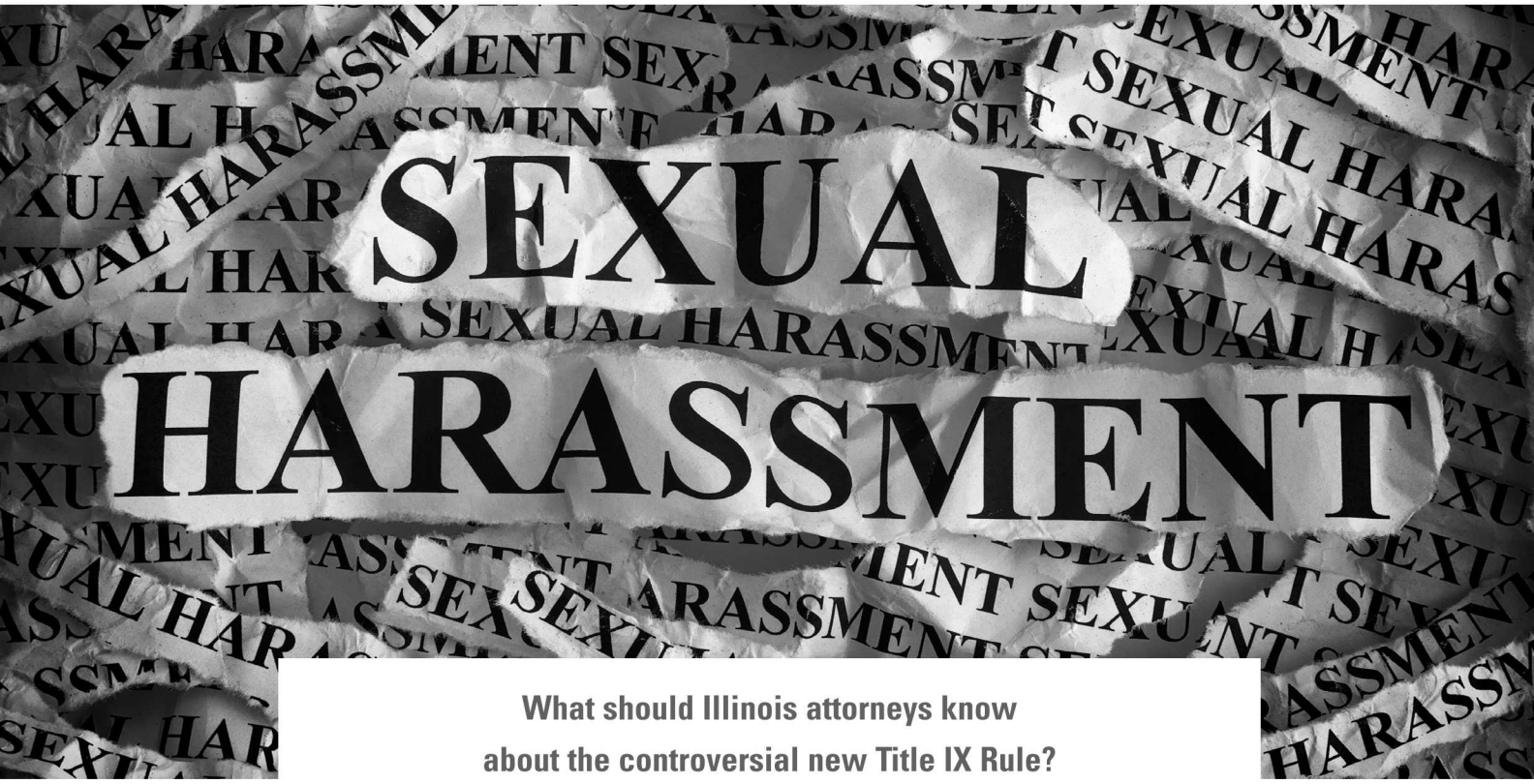
BY JACKIE GHARAPOUR WERNZ

It's Time for Title IX: New Rule, New Regime



What should Illinois attorneys know about the controversial new Title IX Rule?

