New Title IX Regulations

Information Brief | May 28, 2020

VERMONT
VERMONT COMMISSION ON WOMEN

In May 2020, the U.S. Department of Education, headed by Secretary Betsy Devos, announced new regulations to Title IX of the Education Amendments Act of 1972, governing how educational institutions, including colleges and universities, respond to allegations of sexual harassment, sexual assault, domestic violence, dating violence, and stalking. The new rules take effect on August 14, 2020. The Department received 124,000 public comments on the regulations originally proposed in November 2018, before making adjustments and finalizing them. The Vermont Commission on Women was pleased to have offered public comment on the proposed regulations in January 2019.

On May 14th, 2020, four advocacy groups: Know Your IX, Girls for Gender Equity, Stop Sexual Assault in School, and the American Civil Liberties Union, asked the Court to issue an injunction blocking the new regulations before they go into effect because they would "inflict serious harm" on victims and "dramatically undermine" their civil rights.[1]

Here, we summarize the major impacts of the regulations, state the proposed rule, present the comments we shared with the administration last year, and indicate changes (in bold) made to the proposed rules before adoption.

Religious Exemption § 106.12(b)

This new regulation allows an institution to assert a religious exemption to compliance with these rules after the Department has begun investigating for non-compliance, whether or not the institution has previously asserted the exemption. This is a change from previous guidance, which required schools to assert religious exemptions in advance.

Proposed rule: § 106.12 (b) In the event the Department notifies an institution that it is under investigation for noncompliance with this part and the institution wishes to assert an exemption set forth in paragraph (a) of this section, the institution may at that time raise its exemption by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization, whether or not the institution had previously sought assurance of the exemption from the Assistant Secretary.

VCW's public comments:

• We are concerned that changing the timeline for schools declaring a religious exemption from Title IX from before complaints are filed to afterwards will mean that prospective students will not have the information they need during the application process.

• We are concerned that proper handling of a complaint may be delayed or denied by a school's filing of a religious exemption after the complaint has been made.

Final rule: Unchanged; mirrors the proposed rule.

[1] NBC News, "ACLU sues Betsy DeVos over new campus sexual assault rules", May 14, 2020, https://www.nbcnews.com/news/us-news/see-you-court-aclu-sues-betsy-devos-over-new-campus-n1206981.

Definition of Sexual Harassment § 106.30

The new definition narrowed what constitutes sexual harassment under Title IX, weakening protections for student victims of sexual harassment. One striking result of this change is that federal law is now more tolerant of sexual harassment of students at school than of adults in the workplace.

Proposed rule: § 106.44 (e)(1)(ii) 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 recipient's education program or activity.

VCW's public comments:

• We are concerned that the proposed definition of sexual harassment that reads: "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 recipient's education program or activity" presents a higher threshold for defining unacceptable behavior than do the regulations associated with federal employment law in Title VII, which read, in part, "Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when…(3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."

• We believe that the standard for conduct in schools should not be more accepting of sexual harassment than that in the workplace.

Final Rule: Unwelcome conduct **that a reasonable person would determine is** so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity.

Actual knowledge § 106.30

The new rule limits a school's responsibility to respond to reports of sexual harassment. Under the new rule, only reports made to a Title IX Coordinator or another official who can institute corrective measures on behalf of the recipient . In practice, this means reports made to many staff at post-secondary institutions, including most professors, would not necessarily trigger a Title IX investigation. A report made to any employee at an elementary or secondary school does constitute actual knowledge and should be investigated.

Proposed rule: 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, or to a teacher in the elementary and secondary context with regard to student-on-student harassment.

VCW's public comments:

• We appreciate the clarity that comes with defining who at schools can receive official reports.

• We are concerned that confining "actual knowledge" on the part of the post-secondary schools to Title IX coordinators and officials who have the authority to institute correctional measures is unduly limiting.

• We also believe that it will be important to ensure that whoever is taking reports is provided with appropriate training to do so.

Final rule: 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, or to **any employee of an elementary and secondary school.**

Designation of Coordinator, dissemination of policy, adoption of grievance procedures § 106.8(a)

This regulation requires educational institutions to designate a Title IX Coordinator and to notify students, employees, unions, and in some cases, professional organizations, of the coordinator's identity and contact information.

