regulation

- **September, 2018**: Draft Notice of Proposed Rulemaking is leaked; proposed changes to, e.g.:
 - Definition of sexual harassment
 - Scope of institutional responsibility
 - "Responsible employees" vs. "official with authority to institute corrective action"
 - Procedural requirements for investigations/adjudications (including allowing choice in standard of evidence)

6

Proposed OCR Regulations

- Posted November 16, 2018 by OCR
- Will be officially published in Federal Register week of November 19, 2018
- 60 day notice and comment period starts when posted in Federal Register
- Fact Sheet and Summary also posted
- See:
<https://www2.ed.gov/about/offices/list/ocr/newsroom.html>

7

OCR's "Guiding Principles" for New Proposed Regulations

- **"Rulemaking Process:** It is important to address this issue through notice-and-comment rulemaking rather than non-binding guidance. The Department looks forward to the public's comments, and has benefitted from listening sessions and discussions with students, schools, advocates, and experts with a variety of positions."
- **"Greater Clarity:** The proposed regulation seeks to ensure that schools understand their legal obligations and that complainants and respondents understand their options and rights."

8

OCR's "Guiding Principles" for New Proposed Regulations

- **"Increased Control for Complainants:** The Department recognizes that every situation is unique and that individuals react to sexual harassment differently. The proposed regulation seeks to ensure that schools honor complainants' wishes about how to respond to the situation, including increased access to supportive measures."
- **"Fair Process:** The proposed regulation is grounded in core American principles of due process and the rule of law. It seeks to produce more reliable outcomes, thereby encouraging more students to turn to their schools for support in the wake of sexual harassment and reducing the risk of improperly punishing students."

9

Proposed Regulations:
Significant Substantive Changes

10

Proposed Regulation
Sexual Harassment Definition

- Previous OCR guidance required schools to investigate "unwelcome conduct of a sexual nature"
- 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)

11

Proposed Regulation
Sexual Harassment Definition

- Proposed sexual harassment definition:
 - "Unwelcome conduct that is so severe, pervasive and objectively offensive that it denies a person access to the recipient's education program or activity"
 - This is SCOTUS definition
 - Intended to "promote protection of free speech and academic freedom"
- Proposed regulation:
 - No need to investigate "unwelcome conduct of a sexual nature" that falls below threshold

12

Decision Point: Sexual Harassment Definition

- OCR Background & Summary:
 - “Within due process guardrails, . . . [schools] retain pedagogical control over their educational environments.”
 - “For example, the regulation **does not** prevent (or require) a school from using affirmative consent in the school’s code of conduct, and
 - **does not** prevent a school policy from prohibiting sexual behavior that does not meet the Title IX definition of harassment.”

13

Decision Point: Sexual Harassment Definition

- 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

14

Proposed Regulation re Scope of Institutional Responsibility

- Institution must respond when it has:
 - “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”

15

Proposed Regulation re Scope of Institutional Responsibility

- “Formal complaint” triggering response obligation is:
 - Document signed by complainant or Title IX Coordinator alleging covered sexual harassment and requesting initiation of grievance procedures (as outlined below)

16

Proposed Regulation: “Actual Knowledge”

- “Actual knowledge”:
 - School has actual knowledge when report is made to “official with authority to take corrective action”
 - Title IX Coordinator will always be such an official
 - Fact-specific inquiry regarding other officials (fair to assume narrow definition)
 - “Mere ability or obligation to report” does not meet threshold

17

Decision Point: “Actual Knowledge”

- Given narrowing of responsibility to respond to reports to “official with authority to take corrective action”
- 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

18

Proposed Regulation: School'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

19

Decision Point: School's "education program or activity"

- "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"

20

Proposed Regulation: "person in the United States"

- Proposed regulation limits Title IX to discrimination "against a person in the United States"
- OCR Summary: person's being "in the United States" (affecting, for example, study abroad programs); this is a necessary precondition because the text of the Title IX statute limits protections to "person[s] in the United States"

21

Decision Point: "person in the United States"

- "Importantly, nothing in the proposed regulations would prevent [a school] from initiating a student conduct proceeding . . . [regarding reported] sexual harassment that occurs . . . (. . . as to conduct that harms a person located outside the United States, such as a student participating in a study abroad program)."
- Given this "flexibility", schools **will have to decide** whether to prohibit and investigate sexual misconduct that occurs outside the U.S.