DESPITE SHARP OPPOSITION; REQUESTS TO DELAY FROM LAWMAKERS, ATTORNEYS general, and educational organizations; lawsuits; and a global pandemic, the U.S. Department of Education's amendments to the regulations implementing Title IX of the Education Amendments of 1972 became effective Aug. 14, 2020.[1] The amendments, the final version of which was released on May 6, 2020, were accompanied by more than 2,000 pages of commentary, including the department's painstaking responses to nearly 125,000 comments to its proposed rule, first issued in November 2018.

1. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026-20579 (May 6, 2020) (revising 34 CFR § 106 effective Aug. 14, 2020).

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Although many naturally think of equity in athletics when they hear "Title IX," the amendments in the new Title IX regulations ("Final Rule") primarily address the handling of allegations of sexual harassment in the nation's schools, colleges, and universities. With some exceptions, the Final Rule narrows the circumstances in which educational institutions will be found to have violated Title IX by the department's administrative enforcement arm, the Office for Civil Rights (OCR)—a process that could, in extreme circumstances, lead to the withholding of an institution's federal funds. Proponents of the due-process rights of the accused generally laud the changes, while opponents argue that victims of sexual misconduct in schools now will be inadequately protected.

Despite the finality of the regulations, uncertainty remains. The American Civil Liberties Union and others have challenged the Final Rule in court.[2] Presidential candidate Joe Biden has vowed to overturn it if elected.[3] State laws—including in Illinois[4]—and even other federal laws require more stringent standards when addressing similar complaints. And the Final Rule has yet to be interpreted by OCR and the courts.

Nonetheless, the Final Rule was promulgated through notice and comment rulemaking and so will be more difficult to reverse than the less-formal guidance OCR has used to shape this area of law in the past. And Title IX issues regularly creep into other types of cases and controversies far beyond the school campus. But educational institutions and Illinois attorneys cannot wait for additional clarity or rule changes. Attorneys in all areas of practice should become familiar with the major changes in the Final Rule, its impacts for schools, and potential effects beyond education law.

Out with the old, in with the new

Federal courts and OCR have long interpreted Title IX to require a school to investigate or otherwise respond to sexual harassment.[5] Yet, the Final Rule is the first time that either the Title IX statute or regulations have mentioned, let alone defined, the term. If there was any doubt before that Title IX covers sexual harassment in educational institutions, it is gone now.

For the past two decades, and with no definition of sexual harassment in the law or regulations, OCR set its own standards for enforcement actions through guidance, much of which was issued without the notice-and-comment period required for administrative rulemaking.[6] Although the definition has varied, OCR guidance generally defined sexual harassment as unwelcome conduct determined by a reasonable person to be so severe, pervasive, or persistent that it interferes with a student's ability to participate in or benefit from an educational institution's services, activities, or opportunities.[7] Even a single instance of conduct based on sex could, if severe enough, meet the definition of sexual harassment—as could even insignificant sex-based conduct that was nonetheless pervasive or persistent.

The broad "hostile environment" definition and increasingly prescriptive mandates in Obama-era guidance between 2010 and 2015[8]

2. See, *e.g.*, Complaint, *Know Your IX v. DeVos*, No. 20-cv-01224 -RDB (D. Md. May 14, 2020), *available at* https://www.aclu.org/know-your-ix-v-devos.
3. Mairead McArdle, *'It's Wrong': Biden Vows to Overturn DeVos's Due Process Protections for Students Accused of Sexual Assault*, National Review (May 7, 2020), available *at* https://www.nationalreview.com/news/its-wrong-biden-vows-to-overturn-devoss-due-process-protections-for-students-accused-of-sexual-assault/.
4. Illinois Preventing Sexual Violence in Higher Education Act, 110 ILCS 155/1 *et seq*.
5. See, *e.g.*, *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999).
6. See, *e.g.*, Russlynn Ali, U.S. Dep't Educ., Office for Civil Rights, Dear Colleague Letter: Sexual Violence (2011), *available at* http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.
7. *Id.*
8. See Office for Civil Rights, Sex Discrimination: Policy Guidance, *available at* https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/sex.html.

