College & University Professional Association for Human Resources

Title IX Final Rule Released: What You Need to Know Now — May 20, 2020

Q&A With Presenters Adrienne Meador Murray and William E. Hannum III

Contributors of this document include the following persons: From NACCOP and D. Stafford & Associates: Ann Todd, Esq., Adrienne Meador Murray, Beth Devonshire, Esq., and Cathy Cocks. And from Schwartz Hannum: William Hannum, III, Esq. and Gary Finley, Esq. To contact the team at D. Stafford Associates/NACCOP, please contact Adrienne Meador Murray at amurray@dstaffordandassociates.com. To contact the team at Schwartz Hannum, PC, please contact wHannum@shpclaw.com.

The content in this document is for general information purposes only and should not be considered legal advice.

Questions Regarding the Investigation

For inspection of evidence that must be provided to both parties, does that include the investigator's notes from the interviews with the complainant and the respondent?

The investigator should include in the information provided for inspection of evidence the investigator's summary of the interview (or transcript of the interview if that is the process), but we do not read that to necessarily mean the investigator's raw notes. The regulations state that the institution must allow both parties to inspect evidence that is "directly related to the allegations raised." As raw notes may contain information not "directly related to the allegation" (or information specifically prohibited such as past sexual history or medical documentation), we believe the investigator would only need to provide a redacted interview and/or summary.

Do we have to provide the actual copy of the written complaint to the respondent when we give notice of the investigation?

No. The rules state that you must provide notice of the allegation which include only "sufficient details" which include "the identities of the parties involved in the incident, if known, the conduct allegedly constituting sexual harassment … and the date and location of the alleged incident, if known." Nothing in the regulations requires that the actual "formal complaint" and any details or evidence contained must be provided. Further, the preamble speaks to this directly by stating, "The Department will not require the recipients to give respondents a copy of the formal complaint."

When you say that hearings are required for all formal complaints - does this include investigations that conclude with the totality of evidence not reaching our standard of evidence to charge the respondent?

The regulations require dismissal of a formal complaint when the conduct alleged in "the formal complaint" does not constitute sexual harassment as defined by the rules, "even if proved." These

would be cases that on the face of the allegation are either not sex based, do not rise to the defined standard, or do not meet the jurisdiction requirements (person and location). Additionally, the regulations allow for a voluntary dismissal, including "where specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the allegations contained in the formal complaint." The preamble clarifies that this section is designed to dismiss cases in which evidence cannot be gathered because the parties refuse to participate or are no longer under the institution's control and not situations in which the evidence gathered, " has not met a probable or reasonable cause threshold or other measure of the quality or weight of the evidence." The preamble further states that determinations based on the standard of proof should not be "prematurely made by persons other than the decision-maker, without following those adjudication and written determination requirements."

With regard to the 10 days prior to the hearing that the parties are to be provided with the investigative report and all associated evidence, are we required to provide a physical copy of all of this to each party? Can we email it? Can we have it in a room and allow them to come with their lawyers/advisors and review it while on campus?

The regulations state that you must "send" it to the parties and their advisors in "an electronic format or a hard copy." Requiring them to come to a room and examine would not meet this standard. The preamble does, however, explain that schools may use a file sharing platform that restricts parties and advisors from downloading or copying the evidence and can require parties and advisors to refrain from disseminating the evidence through a non-disclosure agreement permitting use only for purposes of the Title IX grievance process.

How long can we delay a hearing to allow a party a chance to review the evidence? Say for example, their counsel needs an extra five days to review—do we delay the hearing to allow for this?

The regulations require a minimum of 10 days to review the evidence "directly related to the allegation." It is up to the school as to whether the 10 days is calendar days or business days. Following that review, the investigator must summarize the "relevant evidence" and create a final report which is again shared with the parties who have 10 days to review prior to the hearing. The policy must allow a "temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action." The regulations specifically state that good cause may include "absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities." The length of time and the "good cause" should be reasonable and considered on a case by case basis.

Questions Regarding the Live Hearing Process

Are employee complaints required to have a live hearing, or just student on student complaints? If both, are there any differences in the hearing?

There is language in the preamble which states "recipients are expected to handle any formal complaints of sexual harassment in an educational program or activity against a person in the United States through its grievance process in section 106.45. The grievance process in section 106.45 applies

irrespective of whether the complainant or respondent is a student or employee." Therefore, if a formal complaint is filed and is not dismissed, it would require a live hearing with cross-examination. The status of the party does not make a difference in regard to a live hearing, and both parties will be subject to a live hearing with cross-examination done by advisors.