22

Proposed Regulation: "Deliberate Indifference"

- OCR adopts SCOTUS civil liability standard in administrative enforcement context:
 - Schools must respond to reports of covered sexual harassment (as newly defined) in manner that is not "deliberately indifferent"
 - "Deliberately indifferent" means "clearly unreasonable in light of the known circumstances"

23

Proposed Regulation: "Safe Harbors"

- Proposed regulation provides "safe harbors" from OCR enforcement
- If school follows procedures in 106.45 (outlined below) in response to formal complaint, its response:
 - is not "deliberately indifferent" (more applicable to complainant claims), and
 - "does not otherwise constitute discrimination under Title IX" (more applicable to respondent claims)

24

Proposed Regulation: "Safe Harbors"

- Title IX Coordinator "must file a formal complaint" if they have "actual knowledge regarding reports by multiple complainants of conduct by the same respondent that could constitute sexual harassment"
- If school does so its response is not deliberately indifferent (even if complainants choose not to participate in investigation, and no disciplinary action can be taken)

25

Proposed Regulation: "Safe Harbors"

- School is not deliberately indifferent when in absence of formal complaint it:
 - Offers and implements supportive measures to preserve complainant's access to the school's education program or activity, and
 - Informs complainant of right to file formal complaint at that time or a later date
 - Specific notice requirements are detailed in regulation

26

Proposed Regulation: Selected Additional Issues

- OCR won't find deliberate indifference:
 - "merely because [it] would have reached a different determination based on an independent weighing of the evidence"
- "[T]reatment of the respondent may constitute discrimination on the basis of sex under Title IX."

27

"Supportive Measures"

- "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

28

"Supportive Measures"

- Supportive measures "are designed to":
 - Restore or preserve access to school's education program or activity, without unreasonably burdening the other party
 - Protect the safety of all parties and the school's educational environment, and
 - Deter sexual harassment

29

"Supportive Measures"

- Supportive measures 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 the campus
 - And other similar measures

30

- Emergency removal may still be appropriate, provided that school:
 - Undertakes “individualized safety and risk analysis
 - Determines that an immediate threat to the health or safety of students or employees justifies removal, and
 - Provides respondent with notice and opportunity to challenge decision immediately following the removal
- Administrative leave of non-students during investigations also permitted

31

Proposed Regulations: Significant Procedural Changes

32

- “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”

33

- “To achieve fairness and reliable outcomes, the proposed regulation would require **due process protections**, including: . . .
 - The clear and convincing evidence or preponderance of the evidence standard, subject to limitations
 - The opportunity to **test the credibility** of parties and witnesses through **cross-examination**, subject to ‘rape shield’ protections”

34

- “To achieve fairness and reliable outcomes, the proposed regulation would require **due process protections**, including: . . .
 - Written **notice of allegations** and an equal opportunity to **review the evidence**
 - Title IX Coordinators, investigators, and decision-makers **free from bias or conflicts of interest** and
 - **Equal opportunity for parties to appeal**, where schools offer appeals.”

35

- The proposed procedural changes, if adopted as proposed, will require a comprehensive overhaul of Title IX policies
- New language regarding various notices, presumptions of innocence, and revised hearing procedures will be necessary
- With that qualification, in interest of time we will address here the most dramatic proposed changes

36

Proposed Procedural Changes

- Proposed regulations:
 - Must investigate “formal complaints”
 - Must satisfy certain notice and ongoing notice requirements
 - Must produce investigation report with certain elements
 - Must give parties opportunity to review evidence as detailed in proposed regulations