Proposed rule: Each recipient must designate at least one employee to coordinate its efforts to comply with its responsibilities under this part. The recipient must notify all its students and employees of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated pursuant to this paragraph.

VCW's public comments:

• We appreciate this measure to codify good practices that many schools are already using.

Final rule: Each recipient must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities under this part, **which employee must be referred to as the "Title IX Coordinator."** The recipient must notify applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, **employees, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient**, of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated **as the Title IX Coordinator** pursuant to this paragraph. **Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), in person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report. Such a report may be made at any time (including during non-business hours) by using the telephone number or electronic mail address, or by mail to the office address, listed for the Title IX Coordinator.**

Basic Requirements for Grievance Procedures, Notice § 106.45 (b)(1), § 106.45 (b)(2)

These rules would codify basic requirements that grievance procedures must adhere to, including treating parties equitably, training Title IX Coordinators, prohibiting conflicts of interest, including a presumption of innocence, and providing notice.

Proposed rules: 106.45 (b)(1) basic requirements for grievance procedures § 106.45 (b)(2) notice of allegations

VCW's public comments:

• We appreciate these measures to codify good practices that many schools are already using.

Final rule: The Final regulations require that an institution's grievance process: treat complainants and respondents equitably; that remedies be designed to restore or preserve equal access to the institution's programs and activities; require an objective evaluation of all relevant evidence; prohibits individuals with a conflict of interest from participating in the process, requires training of the Title IX Coordinators, investigators, decision makers, and facilitators of any informal resolution process; include a presumption that the respondent is not responsible until a determination is made; include reasonably prompt time frames for filing and resolving appeals and informal resolution processes; describe the range of sanctions and remedies that may be implemented; state the standard of evidence to be used; include procedures and bases for appeal; provide written notice to the respondent with sufficient details about the incident, which should include an explanation of certain rights.

Deliberate indifference § 106.44

Implements a standard of deliberate indifference for determining whether schools have responded appropriately to complaints, which means that schools only need to show that they did not act deliberately indifferent, or "clearly unreasonable in light of the known circumstance."

Proposed Rule: A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States must respond in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.

VCW's public comments:

• We are concerned that the standard of deliberate indifference as it is expressed in these regulations is an inappropriately high standard for determining schools' unacceptable responses to complaints.

• We are not convinced that the language coming from the Davis Supreme Court decision, which concerned monetary damages in a civil suit, is appropriately imputed to schools' general administrative procedures.

Final rule: Unchanged

Off-Campus & Overseas Incidents § 106.44 (a)

This regulation restricts schools' responsibility to respond to reports of sexual harassment to incidents that happen at the school's education programs or activities in the United States. Students who are harassed on campuses abroad, at events over which the school does not exercise substantial control, or are harassed by another student off of school property and not during a school event are not protected.

Proposed Rule: A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States must respond in a manner that is not deliberately indifferent.

VCW's public comments:

• We hope that "education program or activity" and "in the United States" will be interpreted as broadly as possible, so as to provide protections for students in off-campus settings such as school trips, fraternities and

sororities, sporting events, etc., as well as those students in school programs that are international in nature, such as campuses of the college or university housed in other countries, or on international school trips.

Final rule: Unchanged, and the Department of Education clarified that schools must respond when sexual harassment occurs in the school's education program or activity, against a person in the United States. Education program or activity includes locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

Emergency Removal of Respondents § 106.44 (c)

This rule requires educational institutions to undertake an individualized threat assessment before removing a student on an emergency basis and requires that removed students have the opportunity to challenge the decision immediately after being removed.

Proposed rule: Nothing in this section precludes a recipient from removing a respondent from the recipient's education program or activity 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 provides the respondent with notice and an opportunity to challenge the decision immediately following the removal.

VCW's public comments:
• Requiring a threat assessment to be conducted before a student is removed from a respondent's education program or activity on an emergency basis is a good practice.
• We suggest that providing more clarity as to whether the assessment needs to be internal or external, as well as what it should otherwise entail, may be helpful.

Final rule: Unchanged.