The parties may choose to address the compliant through an informal resolution process, although institutions cannot require parties to proceed through an informal option. Additionally, , the status of the parties will have an impact on the availability of an informal resolution process. The regulations specifically prohibit schools from offering an informal resolution process for allegations that an employee sexually harassed a student.

What if a student complainant doesn't want to participate in live hearing against an employee respondent? How do we proceed?

It is important to have an understanding of that student's wishes and why the student does not want to proceed. To help encourage participation, the regulations provide the following: allowing for accommodation requests that the live hearing be held in a separate room or virtually; a prohibition on direct questioning being performed by the parties, and instead being performed by the advisor; and allowing for schools to establish rules of decorum. If the student does not want to participate because of retaliation or fear of retaliation, the regulations include a prohibition of retaliation.

If the student wishes to withdraw their formal complaint, the student will be able to continue to access supportive measures.

However, if the student wants to proceed with the formal complaint, but does not want to participate in the live hearing, that will not result in a dismissal of the case, but will result in the decision-maker not being able to rely on the student's prior statements. While the student is not able to have someone testify on their behalf, their advisor would still appear and provide cross-examination on the respondent, even if the student does not appear.

What college employee could ever be qualified as a hearing officer? Can hearings/hearing officers be outsourced?

There are people on campus who can and do serve this role well, including those who have been involved in Student Conduct processes. A legal background is not required, although it is vital that those decision-makers have certain competencies, including those described in Section 106.45(b)(1)(iii). Specifically, that Title IX Coordinators, investigators, and decision-makers must be properly trained in "the scope of the recipient's education program or activity, how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflict of interest, and bias. A recipient must ensure that decision-makers receive training on any technology to be used at the live hearing ad on issues of relevance of questions of evidence, including when questions and evidence about a complainant's prior sexual predisposition or prior sexual behavior are not relevant . . ."

That said, this is something which can also be outsourced as there is no requirement that it be conducted by those who are employed by your campus. This outsourcing might also include other parts of the process including investigations, and the advisors to the parties who are charged with conducting cross-examination.

Can you explain how statements can be used in a hearing? I have heard that if a party does not come to the hearing or submit to cross examination that everything the investigator collected from a party will not be admissible. Is this true?

This is one of the more controversial sections, and many concerns have been raised. As written, decision-makers cannot rely on prior statements if the parties and witnesses do not submit to cross-examination, including, as discussed in the preamble, if the reason the parties or witnesses did not show is because of disability or death. This includes statements made as part of an investigation. Additionally, there is language in the preamble that states "If a party or witness makes a statement in the video, then the decision-maker may not rely on the statement of that party or witness in reaching a determination of responsibility," if that party or witness does not submit to cross-examination. This might include an admission of guilt as it was a "statement."

ED has recently provided a clarification about "statements" as well. Specifically, if the "respondent's alleged verbal conduct, that itself constitutes the sexual harassment at issue, it is not the respondent's 'statement' . . . as it does not constitute the making of a factual assertion to prove or disprove the allegation; instead, the verbal conduct constitutes part or all of the underlying allegation of sexual harassment itself." Therefore, those communications would be allowed, regardless of the respondent's attendance or submission to cross examination.

Can the adjudicator be a single person, or does it have to be a board/panel? Who determines the questions that can be asked if it is a board? Do we pick one person who is charged with this?

The regulations do not specify that the decision-maker be one person and implies that it can be multiple people by using choosing "decision-maker(s)" There may be benefits to using multiple "decision-makers" and many Student Conduct processes currently use this model.

Even if the school opts for a panel, the school may ask only one decision-maker to make the relevancy determinations. Section 106.45(b)(6)(i) requires that "[B]efore a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant." Therefore, the advisor poses the question, the decision-maker determines if the question is relevant, and if the question is relevant, the advisor will ask the question to the opposing party or witness. This is a big task. While all of the decision-makers must be trained on making relevancy determinations per the training requirements in the regulations, some institutions may assign the responsibility to a chair with particular skill or additional practice and training.

Questions Regarding Employees and Title IX/Title VII

Regarding the evidentiary standard, what are your thoughts on states where preponderance is required by state law for college sexual assault cases but collective bargaining agreements may have a higher standard for some of their processes?

Generally, the National Labor Relations Act requires institutions to bargain over any change to terms and conditions of employment for bargaining unit employees while the collective bargaining agreement

is in effect. This obligation to bargain also applies to any discretionary elements associated with an institution's compliance with a change in the law.

Also, the specific answer to this question might vary depending on state law so –it's always a good idea to check the state law to ensure there is no carve-out for union-represented employees.

To the extent that implementing the new regulations will necessitate a change in the terms of the collective bargaining agreement, institutions should work with experienced labor counsel to assess what the institution should do in light of: the new regulations; applicable state law; the language in the parties' collective bargaining agreement; and the parties' bargaining history.

