

Investigations Under New Title IX Regulations

July 9, 2020



Littler[®]

Presented by



**JACQUELINE PHIPPS
POLITO**

Office Managing
Shareholder
Littler Rochester
JPolito@littler.com
585.203.3413



NATALEE B. MARION

Associate
Austin, Texas
Nmarion@littler.com
512.982.7250



IVIE A. SERIOUX

Associate
New York, New York
IGuobadia@littler.com
212.583.2681

Agenda

- The Final Rule
- The New Standard
- The Investigation
- The Grievance Process
- Live Hearings, Cross-Examination and Advisors



Status of the Regulations

- On May 6, 2020, Education Secretary Betsy DeVos Released the Final Rule that Governs how Sexual Assault Investigations are Handled on College Campuses.
- Published in the Federal Register on May 19, 2020.
- Effective Date: August 14, 2020.
 - No expressly stated “grace period.”



The Framework

- The new regulations codify the Supreme Court's rulings in *Gebser* and *Davis* to assess potential violations:
 - Whether the institution had actual knowledge.
 - Definition of actionable sexual harassment.
 - Whether the institution's response demonstrated deliberate indifference.

Actual Knowledge

- Actual knowledge “means 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.”
- Who may have actual knowledge?
 - Title IX Coordinator, or
 - “[A]ny official . . . who has authority to institute corrective measures on behalf of the recipient.”
 - Institutions may determine who will be an individual with authority through policy.
- Be mindful that institutional policy may create contractual liability.
 - For example, individuals listed in institutional policies as authorized to implement sanctions may be duly authorized for Title IX purposes.

What is a Report and Who may make a Report?

- A formal complaint is a document filed by a complainant or signed by the Title IX Coordinator.
- A complainant must be either participating in or attempting to participate in the educational program or activity of the recipient with which the formal complaint is filed.
- There is no time limit or statute of limitations on a complainant's decision to file a formal complaint.



Narrowed Scope of Sexual Harassment

- Under the prior guidance, a single incident, if severe enough, might meet the definition of sexual harassment.
- The new rules state that sexual harassment must be unwelcome conduct that is so “severe, pervasive and objectively offensive” that it effectively denies a person access to the school’s education programs or activities.
 - An isolated incident of unwelcome remarks of a sexual nature, for example, would not meet the revised definition.
 - The new rules also clarify the sexual harassment definition to specifically include sexual assault, dating violence, domestic violence, and stalking, which need not satisfy the severe and pervasive standard.

Mandatory Response Obligations

- Removal of “Safe Harbor” provisions
 - The new regulations make it clear that recipients are always required to follow the mandatory grievance procedures in section 106.45 in response to all formal complaints, and are always required to comply with the response obligations specified in section 106.44(a), even if a formal complaint is not filed.
- Supportive measures
 - Individualized services reasonably available that are non-punitive, non-disciplinary, and not unreasonably burdensome to the other party while designed to ensure equal educational access, protect safety, or deter sexual harassment.
- Equal treatment in a grievance process
- Sanctions
 - The new regulations do not mandate or scrutinize a recipient’s decision with respect to disciplinary sanctions imposed on a respondent after a respondent has been found responsible for sexual harassment, so long as the institution follows the mandatory grievance procedures in § 106.45.

Standard of Evidence

- A recipient's grievance process must:
 - State whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard;
 - Apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty; and
 - Apply the same standard of evidence to all formal complaints of sexual harassment.
- Other Considerations:
 - State laws
 - Faculty handbooks
 - Faculty processes such as tenure revocation

The Investigation

- Written notice of the complaint must be provided to both parties that outlines the allegations and informs them of their right to select an advisor.
- There must be an equal opportunity for the parties to present witnesses and evidence and not restrict either party from discussing the allegations or from gathering evidence (i.e. no “gag orders”).
- An investigation report that fairly summarizes the relevant evidence must be drafted and provided to the parties at least 10 days prior to a hearing for their review and written response.



