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SUMMARY OF NOTICE OF PROPOSED RULEMAKING ON TITLE IX REGULATIONS

This summary is based on the Department of Education’s (“ED”) Notice of Proposed Rulemaking dated November 16, 2018, and is specifically targeted at those aspects of the proposed regulations applicable to colleges and universities (often referred to in the proposed regulations as “recipients”).

New Substantive Standards

- For purposes of administrative enforcement, the proposed regulation adopts the Supreme Court’s deliberate indifference standard from *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998) and *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999). Under this standard, an institution with “actual knowledge” of sexual harassment in its education programs or activities must respond in a manner that is not “deliberately indifferent.” The regulation would further define “deliberate indifference” as a response that is “clearly unreasonable in light of the known circumstances.” This definition of deliberate indifference similarly derives from *Davis* and has been widely applied in federal case law.
- The commentary suggests that, under the deliberate indifference standard, institutions have broad discretion to determine appropriate discipline, which the ED will “not second guess.”
- The proposed regulation defines “sexual harassment” to constitute: (1) quid pro quo harassment committed by an employee, (2) “unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it denies a person equal access to the recipient’s education program or activity,” or (3) sexual assault as defined in the Clery Act regulations. The hostile environment definition of sexual harassment tracks the Supreme Court’s decisions in *Gebser* and *Davis*, as well as federal cases applying that standard.
- The regulation defines “actual knowledge” as occurring when either the Title IX coordinator or an “official of the recipient who has authority to institute corrective measures on behalf of the recipient” has notice of “sexual harassment or allegations of sexual harassment.”¹ This definition, as well, largely tracks *Gebser* and *Davis* and their progeny. Under the proposed regulation, constructive notice would be insufficient to trigger an institution’s Title IX obligations.
- Under the proposed regulation, an institution does not have “actual knowledge” if the “official” with knowledge of the harassment is the perpetrator. This tracks the Fifth Circuit’s ruling in *Salazar v. South San Antonio Independent School District*, 690 Fed. App’x 853 (5th Cir. 2017).

¹ The proposed regulations states that, for elementary and secondary schools, actual notice is also triggered when a teacher is aware of sexual misconduct.

- Under the proposed regulation, a person does not have “authority to institute corrective measures on behalf of a recipient” simply because he or she has an obligation to report sexual harassment. This tracks the decisions in *Ross v. University of Tulsa*, 859 F.3d 1280 (10th Cir. 2017) and *Plamp v. Mitchell School District No. 17-2*, 565 F.3d 450 (8th Cir. 2009).

Safe Harbors for Higher Education

- The regulation would create a safe harbor protection such that, if an institution follows its grievance procedures (as defined in new § 106.45) in response to a “formal complaint” of sexual harassment occurring within its education programs or activities, the institution’s response will not be deemed deliberately indifferent.
- A “formal complaint” would be defined as a “document signed by a complainant or by the Title IX Coordinator alleging sexual harassment against a respondent and requesting initiation of the grievance procedures consistent with section 106.45.”
- The regulation would require the Title IX Coordinator to file a formal complaint when the institution has “actual knowledge of reports by multiple complainants of conduct by the same respondent that could constitute sexual harassment.”
- The regulation would state that, in the absence of a “formal complaint”, an institution is not deliberately indifferent when it “implements supportive measures designed to effectively restore or preserve access to the recipient’s education program or activity.” However, the institution would be required to provide written notice to the alleged victim that “the complainant can choose to file a formal complaint at a later time despite having declined to file a formal complaint at the time the supportive measures are offered.”²
- The regulation would define “complainant” as the “individual who has reported being the victim of conduct that could constitute sexual harassment, or on whose behalf the Title IX Coordinator has filed a formal complaint.” Effectively, this would mean a non-victim could not force the institution to initiate grievance procedures by making a formal complaint of conduct that was targeted at someone else.
- “Supportive measures” would be defined as “non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge, to the complainant or respondent before or after the filing of a formal complaint or where no formal complaint has been filed.” Such measures would be intended to “restore or preserve access to the recipient’s

² This safe harbor provision is limited uniquely to institutions of higher education “in recognition that college and university students are generally adults capable of deciding whether supportive measures alone suffice to protect their educational access.”

education program or activity, without unreasonably burdening the other party; protect the safety of all parties and the recipient's educational environment; and deter sexual harassment."

