HUSCH BLACKWELL

SUMMARY OF DRAFT NOTICE OF PROPOSED RULEMAKING

NON-FINAL AND SUBJECT TO CHANGE

This summary is created based on a Department of Education DRAFT Notice of Proposed Rulemaking dated August 25, 2018. We will update this summary once the Department formally issues its Notice of Proposed Rulemaking and specifically identify any material changes.

NEW SUBSTANTIVE STANDARDS

- For purposes of administrative enforcement, the draft 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 *Gebser* and *Davis* and has been widely applied by lower courts.
- The draft regulation defines "sexual harassment" to constitute: (1) quid pro quo harassment, (2) "unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it denies a person access to the recipient's education program or activity," (so-called, "hostile environment harassment"), 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 *Davis*, as well as federal cases applying that standard.
- The regulation defines "actual knowledge" as occurring when 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." This definition, as well, tracks *Gebser* and *Davis* and their progeny.
- Under the regulation, an institution does not have "actual knowledge" if the "official" with knowledge of the harassment is himself the perpetrator. This tracks the Fifth Circuit's recent ruling in *Salazar v. South San Antonio Independent School District*, 690 Fed. App'x 853 (5th Cir. 2017).
- Under the 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). These individuals would, however, likely include the Title IX coordinator and others responsible for student, staff, or faculty discipline.

SAFE HARBORS FOR HIGHER EDUCATION

- The regulation would create a safe harbor stating that, if an institution follows its grievance procedures (containing the critical elements discussed below) 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 by OCR.
- 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 recipient's 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."
- 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 individualized services offered as appropriate to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed." Such measures would be "non-punitive, time-limited, and narrowly tailored to support continued access to an education program or activity without unreasonably burdening the other party."
- 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 reaches a different determination based on an independent weighing of the evidence." As the Department 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." Consistent with *Davis,* the recipient 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 specifically: "Recipients are not responsible for addressing the continuing effects of conduct that occurred exclusively outside of the education program or activity, unless further conduct that could constitute sexual harassment occurs within the recipient's program or activity." The effect of this reasoning, which tracks Davis and *Weckhorst v. Kansas State University,* 241 F. Supp. 1154, 1180-83 (D. Kan. 2017) (appealed on other grounds), means that an institution is not required to investigate sexual harassment that occurs in a purely private setting, off-campus, unless there is an alleged further act of sexual harassment that happens on campus or in a program or activity.
- "[N]othing in the proposed regulations would prevent a recipient from offering supportive measures to students who report sexual harassment that occurs outside the recipient's education program or activity."

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 the removal." Many public institutions have already been allowing review of interim suspension decisions because of procedural due process requirements under the Constitution. It appears the new regulation would impose a similar process requirement on private schools.
- 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 "redress for the complainant where a finding of responsibility has been made and due process for the respondent before 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.
    - The investigator 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 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 "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.
    - Grievance procedures must list all possible sanctions, describe the standard of evidence to be used, and specify the permissible grounds for appeal, if appeal is allowed.
    - Grievance procedures must also explain 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 the disclosure of evidence (see below).
- If the institution later decides to investigate new allegations, it must issue a revised or supplemental notice.
- The new regulation would formally require the investigation of allegations in a formal complaint, unless the "conduct alleged . . . would not constitute sexual harassment . . . even if proved" in which case the process can be closed.

- The notice acknowledges that institutions can utilize external contractors to conduct investigations.
- 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 could be ready to 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.
    - 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.
    - Provide the parties with the "equal opportunity to pose questions to the other party and to witnesses prior to a determination regarding responsibility, permitting each party to ask all relevant questions, and explaining to the party proposing the questions any decision to exclude the questions as not relevant."
    - **If** a hearing is part of the school's process, then the recipient must permit "cross-examination of any party or witness." If the school does not use a hearing, the school must allow the parties to submit written questions to the investigator to ask the other party and witnesses "in a manner that effectively substitutes for cross-examination."
    - Provide equal access to evidence on which the institution intends to rely in making its determination "with an equal opportunity to respond to that evidence prior to any determination." Effectively, this means the institution will have to allow the parties to review the entire corpus of relevant evidence prior to reaching a determination.
    - "At the request of the complainant or respondent" the school must promptly disclose "any evidence obtained as part of the investigation, including evidence upon which the recipient does not intend to rely." This appears to create a*n* obligation on a school to disclose the entire investigative file, including exculpatory evidence, similar to the prosecution's burden in criminal cases.
    - Create an investigative report that fairly summarizes relevant evidence and allow the parties to review and respond to it prior to determination.
    - 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 "all other discriminatory harassment complaints."
- "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, coupled with the last bullet, 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 new regulation would require the school to issue a 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."

  The regulation is essentially requiring institutions to adopting a findings-of-fact and conclusions-of-law style report common in court proceedings.
- The new regulation would specify that if an institution allows an appeal, it "may allow an appeal either solely by the respondent or by both parties." If allowed for both parties, the "appeal procedures must be equally available."
- The new regulation would explicitly address informal resolution and permit it "at any time prior to reaching a determination of responsibility." Informal resolution may include "mediation" but can only be used with the parties' 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 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 recipient 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 recipient 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 Fourteenth Amendment; 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 PREEMPTION

- The new regulation would explicitly state that Title IX overrides FERPA to the extent there is a conflict.

NON-DISCRIMINATION NOTICE/TITLE IX COORDINATOR NOTICE

- There are several technical changes to the notice of non-discrimination and how it is published.
- The new regulation would specify that the policy and grievance procedures required by Title IX "need not apply to 'persons outside the United States.'" The commentary explicitly states that the statutory language of Title IX "limits its application to protecting "person[s] 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 claiming the exemption.

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