TAKEAWAYS >>

- Title IX's new Rule states that a school, college, or university with actual knowledge of sexual harassment must respond in a manner that is not deliberately indifferent and that alleged hostile-environment conduct must, in most cases, be so severe, pervasive, and objectively offensive to effectively deny access to an institution's programs or activities.

- There now exists an extensive, new two-tiered procedural scheme for processing complaints that begins when an educational institution has actual knowledge of sexual misconduct and progresses when a "formal complaint" has been filed.

- Many procedural steps in the Rule intend to increase perceived fairness to the parties and particularly toward respondents, who are allowed to cross-examine accusers during hearings.

ATTORNEYS IN ALL AREAS OF PRACTICE SHOULD BECOME FAMILIAR WITH THE MAJOR CHANGES IN THE RULE, ITS IMPACTS FOR SCHOOLS, AND POTENTIAL EFFECTS BEYOND EDUCATION LAW.

led many to decry federal government overreach. The department was meddling in the disciplinary affairs of educational institutions, detractors claimed, often ignoring the rights of the accused.

A sexual (harassment) revolution

In crafting a definition of "sexual harassment" in the Final Rule, the department eschewed the broad OCR hostile-environment standard. It replaced it with a more-narrow definition based on two U.S. Supreme Court cases that set the standards for money damages in sexual harassment suits under Title IX.

In 1998, the U.S. Supreme Court in *Gebser v. Lago Vista Independent School District* held that a school district is liable for money damages under Title IX if an official of the school district with authority to institute corrective measures on the school's behalf has actual notice of unwelcome conduct on the basis of sex and the institution is deliberately indifferent to the misconduct, meaning its response was "clearly unreasonable under the known circumstances."[9]

A year later, the Court in *Davis v. Monroe County Board of Education* explained that to be sexual harassment to which a school must respond, alleged sex-based misconduct must be so severe, pervasive, and objectively offensive that it effectively denies equal access to an institution's resources or opportunities.[10] Later courts applied the *Gebser* and *Davis* standards to higher-education institutions in addition to K-12 schools.

In the Final Rule, the department essentially adopted the *Gebser*/*Davis* framework: 1) A school, college, or university with actual knowledge of sexual harassment must respond in a manner that is not deliberately indifferent; and 2) alleged hostile-environment conduct must be so severe, pervasive, and objectively offensive to effectively deny access to an institution's programs or activities.[11]

In response to criticism that the higher *Gebser*/*Davis* framework would exclude some conduct that Title IX covered before, the Final Rule also includes exceptions that are not required to meet the new hostile-environment standard. Specifically, the Final Rule brings under the "sexual harassment" umbrella *quid pro quo* conduct by an employee and sexual assault, domestic violence, dating violence, and stalking, as those terms are defined in other federal law.[12] Such conduct is "sexual harassment" under the Final Rule even if it is not so severe, pervasive, and objectively offensive as to effectively deny a person's equal access to the recipient's education program or activity.

The Final Rule similarly follows *Davis*'s lead with respect to who must have knowledge before a school is on the hook to respond to sexual harassment. If an official with authority to institute corrective measures on behalf of an institution has actual knowledge of sexual harassment or reports thereof, so does the school.[13] For higher-education institutions, this "pool of employees" could be much smaller than under OCR's prior "responsible employees" standard, which covered any employee with authority to redress harassment, any employee with a duty to report sexual harassment, and any individual a student could reasonably believe had such authority or responsibility. But the Final Rule also adds that actual knowledge by any employee of a K-12 school district or by any Title IX coordinator at any school level will be imputed to the institution.

