



*The Women's Bar Association
of the State of New York*

presents

*Convention 2019
Continuing Legal Education Series*

**Title IX:
Changes Under the New Administration
and What It Means for Women**

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8:30 am - 9:30 am

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The Westin Savannah Harbor Golf Resort and Spa
Savannah, Georgia

Title IX of the Education Amendments of 1972

- *“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any educational program or activity receiving federal financial assistance.”*
- 20 U.S.C. § 1681 & 34 C.F.R. Part 106 (1972)

Brief Historical Overview of the Evolution of Title IX

- **1975-** The Dept. of Health, Education and Welfare issues regulations regarding Title IX enforcement, especially with regards to athletics. High schools and colleges that receive federal financial funding are given three years to comply.
- **1979- Cannon v. U. Chicago, 441 U.S. 677 (1979)**, The Supreme Court holds there is a private right of action under Title IX.
- **1980- Alexander v. Yale, 631 F.2d 178 (2d. Cir. 1980)** establishes that sexual harassment is illegal because it is a form of discrimination under Title IX.

Brief Historical Overview of the Evolution of Title IX

- **1982- North Haven Board of Ed. V. Bell, 456 U.S. 512 (1982)**, the Supreme Court determines that employment discrimination comes under Title IX's umbrella and that Title IX applies to both students and employees.
- **1988-** Congress passes the **Civil Rights Restoration Act**, which establishes that any institution that receives federal funding must comply with Title IX in all of its programs and activities.
- **1992- Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992)**, the Supreme Court held that people can sue for monetary damages under Title IX.

Brief Historical Overview of the Evolution of Title IX

- **1998-Gebser v. Lago Vista Indep. School, 524 U.S. 274 (1998)**, The Supreme Court ruled that you will not be able to recover monetary damages from an educational institute for a sexual harassment claim unless:
 - An official from the institution had “actual notice” of the harassment;
 - The official had authority to “institute corrective measures”; and
 - The official “failed to adequately respond” to the harassment and in failing to respond, must have acted with “*deliberate indifference*.”

Brief Historical Overview of the Evolution of Title IX

- **1999- Davis v. Monroe County Bd. of Ed., 526 U.S. 629 (1999)**, the Supreme Court elaborated on *Gebser*, clarifying that “deliberate indifference” is a response that is “clearly unreasonable in light of the known circumstances.” The harassment must go beyond teasing and bullying to harassment that is “so severe, pervasive, and objectionably offensive that it deprives the victims of access to the benefits of education.”

Title IX Under the Obama Administration

- **2011 Dear Colleague Letter-** The Education Department released guidance on how schools should address sexual assault/misconduct in order to comply with Title IX.
 - established 3 steps for schools to follow in order to be in compliance with Title IX:
 - 1. Distribute Notice of Non-Discrimination
 - 2. Designate a Title IX Coordinator
 - 3. Adopt & publish Title IX grievance procedures
 - Required use of the “preponderance of evidence” standard
 - Discouraged cross-examination of accusers
 - Recommended appeals process for both sides
 - Emphasized training for students and those involved with resolution of Title IX complaints
 - Promoted interim measures and long term remedies

Title IX Under the Obama Administration

- **Dear Colleague Letter 2015-**
 - Reminded schools of importance of designating a Title IX Coordinator
 - Included Title IX Resources Guide for Coordinators, outlining their responsibilities, need for them to be visible, need for schools to support them and provide them with training

Title IX Under the Obama Administration

- **2014 Q&A on Title IX and Sexual Violence-** provided clarification on confidentiality, reporting, training, education & prevention, interim measures, investigation, disciplinary process and appeals
 - Who are responsible employees
 - Education regarding sexual violence, trauma
 - Bystander intervention
 - Resources for reporting parties

Title IX Under the Obama Administration

- **Dear Colleague Letter 2016-**
 - Clarified rights of transgender students under Title IX, in particular:
 - Provide safe and non-discriminatory environments
 - Respect students' chosen name and pronouns
 - Ensuring the use of restrooms, locker rooms and housing, consistent with students' chosen gender identities and providing gender inclusive and/or private facilities
 - Maintaining students' privacy on school records
 - Schools must treat students in accordance with their chosen gender identity

Title IX Under the Trump Administration

- **February 2017-** the ED withdrew the Dear Colleague Letter of 2016
- **September 2017-** The ED rescinded the Dear Colleague Letter of 2011 and the 2014 Q&A on Title IX and Sexual Violence
- **November 2018-** The ED introduces the proposed regulations for Title IX
 - Notice of proposed regulations was published in the *Federal Register* on November 29, 2018, and started a 60 day comment period, which ended on January 30, 2019

