Information Session: The Department of Education’s Proposed Title IX Rules

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Outline of Today’s Presentation

• Review the Department of Education’s proposed Title IX rules released on November 16, 2018.
• Provide information on the deadline for comments.
• Discuss the DOE’s process after the deadline for comments.
• Discuss possible impact on Board Policy 1B.3 and System Procedure 1.B.3.1.
• Resources.
• Questions/Discussion.
Background: September 22, 2017 OCR Letter

• Withdraws.
  – Questions and Answers on Title IX and Sexual Violence dated April 29, 2014.

• Rationale.
  – “documents have led to the deprivation of rights for many students.”
  – Lack of clarity.
  – No notice and comment rule-making.
  – DEPARTMENT SIGNALED INTENT TO RULE-MAKE.

• Interim Guidance.
Timeline

- April 4, 2011 OCR DCL on Sexual Violence.
  - Statute effective March 7, 2014.
  - Rules effective July 1, 2015.
- April 2014 OCR Q&A on Title IX and Sexual Violence.
- May 2015 Minnesota Campus Sexual Assault Legislation.
Timeline, continued

- September 22, 2017 OCR Letter withdrawing previous guidance and issuing interim guidance.
- 60 Day Comment Period = January 28, 2019.
- Final Rule = Some time in 2019??
Information Regarding the Proposal


• This includes:
  – The rule.
  – Deadlines.
  – The mechanics of commenting.

• Many entities producing summaries of the proposal.

• Note that all comments will be publicly available on the federal rule-making portal.
What Happens After January 28, 2019?

• DOE must organize and review all comments.

• Potential outcomes include:
  – Proceed with a final rule largely “as is.”
  – Modify/clarify draft and then proceed with a final rule.
  – Delay or pull rule.

• No set timeframe – some commentators estimate a final rule by the summer of 2019.
Key Elements of the Proposed Rule
Definition of Sexual Harassment

- Defines Sexual Harassment actionable under Title IX as:
  - School employee conditioning an educational benefit or service upon a person’s participation in unwelcome sexual conduct (quid pro quo harassment).
  - 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 school’s educational program or activity.
  - Sexual assault, as defined by the Clery Act.
What Triggers a School’s Obligation to Respond?

• A school must respond when:
  – The school has actual knowledge of sexual harassment.
    • Requires notice to a school official who has authority to take corrective action (such as Title IX officer).
  – That occurred within the school’s own education program or activity.
    • Fact-specific inquiry.
    • Factors include ownership of premises, exercising oversight, supervision, funded, sponsored, or endorsed the event.
  – Against a person in the United States.
When is a School Liable?

- Only if the school is “deliberately indifferent” to known sexual harassment.
- This means the response is “clearly unreasonable in light of known circumstances.”
Safe Harbors

- A school is not deliberately indifferent if they respond meaningfully to every known report of sexual harassment (typically by providing supportive measures).
- A school is not deliberately indifferent if it investigates a formal written complaint pursuant to the required due process protections.
- Notice the important distinction in the draft regulations between a report and a complaint.
Supportive Measures

• Designed to preserve or restore a student’s access to the education program or activity, with or without a formal complaint (“non-disciplinary, non-punitive individualized services” available to both complainant and respondent).

• Examples
  – Academic course adjustments.
  – Counseling.
  – No-contact orders.
  – Dorm room reassignments.
  – Leaves of absences.
  – Class Schedule changes.
Sanctions

- Should be designed to restore or preserve access to the educational program or activity.
Due Process

• Required Enhanced Due Process Protections:
  – Written notice of allegations and an equal opportunity to review the evidence.
  – Provide both parties with equal access to review all the evidence (in an electronic format such as a file sharing platform) that the school has collected and give each party ten days to respond before finalizing investigative report.
  – Provide both parties the final investigative report at least ten days before the live hearing.
  – Title IX Coordinators, investigators, and decision-makers free from bias or conflicts of interest.
Due Process

• Required Enhanced Due Process protections:
  – A presumption of innocence.
  – Burden of Proof on the school.
  – Live Hearings before imposition of sanction;
  – Prohibition on the single-investigator model.
  – School has discretion to set standard of proof (with caveats).
  – Cross-Examination (with caveats).
    • Must provide separate rooms with technology to allow the parties to see and hear the party answering questions.
    • Must provide each party an advisor “aligned with that party” who will conduct the cross-examination.
  – Equal opportunity for appeals – if school allows appeals.
Standard of Evidence

• Campus discretion to have either the preponderance of the evidence standard or a clear and convincing standard.

• But:
  – Can only have a preponderance standard if the school also uses that same standard for other student conduct violations and for complaints against employees, including faculty.

• Proposal has a directed question asking for comments on the standard of evidence issue.
Informal Resolution

• School may facilitate an informal resolution process at any time before reaching a determination regarding responsibility provided that each party provides their voluntary, written consent to the process.
Recordkeeping

• Institution must keep the following records for a period of at least 3 years:
  – Each investigation, including any determination regarding responsibility and any disciplinary sanction.
  – Any appeal and the results therefrom.
  – Any information resolution.
  – All materials used to train coordinators, investigators, and decision-makers.
  – Documentation, including supportive measures, showing response not clearly unreasonable.
Board Policy 1B.3 Sexual Violence and System Procedure 1B.3.1

• One system-wide Policy and Procedure.
  – Students and employees.

• Investigator/Decision-Maker Model.
  – Investigator.
  – Decision-Maker.
  – Appeal.
  – Ch. 14 or CBA.

• MOST OBVIOUS IMPACT = TIMING OF LIVE HEARINGS.
Next Steps

• Review rules and consider possible impacts.
• Comments due by January 28, 2019.
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• Await possible final rule.
• Anticipate adjusting policy, procedures and practices through normal processes if and when final rule is published.
• Utilize existing policy, procedures, and practices in the interim.
Resources

- Webinars.
- MOU Template and Memo.
- OHE Guidance.
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