37

Decision Point: Dealing with
Non-Title IX Sexual Misconduct

- Proposed regulations:
 - If the conduct alleged by the complainant would not constitute sexual harassment as defined in proposed regulations even if proved or did not occur within the recipient's program or activity, the recipient must dismiss the formal complaint with regard to that conduct
 - However, schools can still prohibit and investigate sexual misconduct that is outside proposed Title IX definition
 - Schools **will have to decide** whether to maintain a separate procedure for sexual misconduct that is not covered by proposed Title IX definition

38

Proposed Procedural Changes

- Proposed procedures would require that schools must:
 - (i) Ensure that burden of proof and burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties
 - (ii) Provide equal opportunity for parties to present witnesses and other inculpatory and exculpatory evidence;
 - (iii) Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence

39

Proposed Procedural Changes

- Proposed procedures would require that schools must:
 - (iv) Provide parties with same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, and not limit the choice of advisor or presence for either the complainant or respondent in any meeting or grievance proceeding
 - however, school may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties (and advisors are allowed to conduct cross examination)
 - (v) Provide to the party whose participation is invited or expected written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings with a party, with sufficient time for the party to prepare to participate;

40

“Live Hearings”

- “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.”
- “Such cross-examination at a hearing must be conducted by the party's advisor of choice, notwithstanding the discretion of the recipient . . . to otherwise restrict the extent to which advisors may participate in the proceedings.”
 - Requirements are taken from *Doe v. Baum, Univ. of Michigan, et al.*, 903 F.3d 575, 581 (6th Cir. Sept. 7, 2018)

41

“Live Hearings”

- “If a party does not have an advisor present at the hearing, the recipient must provide that party an advisor aligned with that party to conduct cross-examination.”
- “All cross-examination must exclude evidence of the complainant's sexual behavior or predisposition, unless such evidence about the complainant's sexual behavior is offered to prove
 - that someone other than the respondent committed the conduct alleged by the complainant, or
 - if the evidence concerns specific incidents of the complainant's sexual behavior with respect to the respondent and is offered to prove consent.”

42

“Live Hearings”

- “At the request of either party, the recipient 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.”
 - Rationale taken from *Doe v. Baum* (6th Cir. 2018)
- “The decision-maker must explain to the party’s advisor asking cross-examination questions any decision to exclude questions as not relevant.”

43

“Live Hearings”

- “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”
 - Rationale taken from *Doe v. Baum* and other Sixth Circuit precedent

44

“Live Hearings”

- Ramifications of live hearings with cross examination by attorney advisors will be enormous, e.g.:
 - Decision-maker will have to control attorneys
 - Beyond “relevance” and “rape shield” controls, there are no parameters as to what decision-maker can do to control hearings
 - Cost of providing advisors for parties will be significant
 - Likely to have significant impact on willingness of complainants to participate

45

Prohibition of Single-Investigator Model

- Proposed regulation:
 - “The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility.”
- This and “live hearing” requirement effectively prohibit “single investigator” and “investigation only” models

46

Standard of Evidence

- Schools may use either:
 - preponderance of the evidence standard or
 - clear and convincing evidence standard
- May employ preponderance of the evidence standard only if use that standard for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction

47

Decision Point: Standard of Evidence

- Must also apply same standard of evidence for complaints against students as it does for complaints against employees, including faculty
- But, can choose to use clear and convincing for sexual harassment only, even if use preponderance for other types of misconduct
- Schools **will have to decide** whether to use preponderance or clear and convincing standard and
- Schools **will have to decide** whether to use clear and convincing standard for sexual harassment only, even if use preponderance for other types of misconduct

48

- Current Regulation states that:
 - “A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part.”
 - 34 CFR 106.8(b) (emphasis added)

49

- Proposed regulation (preamble):
 - “Employees of a school may have rights under both Title IX and Title VII. To the extent that any rights, remedies, or procedures differ under Title IX and Title VII, this provision clarifies that nothing about the proposed regulations is intended to diminish, restrict, or lessen any rights an employee may have against his or her school under Title VII.”
 - “Proposed section 106.8(d) would clarify that the recipient’s policy and grievance procedures apply to all students and employees”
- Impact of live hearing/cross examination requirements to existing employee procedures could be very significant