Context behind the New Proposed Title IX Regulations

- The proposed rules would amend and add to the ED's current Title IX rules
- The ED, and Betsy DeVos have claimed that significant changes were needed and that these new changes will reduce the liability of educational institutions, strengthen due process rights for the accused, and produce more reliable outcomes from disciplinary hearings
- Relies on decisions in *Gebser* and *Davis*
- Uncertain when the final rules will be promulgated or become effective
 - The ED is currently in the process of reviewing these comments; it must review every single one before the final version of the rules are promulgated

Key Additions Under Proposed Title IX Regulations

- **Obligation to Respond to Respond to Complaint of Sexual Harassment**
- Under the proposed new rules, only educational institutions with “*actual knowledge*” of “sexual harassment” regarding an *educational program or activity of the school within the United States*, “must respond in a manner that is *not deliberately indifferent*.”
 - All of the above factors above must be met for a duty to arise for an institution to investigate
- This changes the obligation of an institution to respond to a complaint of sexual harassment
- Institutions are no longer accountable if they “reasonably should know” of a sexual harassment complaint and fail to investigate

Key Additions Under Proposed Title IX Regulations

- **Definition of Sexual Harassment**

- (a) an employee “conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct”;
- (b) 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
- (c) sexual assault, as defined in the Clery Act

Key Additions Under Proposed Title IX Regulations

- **Definition of Actual Knowledge**
 - Notice of incident must be given to the Title IX Coordinator or any official with the authority to take corrective action
 - Simple fact that it happened on campus or under otherwise institution's control, not enough to constitute "actual knowledge"
 - Not enough that school "should have known"
 - Mere ability or obligation to report does not qualify an employee to take corrective action

Key Additions Under Proposed Title IX Regulations

- **Educational Programs or Activities Covered by Title IX**
 - ED urges schools to consider “...factors such as whether the harassment occurred at a location or under circumstances where the school owned the premises, exercised oversight, supervision or discipline over the location or participants, or funded, sponsored, promoted or endorsed the event or circumstance.”
 - Only people inside the United States are covered

Key Additions Under Proposed Title IX Regulations

- **New Deliberate Indifference Standard**
 - If a school is obligated to respond to a complaint of sexual discrimination, it must do so in a manner that is *not deliberately indifferent*
 - Here, the ED adopted the definition set forth in *Davis* for “Deliberate Indifference” as “a response to sexual harassment that is clearly unreasonable in light of the known circumstances.”
 - Examples of not being deliberately indifferent:
 - If in the absence of a formal complaint, an institution offers and implements supportive measures
 - If after receiving formal complaint, institution follows proposed grievance procedures
 - An institution would not be deliberately indifferent solely because it determined that it was not obligated to respond to a complaint of sexual harassment and ED concludes otherwise

Key Additions Under Proposed Title IX Regulations

- **Proposed New Grievance Procedure**
 - More court-room like approach
 - Emphasis on equitable treatment for both sides
 - Changes regarding standard of evidence
 - Both sides entitled to advisor of choice
 - Live hearing required
 - Cross-examination permitted
 - Decision maker cannot be Title IX Coordinator or Investigator
 - No timeframe for resolving allegations
 - No obligation to allow for an Appeal

Key Additions Under Proposed Title IX Regulations

- **Advisors**

- Both sides would be entitled to advisors of their choice during grievance procedure,
 - Students can choose an attorney as their advisor
- Institutions cannot limit choice of advisor
- Institutions can restrict advisor's participation in proceedings as long as restrictions are applied equally to both sides

Key Additions Under Proposed Title IX Regulations

- **Hearings**

- Prior to hearing and completion of investigative report, each party must receive all the evidence and have 10 days to provide a written response
- **ED mandates that all hearings in institutions for higher education be live**
 - No such restriction for K-12
- Reviewable evidence must be available at the hearing

Key Additions Under Proposed Title IX Regulations

- **Cross-Examination Must be Permitted During Hearings**
 - Departure from Obama Era
 - Parties do not conduct cross-examination themselves, rather their advisors would do so
 - If a party is without an advisor, then the school must provide one
 - If a party does not submit to cross-examination, then the adjudicator is not permitted to rely on their statements in reaching a determination
 - Cross-Examination would exclude evidence of the complainant's sexual behavior or predisposition, with 2 exceptions:
 - To prove someone other than the respondent committed the alleged conduct;
or
 - The evidence "concerns specific incidents of the complainant's sexual behavior with respect to the respondent and is offered to prove consent."
 - If the adjudicator disallows certain questions during cross examination, they must provide a rationale