- The commentary gives, as examples of supportive measures, "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."
- The proposed regulation would require the institution to preserve the confidentiality of supportive measures "to the extent that maintaining such confidentiality would not impair the ability of the institution to provide the supportive measures."
- The regulation clarifies that the Title IX coordinator is responsible for "coordinating the effective implementation of supportive measures." This means the Title IX coordinator "must serve as the point of contact for the affected students to ensure that the supportive measures are effectively implemented so that the burden of navigating paperwork or other policy requirements within the recipient's own system does not fall on the student receiving the supportive measures." Note: This provision may limit the ability of schools to utilize offices beyond the Title IX coordinator, such as a student support center or student services center, to coordinate Title IX support measures.
- The regulation would include a new provision specifying that OCR will not deem an institution's response to be deliberately indifferent "merely because the Assistant Secretary would have reached a different determination based on an independent weighing of the evidence." As the ED notes, this ties the draft regulation to *Davis*' teaching that "courts should refrain from second-guessing the disciplinary decisions made by school administrators."
- The commentary to these new provisions specifies that a "recipient is only responsible for responding to conduct that occurred within its 'education program or activity.'" This is consistent with *Davis*, which held that a school must "exercise substantial control over both the alleged harasser and the context in which the known harassment occurs" in order to be liable for sexual harassment.
- The commentary notes that an institution's "education programs and activities" include all of its "operations" and whether misconduct occurs within those operations does not necessarily depend on physical location. In determining whether conduct occurs within a school's education programs and activities, the commentary indicates numerous factors are relevant, including the degree of oversight and supervision the institution has exercised over the location in question. The guidance notes that, even if sexual misconduct occurs outside an

institution's education programs and activities, "nothing . . . would prevent a recipient from initiating a student conduct proceeding or offering supportive measures to students who report" such misconduct.

- The guidance appears to suggest that a victim's mere presence on an institution's campus at the time of sexual misconduct does not mean the victim was actually participating in education programs and activities. *Citing Doe v. Brown Univ.*, 896 F.3d 127 (1st Cir. 2018).

Additional Rules Governing Responses to Sexual Harassment

- The regulation would create a new provision allowing the removal of a respondent on an emergency basis "provided that the recipient undertakes an individualized safety and risk analysis, determines that an immediate threat to the health or safety of students or employees justifies removal, and [the institution] provides the respondent with notice and an opportunity to challenge the decision immediately following removal." Public institutions should have already been following this process because procedural due process requires it. It appears the new regulation would impose a similar process requirement on private schools.
- The comment further clarifies that, for students with disabilities, the removal process must also comport with the ADA and Section 504.
- The regulation would create a new rule stating that nothing in Title IX prevents a school from placing a non-student respondent on administrative leave during an investigation.

Grievance Procedures

- The regulation would add a new provision stating that "a recipient's treatment of a complainant in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex", and also states that "a recipient's treatment of the respondent may constitute discrimination on the basis of sex under Title IX."
- The regulation would specify new, mandatory elements of grievance procedures, namely:
 - Complainants and respondents must be treated equitably, which requires "remedies for the complainant where a finding of responsibility against the respondent has been made, with such remedies designed to restore or preserve access to the recipient's education program or activity and due process for the respondent before any disciplinary sanctions are imposed." This appears to directly apply the concept of "due process" to private institutions, as well as public institutions.

- The investigation of allegations must be “objective” and consider “all relevant evidence – including both inculpatory and exculpatory evidence” and must provide that “credibility determinations may not be based on a person’s status as a complainant, respondent, or witnesses.” This appears, for example, to preclude any reasoning that a complainant’s account is more likely true than not because there are very few “false” sexual assault reports.
- Title IX investigators cannot have a conflict of interest or bias against complainants or respondents and must be trained in 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 for all parties, and promote accountability.” The regulation would preclude any training materials that rely on sex stereotypes.
- Grievance procedures must adopt a presumption that the respondent is not responsible for the alleged conduct “until a determination regarding responsibility is made at the conclusion of the grievance process.”
- Procedures must have “reasonably promptly timeframes” that can be extended for “good cause” with “written notice” to the parties with delays justified by a host of factors, including absences of witnesses, “concurrent law enforcement activity”, or “the need for language assistance.” This appears to give a school greater flexibility to delay an investigation in deference to a law enforcement investigation than did the prior sub-regulatory guidance.
- Must list all possible sanctions and remedies that are possible following any determination of responsibility.
- Must describe the standard of evidence to be used.
- Must specify the procedures and permissible grounds for appeal for the complainant and respondent, if appeal is allowed.
- Must describe the range of supportive measures available to both parties.

Notice and Investigation

- The regulation would require an institution to provide written notice to the parties of the grievance procedures and allegations.
- The notice of allegations must include “sufficient details (such as the identities of the parties involved in the incident, if known, the specific section of the recipient’s policy allegedly violated, the conduct allegedly constituting sexual harassment

under this part and under the recipient's policy, and the date and location of the alleged incident, if known) and provide sufficient time to prepare a response before any initial interview.”