50

- Schools may facilitate informal resolution of sexual assault reports if:
 - Parties are provided written notice of:
 - The allegations
 - The requirements of the informal resolution process, including any rule that precludes parties from resuming formal complaint process
 - Any consequences from participating, including records that will be maintained or could be shared
 - School obtains parties’ voluntary, written consent to informal resolution process

51

- Contrary to 9/22/17 OCR Q&A (which said that schools could choose to allow appeals by respondents only), proposed regulations provide that:
 - if either party has a right to appeal, both parties have a right to appeal

52

- “An equitable resolution for a complainant must include remedies where a finding of responsibility for sexual harassment has been made against the respondent”
 - “Such remedies must be designed to restore or preserve access to the recipient’s education program or activity”
- “An equitable remedy for a respondent must include due process before any disciplinary sanctions are imposed”

53

- Proposed regulation re training:
 - Schools “must ensure that coordinators, investigators, and decision-makers receive training on both the definition of sexual harassment and how to conduct an investigation and grievance process, including hearings, if applicable, that protect the safety of students, ensure due process protections for all parties, and promote accountability.
 - “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”

54

OCR Commentary

- 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 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)

55

Proposed Regulation: Recordkeeping

- 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

56

Notice and Comment Process

57

Notice and Comment Process

- Public will have 60 days from when NPRM posted in Federal Register (later in week of 11/19/18) to submit comments
- Public can comment on any aspects of proposed regulations
- Comments may be submitted by www.regulations.gov portal or postal mail
- Electronic submissions should be in Word format

58

Notice and Comment Process

- OCR seeks public comment on several "directed questions" including:
 - **"Applicability of the rule to employees.** Like the existing regulations, the proposed regulations would apply to sexual harassment by students, employees, and third parties. The Department seeks the public's perspective on whether there are any parts of the proposed rule that will prove unworkable in the context of sexual harassment by employees, and whether there are any unique circumstances that apply to processes involving employees that the Department should consider."

59

Notice and Comment Process

- OCR seeks public comment on several "directed questions" including:
 - "The proposed rule would require recipients to ensure that Title IX Coordinators, investigators, and decision-makers receive training on the definition of sexual harassment, and on how to conduct an investigation and grievance process, including hearings, that protect the safety of students, ensures due process for all parties, and promotes accountability.
 - The Department is interested in seeking comments from the public as to whether this requirement is adequate to ensure that recipients will provide necessary training to all appropriate individuals"

60

Notice and Comment Process

- OCR seeks public comment on several “directed questions” including:
 - whether it is desirable to require a uniform standard of evidence for all Title IX cases rather than leave the option to schools to choose a standard, and if so then what standard is most appropriate, and
 - if schools retain the option to select the standard they wish to apply, whether it is appropriate to require schools to use the same standard in Title IX cases that they apply to other cases in which a similar disciplinary sanction may be imposed

61

Notice and Comment Process

- OCR seeks public comment on several “directed questions” including:
 - Department seeks comments on the extent to which institutions already have and use technology that would enable the institution to fulfill requirement that “live hearings” be conducted through use of remote access technology if requested by parties without incurring new costs or
 - whether institutions would likely incur new costs associated with this requirement

62

Preliminary Thoughts on Navigating Proposed Regulatory Environment

- Consider school's position on **decision points** now, even during notice/comment period
- Recognize that substantial process revisions will be necessary
- Recognize that professionalizing hearing officers will likely be required

63

Preliminary Thoughts on Navigating Proposed Regulatory Environment

- Consider that confining Title IX-covered cases to Title IX-specific process
 - and adjudicating non-Title IX-covered sexual misconduct, dating/domestic violence and stalking through a separate Clery-compliant process
- may be most efficient and appropriate

64

Contact Information

Jeffrey J. Nolan
jnolan@dinse.com

(802) 864-5751

65