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DOE Releases Questions and Answers on New Title IX Rule Weeks After Compliance Date

BY CHRISTOPHER D. CARUSONE
AND KATE EMERT GLEASON

Special to the Legal

Despite expectations that the U.S. Department of Education (DOE) would release new Title IX regulations last fall, the final version of the new Title IX rule was not issued until half a year later on May 6, amid the COVID-19 pandemic. A number of state attorneys general filed a suit seeking an injunction to prevent the new regulations from being implemented on the proposed date of Aug. 14. However, on Aug. 12, U.S. District Judge Carl Nichols of the District of Columbia denied the injunction, and both secondary and post-secondary educational instructions are now required to conform their Title IX policies and procedures to the new regulations.

In January 2020, prior to the release of the final Title IX Rule, the DOE created a new “Outreach, Prevention, Education and Nondiscrimination Center,” otherwise known as “the OPEN



CARUSONE

CHRISTOPHER D. CARUSONE chairs the government law and regulatory affairs group and serves as co-chair for the internal investigations group at Coben Seglias Pallas Greenball & Furman. He advises clients on internal investigations involving Title IX and student conduct, and allegations of waste, fraud and misconduct. Carusone can be reached at ccarusone@cobenseglias.com and 717-480-5306.



GLEASON

KATE EMERT GLEASON is an associate at the firm and a member of the firm's construction, Title IX, internal investigations and scientific misconduct groups. She assists in conducting internal investigations into allegations of sexual misconduct, discrimination, harassment and other acts of misconduct at education institutions and businesses.

Center.” The OPEN Center, staffed by Office of Civil Rights attorneys, provides technical assistance to help educational institutions become compliant with federal civil rights law prior to the filing of a complaint.

In early September, the DOE Office of Civil Rights, through

the OPEN Center, issued a technical assistance document to answer a number of questions about compliance with the new rule. Notably, the DOE may periodically release similar questions and answers documents addressing the Title IX Rule in

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the future. Below are some of the key takeaways from the Sept. 4 questions and answers document.

- **The Title IX rule will not be enforced retroactively.**

The DOE clarified that the enforcement of the rule will only cover incidents that occur after the effective date. This means that the new rule does not apply to a school's response to sexual harassment that allegedly

occurred before Aug. 14. Only sexual harassment that allegedly occurred on or after Aug. 14 will be subject to the rule. In other words, the Office of Civil Rights will judge a school's Title IX compliance against the rules in place at the time the alleged sexual harassment occurred.

- **Schools may use the same personnel and similar procedures for non-Title IX misconduct.**

Institutions can continue to address misconduct that does not meet the definition of sexual harassment, and can in fact use the same Title IX personnel to review and investigate misconduct that falls outside the scope of Title IX. Schools can even use a similar grievance process as the one set forth in Section 106.45 with respect to allegations of misconduct that do not constitute sexual harassment under the new rule's definition. In the same vein, a school is also free to respond to non-Title IX misconduct under disciplinary procedures that do not follow Section 106.45. The new Title IX Rule only serves to require a specific grievance process where allegations concern sexual harassment as defined in the rule.

- **A complainant who has left school because of sexual harassment can still pursue a formal complaint in certain situations.**

A complainant has the right to file a formal complaint if they still participate or attempt to participate

in the school's programs or activities. The DOE explains that, for example, a complainant who has graduated but intends to stay involved with the school's alumni program or activities is a complainant that is attempting to participate in the school's education program or activities. Further, a complainant that is on a leave of absence is considered to be participating or attempting to participate if the complainant is still enrolled, or intends to reapply. Specifically, if a complainant has left school because of sexual harassment but expresses a desire to re-enroll should the school respond appropriately to the harassment, that complainant is attempting to participate and can file a formal complaint. However, the Questions and Answers document does not directly address whether a complainant that has left school because of sexual harassment and does not intend to re-enroll has the ability to pursue a formal complaint. The DOE notes that the rule allows a Title IX coordinator to sign a formal complaint regardless of whether the complainant is participating or attempting to participate in the school's education program or activity. For example, a Title IX coordinator may decide it is necessary to sign a formal complaint if they have received numerous reports about sexual harassment against a particular respondent.

- **The "reasonable person" standard in the definition of sexual harassment applies to**

- the effective denial clause of the definition.**

The definition of sexual harassment in the new rule states that sexual harassment is conduct on the basis of sex that constitutes "unwelcome conduct determined by a reasonable person to be so severe, pervasive and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity." The DOE explains that "reasonable person" applies to each of the four elements: severity, pervasiveness, objective offensiveness, and the effective denial of equal educational access. Specifically, to show effective denial of access, the rule does not require showing that a complainant, for example, dropped out of school, failed a class, had a panic attack, etc. in order to receive a school's supportive response to sexual harassment. A demonstration that there was complete exclusion from education is not required—in fact, no concrete injury is required for a conclusion that a complainant has been deprived access to educational programs or activities.

- **The rule permits schools discretion to adopt rules regarding relevance and credibility of evidence.**

The DOE emphasizes that the Title IX Rule does not adopt the Federal Rules of Evidence for Title IX hearings. Instead, relevance of evidence is the only criteria for admissibility. Importantly, as the

rule does not define relevance, schools have the ability to apply the ordinary meaning of the word and create their own rules, within certain limitations. For example, a school cannot make a rule excluding relevant evidence because its probative value is substantially outweighed by the danger of unfair prejudice, or because the evidence constitutes character evidence or evidence of prior bad acts.

However, a school can adopt rules to determine how relevant and admissible evidence is evaluated for weight and credibility, as long as the adopted rules do not conflict with the requirements of the grievance process, and apply equally to all parties. For example, a school can adopt a rule that directs what weight and credibility a decision-maker should apply to evidence regarding a party's prior bad acts, as long as the rule applies equally to the complainant's and the respondent's prior bad acts. A school can further create rules that dictate how parties behave during a hearing (i.e., no badgering of witnesses).

• **A decision-maker can consider statements from a witness or party who submits to cross-examination from all parties.**

A decision-maker can only consider statements that have

been vetted through cross-examination. Statements by parties or witnesses that have not submitted to cross-examination cannot be relied upon. This means that statements contained in police reports, medical reports, and other types of documents and records cannot be relied upon if they are made by a party or witness who has not been submitted to cross-examination. The parties and witnesses will have the opportunity to discuss credibility and the importance of various documents and records during the hearing, where the parties have the opportunity to cross-examine the witnesses and parties that made the statements.

The key here is that the rule requires that all parties have the opportunity to cross-examine witnesses and parties that have made statements. This means that a decision-maker is not forbidden from relying on a statement of a witness or party who was not provided the opportunity to submit to cross-examination because a party simply chose not to conduct cross-examination of that witness or party. In this situation, if a party chose not to conduct the cross examination of a witness or party (but had the opportunity to), that witness or party cannot be said to have submitted or not

submitted to cross-examination. On the other hand, if, during cross-examination, a party refuses to answer an advisor's relevant cross-examination questions, then that party is not considered to have submitted to cross-examination, and the decision-maker cannot rely on that party's statements. Such an ability to waive certain questions would circumvent the purpose of cross-examination.

• **Compliance.**

As of Aug. 14, educational institutions are required to have policies that are compliant with the new Title IX Rule. While the DOE's question and answer document provides some guidance on questions that have come up since the effect date, schools may want to confer with counsel to ensure their policies and procedures are in compliance. •