If the sexual harassment occurs solely between two employees, is it Title IX or is it Title VII?

It is potentially both, if the alleged misconduct meets the definitions of sexual harassment under both Title VII and Title IX.

The institution should follow the Title IX policies and procedures if the harassment meets the relevant criteria under Title IX (*i.e.*, if it is severe, pervasive, objectively offensive, and occurs within the institution's programs or activities).

But at the same time, the institution should also bear in mind the possibility that the alleged misconduct might also violate the institution's Title VII policies and procedures, regardless of the outcome under the Title IX policies and procedures. For example, if the employee does not file a formal Title IX complaint, or if Title IX does not apply, then the institution should still investigate and address the alleged misconduct under its Title VII policies.

Ultimately, the institution should consider the employee's rights under both.

And along this same thought, if the sexual harassment that is described to the Title IX Coordinator in the formal complaint doesn't rise to the level as defined under the new regs can we push it to HR for Title VII?

Yes. Some allegations of sexual harassment will potentially not be covered by Title IX but might still violate Title VII and/or the institution's other policies. In such instances, the institution should handle the allegations as it would usually handle allegations under its Title VII sexual harassment policy or other applicable policies.

How do live-hearings processes impact at-will employment?

The at-will doctrine varies by state law, but generally provides that an employer can fire an employee *with or without notice, and for any reason or no reason at all*. The live hearings will slow down the decision-making process, which impinges on the idea that an employee at will can be fired suddenly – "with or without notice." Very few private institutions allowed any hearing or appeal prior to termination of an employee and due process at public institutions varied widely, particularly depending on the status of the employee.

That said, employers have always been prohibited from firing someone for a discriminatory reason (Title VII) and therefore most employers would do some level of investigation prior to a termination that could

trigger a sex discrimination complaint. Additionally, most institutions have some type of employee handbook that outlines a process a school will follow prior to termination, which negates the pure at-will doctrine.

In regard to providing an advisor for cross examination... what are your thoughts about University administrators or faculty liaisons serving on these roles?

The regulations require no training for the advisor, but if the institution is providing the advisor, they should be trained and experienced in conducting cross-examination. . An advisor who does not have relevant experience and training could later be viewed as inadequate, especially if the opposing party is being advised by a more experienced advisor/attorney. There would then be the risk of legal claims against the institution that the advisor lacked the proper training and/or experience, and that the institution did not provide an equitable process as required by Title IX.

Any advisor appointed by the institution will be conducting cross examination on a current student or employee. The adversarial nature of cross-examination alone may have institutions considering the selection of outside advisors to serve in this role.

Regarding training requirements-- if school hires outside experts/attys to serve in investigator or decision maker function how does school obtain/publish all training materials that outside expert has consumed/reviewed?

It is not entirely clear. The conservative answer would be for the institution to ask its outside experts and attorneys to provide copies of training materials (those that the outside experts/attorneys have used), to be published on the institution's website. But as a practical matter, this seems unwieldy and arguably beyond what was intended or will be required. Thus, it may make sense to consult with counsel about this issue, to consider whether there might be some reasonable alternative. At a minimum, the investigative report should contain detailed information about the training and qualification of the investigators.

Additional Resources

- Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance [pages 30026-30579]. A Rule by the Education Department on 05/19/2020
- Title IX Regulations Addressing Sexual Harassment (Unofficial Copy) PDF (6M)
- Title IX: Fact Sheet: Final Title IX Regulations PDF (209K)
- Title IX: U.S. Department of Education Title IX Final Rule Overview PDF (553K)
- Title IX: Summary of Major Provisions of the Department of Education's Title IX Final Rule PDF (675K)
- Title IX: Summary of Major Provisions of the Department of Education's Title IX Final Rule and Comparison to the NPRM PDF (706K)
- OCR Webinar: Title IX Regulations Addressing Sexual Harassment (Length: 01:11:29) 05/06/2020
- CUPA-HR May 20, 2020 archived webinar, "Title IX Final Rule Released: What You Need to Know Now"

- CUPA-HR Sexual Harassment Resources: https://www.cupahr.org/knowledge-center/sexual-harassment-resources/
- Title IX Final Rule – 10 Things You Need to Know https://www.cupahr.org/blog/title-ix-final-rule-10-things-you-need-to-know/
- Title IX and Sexual Harassment Toolkit (CUPA-HR members-only)
- A Matter of Trust: Strategies for Creating a Harassment-Free Workplace (Higher Ed HR Magazine)
- A Thoughtful Approach: How to Conduct Impactful, Engaging, In-Person Sexual Harassment Training (Higher Ed HR Magazine)
- Member Forums in CUPA-HR Connect