Live Hearings with Cross-Examination § 106.45(6)(i)

Proposed rule: Would require institutions of higher education to conduct live hearings that allow for cross-examination by parties' advisors. At elementary and secondary institutions, questions continue to be submitted in writing.

VCW's public comments:
• We share the Department's concern that an effective investigation process be fair to all parties.
• We value an investigatory and resolution process that allows the respondent to question the complainant, guarantees both parties the ability to question each other, ensures that witnesses are properly identified and questioned, provides for secure sharing of evidence, and guarantees both parties the opportunities to review and respond to evidence, findings, and the final report before the final decision is rendered.
• Some concerns were raised that:

- Depending upon the practices of various colleges and universities, one aspect of student conduct could be controlled by a quasi-judicial process when other aspects of student conduct are not
    - o Requiring schools to implement a quasi-judicial process in an educational setting might undermine the effectiveness of the resolution process for both parties. Educational institutions might not be properly equipped to conduct such a process, and it might be unrealistic, impractical, and potentially dangerous to require education professionals to control overly-zealous questioners, make evidentiary rulings in the moment, and otherwise behave as courtroom judges.
- The prospect of facing live cross-examination has the potential to inappropriately discourage people from reporting
    - o Requiring cross-examination to be conducted by advisors could place parties not represented by an attorney at a significant disadvantage, and this disparity could be heightened by unequal access to financial resources.

Final Rule: Clarifies explicitly that the parties shall never be permitted to directly cross-examine the other; specifies that questions asked of a party via cross-examination or otherwise be relevant, and requires the decision-maker to determine the relevancy of a question before the party responds; and allows hearings to be conducted virtually.

File Sharing Platform § 106.45 (b)(3)(viii)

This regulation requires that investigative reports and evidence be shared in an electronic format that restricts parties from downloading or copying the evidence, and requires that parties have at least ten days to respond.

Proposed rule: Prior to completion of the investigative report, the recipient 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.

VCW's public comments:

• We recognize and appreciate the need for confidentiality and security in the sharing of evidence, and would suggest that language be included in the regulations that calls for both while allowing schools to use their discretion in determining how best to meet those standards.

• We are concerned that requiring the sharing of evidence in an electronic format such as a file sharing platform could place an undue financial and technical burden on schools.

Final rule: Provide both parties an 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 regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation.

Standard of Evidence § 106.45 (b)(1)(vii)

This rule allows schools to determine whether they will apply the preponderance of the evidence standard or the clear and convincing evidence standard and requires schools to apply the same standard for other complaints against students and employees and to apply the same standard to all sexual harassment complaints.

Proposed rule: To reach this determination, the recipient must apply either the preponderance of the evidence standard or the clear and convincing evidence standard, although the recipient may employ the preponderance of the evidence standard only if the recipient uses that standard for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction.

VCW's public comments:

• We agree that the standard of evidence used for Title IX proceedings should not be lower than that used for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction, but we also do not believe that the standard should be higher.

• We suggest that the language used in the Q & A issued by the Department of Education in September 2017 more effectively captures this than that in the proposed regulations; that language reads, "The standard of evidence for evaluating a claim of sexual misconduct should be consistent with the standard the school applies in other student misconduct cases…When a school applies special procedures in sexual misconduct cases, it suggest a discriminatory purpose and should be avoided."

Final rule: 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;**

Requirement to dismiss certain complaints § 106.45 (b)(ii)(3)

This rule requires that institutions dismiss complaints that don't meet the new definition of sexual harassment under Title IX, as well as complaints that did not occur within the institution's program or activity.

Proposed rule: If the conduct alleged by the complainant would not constitute sexual harassment as defined in section 106.44(e) even if proved or did not occur within the recipient's program or activity, the recipient must dismiss the formal complaint with regard to that conduct.

VCW's public comments:

• We suggest that schools not be required to dismiss complaints that are determined before investigation to fall outside of the narrow definition of sexual harassment in the proposed regulations, but should be explicitly granted the discretion to follow the formal procedures if they so choose, as well as to address such behavior in their own student conduct process.