The Investigation

- Reasonably prompt time frames and good cause for extensions;
- Presumption of respondent not responsible,
- Burden of proof, and standards of evidence and same across all investigations;
- Mandatory dismissals;
- Right of complainant to dismiss; and
- Role of advisors during investigation (versus hearings).



The Investigation

- All relevant evidence must be disclosed to the parties.
- Privilege and potential waiver:
 - The regulations contemplate full discovery, arguably without the overbroad and unduly burdensome protections in litigation. Anything provided to the investigators has to be provided to the parties. Thus, if an employee email is searched, in-house counsel will need to conduct a privilege review BEFORE it is sent to the investigator.



The Investigation

- Single investigator/adjudicator model rejected.
- The decision maker at a hearing cannot be the same person who served as the Title IX Coordinator or investigator.
 - What is the role of the decision-maker?
- A Title IX Coordinator can serve as an investigator.
- Investigator must receive training on the definition of sexual harassment, how to conduct an investigation, how to be impartial – including avoiding conflict of interests, bias and prejudgment of the facts at issue.
- *See* § 106.45(b)(7)(i).

A “Good” Investigation Defined:

- Backed by policy with complaint procedure
- Trained professional to receive complaint
- Timely investigation
- Interview witnesses
- Speak with accused
- Documented interviews
- Documents collected and secured



Documenting the Allegations



Do

- Use objective language
- Group together logically



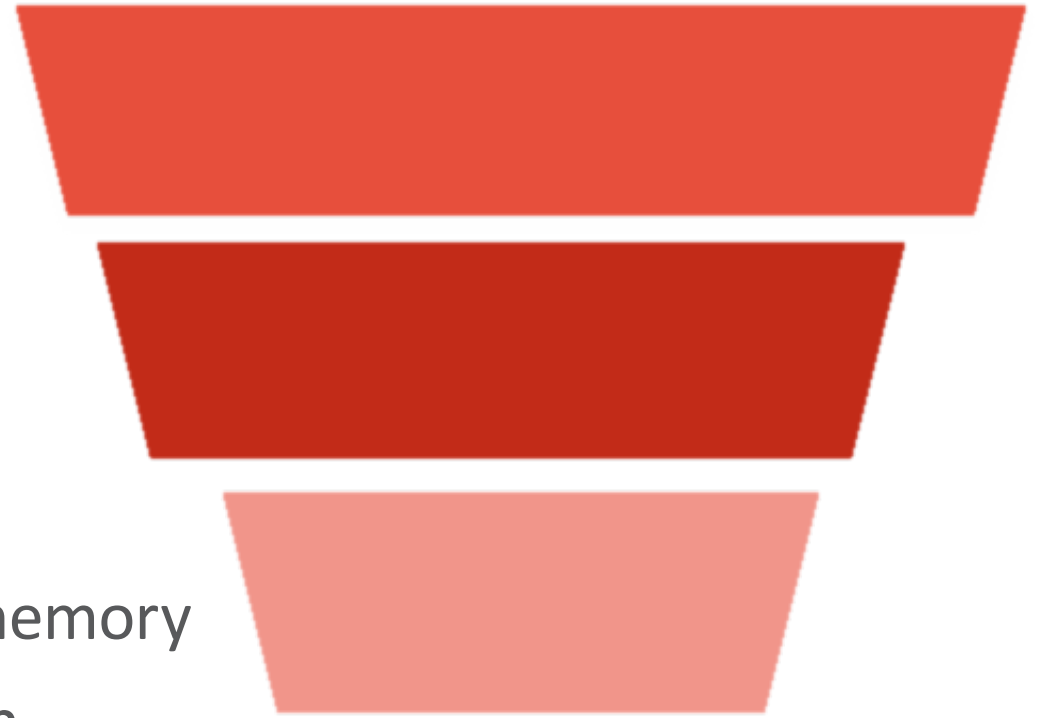
Don't

- Use legal conclusions
- Put words in the complainant or accused mouths

Ask the Right Questions:

Use “Funneled” Questioning

- Open-ended questions
- Aim for all relevant evidence
- Make sure the witness answers the questions fully
- Ask, “Do you remember anything else?”
- Summarize so witness can offer facts that were left out
- Identify other ways to refresh witness’s memory
- Encircle knowledge with wrap-up question



Ask the Right Questions:

Use “Funneled” Questioning

- What? Who? Where? When?
- Don't disrupt train of thought
- Use active listening:
 - Don't be wed to your outline
 - Listen to subtle changes and clarify
- Follow up on cues
 - Watch for eye contact
 - Gestures
 - Body language



Formal Grievance Process

- Emergency Removals and Administrative Leave
 - An institution may remove a respondent from education program or activity under certain circumstances
 - There are no specific timeframes, and institutions are not required to reassess the removal
 - Other considerations:
 - Who will conduct the assessment and what information will it be based on?
 - Where is the line between suspension and accommodating ongoing participation?
 - What will the respondent's ability to challenge it look like?

Hearing Procedures

- Recipient may establish rules governing the hearing process.
- Rules may govern the conduct of advisors, prohibit abusive questioning, specify any objection process
- Other considerations:
 - What rules will be established to govern the hearing?
 - Will parties be required to acknowledge the rules in advance?

Cross Examination and Advisors

- Cross examination must be conducted by each party's advisor, directly, orally, and in real time.
- The institution may not require that the questions be in writing.
- The decision maker may remove disruptive advisors in certain circumstances.
- Cross examination must be evaluated in context, including consideration of stress.
- Other considerations:
 - Who will serve as advisors provided by the recipient?
 - To what extent should recipients prepare parties for cross examination?

Relevancy Determinations

- Decision maker must determine whether questions are relevant and explain any decision to exclude.
- Questions may only be excluded based on relevance.
 - Questions and evidence about complainant's sexual predisposition or prior sexual behavior, unless to prove that someone other than respondent committed the conduct alleged or, if concerning specific incidents of complainant's conduct with respondent, offered to prove consent, are not relevant.
 - The regulations do provide rape shield protections.
 - But, when prior sexual history can be relevant is a point to consider.
- Points to Consider:
 - Who will be the decision maker?
 - How will the decision maker be trained in relevance?
 - What rules will be established to govern the hearing?

Admissions

- If a party is not subject to cross examination, there can be no reliance on their statement in determining responsibility.
- Points to Consider:
 - How to train decision makers to deal with developments concerning statements?
 - How to work with a witness to get them to cross examination?



Use of Hearsay

- The hearsay rule in Title IX hearings
- Potential implications of excluding the statements of those who do not appear.
- The regulations provide for the parties to be in separate rooms during the hearing.
- Point for consideration:
 - The implications of conducting hearings via video conference during the COVID-19 pandemic.

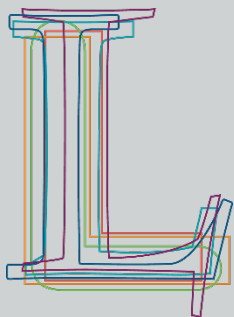
Appeals

- A recipient must offer both parties an appeal from:
 - a determination regarding responsibility, and
 - from a recipient's dismissal of a formal complaint or any allegations therein on the following bases:
 - Procedural irregularity
 - New evidence
 - Conflict of interest or bias
 - Additional bases as offered by the recipient.
- Informal Resolution
- Retaliation
- Record Keeping

Strategic Considerations For Employment Issues

- Intersection of duties under the Final Rule with duties under:
 - Title VII and Ellerth/Farragher in light of the lower standard and impact of mandatory dismissal on Title VII and state law obligations;
- Duties under state law
- When and whether Title IX preempts state law
- Intersection with grievance procedures in CBAs for unionized employees

Key Takeaways and Questions?



Thank You!

This information provided by Littler is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute. Although this information attempts to cover some major recent developments, it is not all-inclusive, and the current status of any decision or principle of law should be verified by counsel.