It's not who you're with, but where you are

Under previous OCR guidance and practice, conduct that took place outside of the U.S., off-campus, or online could be fair game under Title IX—even conduct perpetrated by a person who was not a student, parent, employee, or other obvious member of a campus community.[14] If the conduct had sufficient impact on a student's education or receipt of other services or benefits of a school, a school could be required to respond under Title IX or risk OCR's scrutiny.

Not anymore. The Final Rule adopts two other limitations from the *Davis*

ISBA RESOURCES >>

- ISBA Free On-Demand CLE, *The New Title IX Regulations: A New Era* (recorded Friday, June 19, 2020), law.isba.org/3eis0sE.
- Pete Sherman, *Laws of Behavior*, 107 Ill. B.J. 16 (Mar. 2019), law.isba.org/3ej2TpU.
- Phyleccia Reed Cole, *Additional State Ethics Act Requirements Add to the Multitude of Sexual Harassment Regulatory Requirements for Illinois Public Colleges and Universities*, Education Law (Aug. 2018), law.isba.org/2Co2NvP.

9. 34 C.F.R. § 106.30(a) (effective Aug. 14, 2020).
10. *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999).
11. *Id.*
12. *Id.*
13. 34 C.F.R. §§ 106.30(a), 106.44(a) (effective Aug. 14, 2020).
14. See, *e.g.*, Brittany K. Bull, *Raped Abroad: Extraterritorial Application of Title IX for American University Students Sexually Assaulted While Studying Abroad*, 111 Nw. U. L. Rev. 439, 459–62 (2017) (discussing OCR's willingness to assert jurisdiction over allegations of sexual violence during international school programs suggesting an expansive interpretation of Title IX's extraterritoriality).

decision: To be covered by Title IX, conduct 1) must take place "in" a school's education program or activity and 2) must be perpetrated against a person in the U.S.[15] The Final Rule adopts the definition, from *Davis*, that the conduct is in a program or activity of an institution if the institution has "substantial control" over the context in which the harassment took place and over the harasser.[16]

The requirement that conduct take place in an educational program or activity has raised fears that misconduct occurring online or outside a school's immediate community will not be covered. In the commentary to the Final Rule, the department denies that the method or medium of conduct matters. The Final Rule also makes clear that, in higher education, conduct in buildings owned by officially recognized student organizations such as fraternities will be covered.[17] And courts applying the *Davis* standard have found that Title IX applies to at least some social-media communications initiated off campus.[18] So, there is still room for some online and off-campus conduct to be covered. But the Final Rule certainly will exclude some sex-based conduct that negatively impacts a student's education based on where the conduct took place or who perpetrated it.

A pillar of support

The Final Rule requires educational institutions to provide "supportive measures" to individuals who are reported to be the victims of sexual harassment ("complainants") and individuals who are reported to be perpetrators ("respondents").[19] Supportive measures are nondisciplinary, nonpunitive individualized services offered free of charge to the complainant or respondent where there has been a report of sexual harassment.

Supportive measures include interventions such as counseling, extensions of deadlines, and modifications to class schedules and housing locations, all of which were examples of "interim measures" allowed under previous OCR guidance. But unlike interim measures, the Final Rule makes clear that supportive measures are required, are not necessarily "interim" in nature, apply even if no formal complaint has been filed, and apply equally to the respondent and the complainant. Although one-sided, no-contact orders are not prohibited, particular circumstances, such as a court order, would likely be required to avoid making such orders mutually applicable to the complainant and the respondent.

New formalities, new formulae

The Final Rule creates an extensive new procedural scheme for processing complaints. In fact, it creates two: one when an educational institution has actual knowledge of sexual misconduct[20] and one when a "formal complaint" has been filed.[21]

After a Title IX coordinator, official with authority, or K-12 educational employee gains actual knowledge of sexual harassment, the Title IX coordinator must meet with the alleged victim, offer supportive measures, and provide notice of more formal procedures available. Unlike under previous OCR guidance, an educational institution is not required to investigate or further respond to concerns unless either the alleged victim files a "formal complaint" or the Title IX coordinator decides to pursue the complaint over the complainant's objection by "signing" a complaint.