- The notice must also include a statement that the “respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process.” It must also inform the parties that they can request to inspect and review the evidence (see below).
- The notice must also inform the parties of any provisions in the school's policy that prohibits making false statements or knowingly submitting false information during the process.
- If the institution later decides to investigate new allegations, or if it later learns of details that it would have included in the initial notice, if known, it must issue a revised or supplemental notice.
- The new regulation would require the investigation of allegations in a formal complaint, unless the “conduct alleged . . . would not constitute sexual harassment . . . even if proved or did not occur within the recipient's program or activity” in which case the process must be terminated. Note: For allegations that are dismissed, the commentary indicates a school would still be free to address such conduct under its general student conduct code, although Title IX does not require the school to do so.
- When conducting the investigation, the institution must:
 - Bear the burden of gathering evidence sufficient to reach a determination rather than placing it on the parties.
 - Provide equal opportunity for the parties to present witnesses and inculpatory or exculpatory evidence.
 - Not restrict the ability of the parties to discuss the allegations under investigation or to gather or present relevant evidence. This is a significant element that would appear to preclude any blanket interim measure restricting parties from talking to witnesses.
 - Provide the parties the same opportunities to have others present, including Clery support persons and not limit the choice thereof. The school may, however, limit the role of the support person (subject to the support person's ability to conduct cross-examination at a hearing, discussed below).

- Provide written notice of the date, time, location, participants, and purpose of a hearing or investigative interview or other meeting with sufficient time to prepare.
- Colleges and universities' procedures "must provide for a live hearing."³ "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."
- If a party does not have an advisor present at the hearing, "the recipient must provide that party an advisor aligned with that party [sic] to conduct cross-examination." Note: This is a new, affirmative obligation to provide a support person, at least for the limited purpose of cross-examination.
- The commentary states that "[a]ll 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." Note: These standards are derived from Federal Rule of Evidence 412.
- "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."
- The commentary states that the decision-maker must explain any decision to exclude cross-examination questions on grounds of relevance.
- The regulation would preclude the institution from relying on any statement from a party or witness who does not submit to cross-examination at the hearing.
- Provide both parties equal opportunity to "inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination

³ K-12 institutions are not required to hold a hearing. The commentary explains that, in the absence of a hearing, such schools must have a process that allows the parties to submit questions to the investigator, who in turn poses them to the other parties.

regarding responsibility, so that each party can meaningfully respond to the evidence prior to the conclusion of the investigation.”

- Prior to completing the investigation report, the institution “must send to each party and the party’s advisor, if any, the evidence subject to inspection and review in an electronic format, such as a file sharing platform, that restricts the parties and advisors from downloading or copying the evidence, and the parties shall have at least ten days to submit a written response, which the investigator will consider prior to completion of the investigative report.” The institution must also make the same evidence available to the parties at the hearing so that they may use it, including in cross-examination. Note: This language would not be satisfied by allowing the parties to physically review the evidence in a proctored setting.
- Create an investigative report that fairly summarizes relevant evidence and provide a copy at least ten days prior to a hearing, for the parties’ review and written response.
- The comments to this section make clear that “although schools will often report misconduct under this section to the appropriate authorities, including as required under state law, a report to police or the presence of a police investigation regarding misconduct under this section does not relieve a recipient of its obligations under this section.”

Standard of Evidence

- The new regulation would permit the use of either “preponderance of the evidence” or “clear and convincing.”
- An institution may use “preponderance of the evidence” only if it uses that standard for “conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction.” Conversely, “because of the heightened stigma often associated with a complaint regarding sexual harassment,” the commentary indicates that schools are free to use a clear and convincing standard for sexual misconduct cases “even if other types of complaints are subject to a preponderance of the evidence standard.”
- “The recipient must also apply the same standard of evidence for complaints against students as it does for complaints against employees, including faculty.” This statement could be construed to either require schools to eliminate clear-and-convincing standards that persist for tenured faculty, or raise the standard for all other cases to “clear and convincing,” if it is to be maintained for tenured faculty.