Final rule: If the conduct alleged **in the formal complaint** would not constitute sexual harassment as defined in **§ 106.30** even if proved, did not occur **in the** recipient's education program or activity, **or did not occur against a**

person in the United States, **then** the recipient must dismiss the formal complaint with regard to that conduct **for purposes of sexual harassment under title IX or this part; such a dismissal does not preclude action under another provision of the recipient's code of conduct.**

Mandatory Appeals Process § 106.45 (8)(i)

This regulation requires that institutions provide an appeal process for both parties, and provides specific bases for an appeal that must be offered.

Proposed rule: A recipient may choose to offer an appeal. If a recipient offers an appeal, it must allow both parties to appeal. In cases where there has been a finding of responsibility, although a complainant may appeal on the ground that the remedies are not designed to restore or preserve the complainant's access to the recipient's education program or activity, a complainant is not entitled to a particular sanction against the respondent.

VCW's public comments:

- We agree that if a recipient offers an appeal, it must do so for both parties.
- We are concerned that there is a lack of clarity regarding the grounds for appeal, and whether they apply equally to both parties.

Final rule: 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: (A) Procedural irregularity that affected the outcome of the matter;(B) New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and (C) The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter. (ii) A recipient may offer an appeal equally to both parties on additional bases.

Informal Resolution § 106.45 (9)

This regulation allows institutions to offer information resolution as an option for students in Title IX processes where they both agree and as long as either party may resume the formal complaint at any time before agreeing to a resolution.

Proposed rule: At any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the recipient-- (i) Provides to the parties a written notice disclosing-- (A) The allegations; (B) The requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, if any; and (C) Any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared; and (ii) Obtains the parties' voluntary, written consent to the informal resolution process.

VCW's public comment:

• We welcome the inclusion of informal resolution processes as a possible path that some schools and students might find beneficial.

• We are concerned that some students might feel pressured to abandon a formal complaint and instead take up informal resolution.

• We would like to see an assurance that either party, once entering informal resolution, has the option to revert to a formal process, while protecting both parties from being incriminated by anything revealed in the informal process.

Final rule: A recipient may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints of sexual harassment consistent with this section. Similarly, a recipient may not require the parties to participate in an informal resolution process under this section and may not offer an informal resolution process unless a formal complaint is filed. However, at any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the recipient –

> (i) Provides to the parties a written notice disclosing: the allegations, the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared;
>
> (ii) Obtains the parties' voluntary, written consent to the informal resolution process; and
>
> (iii) Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

Record-keeping § 106.45(10)

This rule clarifies what records must be kept and requires them to be retained for at least seven years.

Proposed rule: A recipient must create, make available to the complainant and respondent, and maintain for a period of three years records of...

VCW's public comment:

• We welcome the clarity provided in the proposed record-keeping process.

• We also suggest that three years is too short a time period for retaining records. Many students take longer than four years to complete a degree, and a three-year retention period would mean that some records would be disposed of before the student had left the institution.

Final Rule: A recipient **must maintain** for a period of **seven** years records of…

Single Investigator Model Prohibited § 106.45(b)(7)(i)

Under this rule, educational institutions can no longer use a single investigator model, in which one official investigated, adjudicated, and issued disciplinary sanctions. The new regulations require three officials to work through a complaint process: a Title IX coordinator; an investigator; and a decision-maker.

Proposed Rule: The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility.

VCW did not offer public comment on this rule.

Final Rule: The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility. To reach this determination, the recipient must apply the standard of evidence described in paragraph (b)(1)(vii) of this section.

Parties cannot be prohibited from speaking about the allegations §106.45(b)(5)(iii)

This rule prohibits an institution from restricting a student's right to discuss the allegations under investigation, or from gathering evidence independently.

Proposed Rule: When investigating a formal complaint, a recipient must not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence;

VCW did not offer comment on this rule.

Final rule: When investigating a formal complaint **and throughout the grievance process**, a recipient must not restrict the ability of either party to discuss the allegations under investigation or to gather **and present relevant** evidence;

Retaliation Prohibited § 106.71

This new rule, added to the final regulations but not originally proposed, prohibits retaliation against any individual exercising their rights under Title IX, and specifically allows complaints of retaliation to be filed.

Final Rule: No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part. Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by title IX or this part, constitutes retaliation. The recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported

to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder. Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under § 106.8(c).