Formal complaints may be less common under the Final Rule than under previous OCR guidance. Unlike Obama-era OCR guidance, the Final Rule allows schools wide latitude to use informal processes, such as mediation, to address all complaints other than those alleging employee-on-student sexual harassment.[22] This may lead more matters to settle without an investigation. The Final Rule also no longer permits anyone other than the actual alleged victim to file a complaint.[23] And educational institutions are no longer required to open an investigation without a willing complainant in all circumstances where there might be ongoing harm to schools.

THE FINAL TITLE IX RULE SIGNALS A MAJOR CHANGE IN THE TITLE IX LANDSCAPE FROM WHICH WE WILL LIKELY NEVER FULLY RETURN, NO MATTER WHAT HAPPENS WITH ANY LAWSUIT OR ELECTION. ATTORNEYS SHOULD PREPARE TO ADDRESS THESE CHANGES AND THEIR EFFECTS ON EDUCATIONAL INSTITUTIONS AND THE LAW FOR YEARS TO COME.

Although the Title IX coordinator may "sign" a complaint even if a complainant does not wish to proceed with an investigation, that decision will be scrutinized by OCR for "deliberate indifference" and so must not be clearly unreasonable under the circumstances. While it is unclear whether the decision not to sign a complaint without the complainant's involvement will be subjected to the same scrutiny, Title IX coordinators may be more likely to choose that path.

Once a formal complaint is filed, the regulations require schools to follow a number of specific steps to investigate and resolve the complaint. Educational institutions must choose between two standards of evidence for investigations: 1) preponderance of the evidence, which OCR required under previous guidance; or 2) the higher clear-and-convincing-evidence standard. The Final Rule makes clear for the first time, however, that schools must apply the same standard to

15. 34 C.F.R. § 106.44(a) (effective Aug. 14, 2020).
16. *Id.*
17. *Id.*
18. See, *e.g.*, *Feminist Majority Foundation v. Hurley*, 911 F.3d 674, 687–89 (4th Cir. 2018).
19. 34 C.F.R. § 106.30(a) (effective Aug. 14, 2020).
20. 34 C.F.R. § 106.44(a) (effective Aug. 14, 2020).
21. 34 C.F.R. § 106.44(b) (effective Aug. 14, 2020).
22. 34 C.F.R. § 106.44(b)(9) (effective Aug. 14, 2020).
23. 34 C.F.R. § 106.30(a) (effective Aug. 14, 2020).

both employee and student respondents.[24]

Many procedural steps in the Final Rule are aimed at increasing perceived fairness to the parties, and particularly toward respondents. Specific notices and communications are required along the way. Hearings with live cross-examination are required in higher education. In K-12 schools, written cross-examination must be allowed even if a school or district elects not to allow a live hearing. Higher education institutions must provide advisors at no cost to students for hearings, and parties and their advisors must be given access and an opportunity to respond to any report before it is finalized. For the first time ever, schools must offer an appeal to both parties under Title IX, albeit on limited bases. And the investigator, initial decisionmaker, and decisionmaker on appeal must be separate individuals, all of whom must be free of conflict or bias. The Final Rule also includes significant new recordkeeping requirements that will be new to many schools, particularly K-12 schools.

The floor, ceiling, or both?

The Final Rule unquestionably lowers the standard for administrative liability for schools under Title IX. It also could have ripple effects on how courts interpret the law in lawsuits for money damages. That does not mean that schools, colleges, and universities must, can, or even should turn away students who complain about sexual misconduct that is now outside of Title IX's scope.