Key Additions Under Proposed Title IX Regulations

- **Standard of Evidence**

- Institutions would be given option of using “preponderance of the evidence” (more likely than not) or “clear and convincing” (more than 75% likelihood); this is change from Obama era, where schools were encouraged to use “preponderance of evidences”
- However, if institutions choose to use “preponderance of the evidence,” then they must use the same standard for other conduct code violations that do not involve sexual harassment but “carry the same maximum disciplinary sanction
- Same standard must apply to students and employees

Key Additions Under Proposed Title IX Regulations

- **Outcome Determination**

- Comprehensive written determination to be issued by adjudicator that includes:

- Provisions of policy that were allegedly violated
 - detailed description of all procedural steps taken from initiation of complaint until issuance of determination
 - Factual findings supporting determination
 - Application of school policy to facts
 - “statement of, and rationale for, the result as to each allegation,” including determination of responsibility and sanctions and remedies
 - Must explain rights to appeal, if any

Key Additions Under Proposed Title IX Regulations

- **Appeals**
 - **Institutions not obligated to allow an appeal**
 - Departure from Obama era
 - Must be offered to both sides
 - Where finding of responsibility, a complainant's grounds for appeal are limited to contesting the sufficiency of remedies
 - The complainant is “not entitled to a particular sanction against the respondent” as basis for an appeal
 - Appeal decision-maker must be different from investigator and adjudicator, must be conflict-free

Key Additions Under Proposed Title IX Regulations

- **Informal Resolution Permitted**
 - the proposed rules allow the parties to resolve sexual assault complaints through mediation and other informal procedures
 - Both sides must provide voluntary, written consent
 - This process can begin at any time and does not require full investigation or adjudication

Statistics Regarding Sexual Assault on Campus

- 11.2% of all students experience rape or sexual assault through physical force, violence, or incapacitation (among all graduate and undergraduate students)
- Among graduate and professional students, 8.8% of females and 2.2% of males experience rape or sexual assault through physical force, violence or incapacitation
- Among undergraduate students, 23.1% of females and 5.4% of males experience rape or sexual assault through physical force, violence or incapacitation
 - Source:
 - David Cantor, Bonnie Fisher, Susan Chibnail, Reanna Townsend, et. al., Association of American Universities (AAU), Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct (September 21, 2015).

Implications of Proposed Rules

- Title IX disciplinary proceedings will now more closely represent courtroom proceedings
- Narrows the circumstances in which a Title IX complaint can be brought:
 - **Old definition** of sexual harassment (prior to the new proposed rules)was unwelcome conduct of a sexual nature that could include unwelcome sexual advances, demands for sexual favors, and other verbal, non-verbal or physical conduct of a sexual nature.
 - **New definition** of sexual harassment is unwelcome conduct that **must be severe *and* pervasive *and* objectively offensive**
 - A Sexual Assault could be severe but not pervasive

Implications of Proposed Rules

- Limits obligation of school to respond to complaints of sexual harassment that occur outside their educational programs or activities in the United States
 - Places not covered:
 - Off campus housing
 - Off campus fraternity houses
 - Study Abroad
 - Presents issues for students attending commuter schools or engaged in study abroad programs
 - Currently, all students are covered by institution's code of conduct regardless of their residence, and are covered during study abroad

Implications of Proposed Rules

- Institutes are only obligated to investigate a complaint if it is reported to the proper official
 - If alleged victim reports incident to victim's advocate, resident advisor, professor or other employee who is not a designated "official with authority to institute corrective measures," the institute does not have any responsibility for complaint
 - Currently, institutes bear responsibility to investigate complaints if they "knew or reasonably should have known" which would include reports made to RAs, professors or people other than the Title IX Coordinator
 - New Proposed Rules do not make clear who would be an "official with authority" or how that information would be conveyed to students, and if there would be requirements for how it was conveyed

Implications of Proposed Rules

- Issues raised by use of live cross-examination
 - If one party has an attorney, but the other party cannot afford one, will the school have to provide one?
 - University administrators overseeing live hearing do not have legal training and would be potentially overseeing cross examination by attorneys and making rulings on their questions

Implications of Proposed Rules

- Could discourage reporting of sexual assault/misconduct, especially with emotional distress from cross-examination
- Potential that institutes will decrease attention to sexual misconduct
- Grievance procedures made more equitable to both sides
 - Institutes discouraged from favoring one party over another throughout grievance procedure

FUTURE OF TITLE IX

- In contrast to Obama-era guidance, Betsy DeVos's proposed rules are going through a legal process to make them binding law, which will make them difficult to undo once adopted
- The ED received over 100,000 comments to review, there is still possibility that there might be some amendments to the final regulations
- There will very likely be lawsuits once the rules are promulgated
- Conflicts with divergent state laws, like New York's Enough is Enough

Sources

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