Additional Requirements for Grievance Procedures

- The regulation would make clear that the “decision-maker(s)” —that is, the hearing officer/hearing panel for colleges and universities—cannot be the same person as the “Title IX Coordinator or the investigator(s).” Note: This directive, coupled with the requirement of a live hearing, effectively bars any college or university from using a single-investigator model.
- The new regulation would require the school to issue a formal, written determination of the outcome of a formal complaint that includes the following elements:
 - The sections of policy allegedly violated.
 - A description of the procedural steps taken from receipt of the complaint through determination.
 - Findings of fact supporting the determination.
 - Conclusions regarding application of facts to the policy language.
 - A statement of “rationale” for each allegation, “including a determination regarding responsibility,” “any sanctions,” and “any remedies provided.”
 - A statement of the procedures and permissible grounds for the parties to appeal.

The regulation is essentially adopting a findings-of-fact and conclusions-of-law style report.

- The new regulation would allow, but not require, a school to offer an appeal. “If a recipient offers an appeal, it must allow both parties to appeal.” The commentary further specifies that any appeal process must allow both parties written notice of the appeal, give them the ability to submit a written statement in support or opposition to appeal, and require that a written decision, with a rationale, be provided to the parties. It makes clear the appellate officer cannot be the same person who investigated or decided the case below.
- The new regulation would require grievance procedures to state that a written determination does not become final until any appeal process is concluded or, if an appeal is allowed and not filed, when an appeal would no longer be timely.

- The new regulation would explicitly address informal resolution and permit it “at any time prior to reaching a determination regarding responsibility.” Informal resolution may include “mediation” but can only be used with the parties’ written consent and after there is a written notice disclosing:
 - The allegations.
 - The requirements of the informal resolution process including the circumstances under which a party can result in a formal complaint.
 - Any consequences from participating in informal resolution, including records that may be maintained or shared.

Recordkeeping

- The new regulation would require a school to maintain for a period of at least three years, and make available to the parties on request records of:
 - The investigation, including determination, sanction, and remedies.
 - The appeal and results therefrom.
 - The informal resolution, if any.
 - All materials used to train investigators, adjudicators, and coordinators with regard to sexual harassment.
- The regulation would also require a school to maintain, for three years, records of non-formal complaints and supportive measures that were taken in response to them.

Retaliation

- The new regulation would make clear that it is not retaliation for a school to take disciplinary action against a person who makes a bad faith complaint or who knowingly provides false information during the investigation or adjudication.

OCR Remedies

- The new regulation will make clear that OCR cannot require a school to pay damages to the complainant as a remedy for an OCR complaint.

Constitutional Protections

- The new regulation would include a provision specifying that Title IX does not require a school to “restrict any rights that are protected from governmental

action by the First Amendment of the U.S. Constitution; deprive an individual of rights that would otherwise be protected from governmental action under the Due Process Clause of the Fifth and Fourteenth Amendments; or restrict any other rights guaranteed against governmental action by the U.S. Constitution.” The commentary makes clear that “under the Title IX regulations, recipients—including private recipients—are not obligated by Title IX to restrict speech or other behavior that the federal government could not restrict directly.”

FERPA

- The new regulation would explicitly state nothing in FERPA should be construed to preclude an institution’s obligations under Title IX, including the obligations in the new proposed regulation.

Title VII

- The regulation would make clear that nothing in the Title IX regulation is intended to “diminish, restrict, or lessen any rights an employee may have against his or her school under Title VII.”

Non-Discrimination Notice/Title IX Coordinator Notice

- There are several technical changes to the notice of non-discrimination and how it is published. The regulation would require the policy on the institution’s website and in relevant handbooks and catalogs.
- The new regulation would specify that the policy and grievance procedures required by Title IX apply to all students and employees in the United States.

Religious Exemption

- The new regulation would make clear that the statutory exemption for religious institutions contained in 20 U.S.C. § 1681(a)(3) is self-executing and a school need not notify OCR in advance of its claimed exemption, although it may do so in order to seek assurance of its exemption. The proposed regulation would permit an institution to assert a religious objection during the pendency of an OCR investigation.

Specific Requests for Comment

Although interested persons are permitted 60 days to comment on any aspect of the proposed regulations, the notice solicits feedback on a number of specific topics, including as relevant to higher education:

- Whether any parts of the proposed rule would prove unworkable in the context of sexual harassment of employees.

- Whether the provisions of the proposed rule requiring training for Title IX coordinators, investigators, and decision-makers are adequate.
- Whether the proposed rule adequately takes into account issues arising from various federal laws governing students with disabilities, including the ADA and Section 504.
- Whether it is desirable, instead of permitting a school to use either a preponderance or clear and convincing standard, to mandate a unitary standard for all institutions.
- Whether greater clarity is required as to what information on disciplinary measures can be shared with the complainant.
- Whether the three year records retention requirement is appropriate.
- Advice from commentators on what technology should be used to separate parties during hearings for purposes of cross examination, including whether such technology would result in new costs.

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