In some contexts, a school may be required to address a complaint even if it falls outside of Title IX. Other laws, including other federal and state laws, may require schools to respond to sexual misconduct outside of the Final Rule. The Clery Act[25] and Violence Against Women Act[26] are two examples. In Illinois, elementary and secondary schools may be required to address bullying based on sex under the School Code even if such conduct is not "sexual harassment" as defined by the Title IX Rule.[27] Illinois colleges and universities must comply with the Preventing Sexual Violence in Higher Education Act, which includes, under its definition of "sexual violence," conduct that might not fall under the definition of sexual harassment under the new Title IX Rule.[28]

In other cases, a school may choose to address conduct even if jurisdiction is lacking under Title IX. An educational institution must "dismiss" a complaint under Title IX that does not meet the Final Rule's jurisdictional standards. But it can use other policies and procedures to address the same conduct—if it chooses to do so. If it does, a dismissal under Title IX may be purely technical. Many higher education institutions may wish to take this approach where students are older, norms are more well-settled, and potential impacts on campus safety are greater.

But using the more stringent Title IX procedures for conduct that does not fall under the Final Rule may not always be advisable. In K-12 schools, especially, less-serious sexual conduct is common and even "age-appropriate" in some cases. Efforts toward restorative practices and away from the school-to-prison pipeline also may weigh against extending the quasi-judicial procedures of the new Title IX beyond its intended reach.

Key considerations for educational institutions

Regardless of pending litigation, educational institutions that have not done so already must act now to comply with the Final Rule. What is required? Policies and procedures should be updated and in effect by the implementation deadline. The Final Rule requires specific training for individuals with responsibilities over Title IX, including investigators, hearing officers, decisionmakers at either the investigation or appeal level, and informal resolution facilitators.[29] Training on the Final Rule is also advisable for all "officials with authority," including all Title IX coordinators and all K-12 employees. Students should also be notified of important changes, including identifying who is designated as an official with authority at the higher-education level.

And for nonschool attorneys

Attorneys who do not represent schools may wonder how the Final Rule will impact them. Title IX issues often flow out of the education law realm and into others, and there is little reason to believe the impacts of this Final Rule will differ.

How will the new, pseudo-judicial procedures required for investigations and resolutions of complaints—including live cross-examination at hearings—impact criminal processes that often run parallel to those under Title IX? How will the department's proclamation in the commentary to the Final Rule that it applies to employee-on-employee misconduct affect the processing of employee sexual-harassment complaints under Title VII of the Civil Rights Act of 1964, which uses a "severe *or* pervasive" definition of hostile environment?

Another requirement of the Final Rule that may pique the interest of consultants and copyright attorneys is the mandate that educational institutions post "all materials" used to train employees with responsibilities over Title IX investigations, determinations, and appeals on the institution's website. A blog post from OCR suggests that a school may not use training materials to comply with the law's requirements unless the educational institution is able to secure permission from the copyright holder to publish the training materials on the school's website.[30] The OCR blog claims that "[n]othing in the Title IX Rule abrogates intellectual property rights."[31] But it also states that "[i]f a school is unable to secure permission from a

24. 34 C.F.R. § 106.44(b)(1)(vii) (effective Aug. 14, 2020).
25. 20 U.S.C. 1092.
26. Violence Against Women Act of 1994, 42 U.S.C. 13925 *et seq*.
27. 105 ILCS § 5/27-23.7.
28. 110 ILCS 155/1 *et seq*.
29. 34 C.F.R. § 106.45(b)(iii) (effective Aug. 14, 2020).
30. U.S. Dep't Educ., Office for Civil Rights, Schools Must post Important Information Regarding Title IX on School Websites Under the New Title IX Rule (May 18, 2020), *available at* https://www2.ed.gov/about/offices/list/ocr/blog/20200518.html.
31. *Id.*

third party to post copyrighted training materials, then the school must create or obtain training materials that can lawfully be posted on the school's website."[32] Has the department effectively abolished copyright protections for organizations and individuals who provide Title IX-related training and consulting services to schools? What about attorney-client-privileged communications that are nonetheless part of an employee's training?

These questions will be answered over time, and practitioners should keep the Final Rule on their radars until they are.

The Final Rule signals a major change in the Title IX landscape from which we will likely never fully return, no matter what happens with any lawsuit or election. Attorneys should prepare to address these changes and their effects on educational institutions and the law for years to come. IBJ

32.
33. *Id.*