

Highlights from the Final Rule and Impacts for Survivors of Sexual Violence in Institutions of Higher Education

Severely Diminishes Access to Protections and Expands Dismissal Requirements

Narrowed Definition of Sexual Harassment

Under the prior Title IX guidance, schools were required to investigate sexual harassment complaints that constituted “unwelcome conduct of a sexual nature.” The new Final Rule changes that definition. Now, in order to constitute sexual harassment, conduct must fit one of three limited circumstances:

- a) The conduct is “so severe, pervasive and objectively offensive” as to deny a person equal access to a school program or activity;
- b) The conduct meets the Clery Act’s definition of sexual assault, or the VAWA definition of dating violence, domestic violence or stalking; or
- c) The conduct involves unwelcome “quid pro quo” – offers of incentives in exchange for sexual acts.

This is a much higher bar for unwanted conduct than the previous rule and requires victims to endure repeated and escalating levels of abuse before meeting the threshold for filing a complaint.

Narrowed Applicability of the Rule

Under the new Final Rule, a victim is only entitled to protections against harassment if they were participating or attempting to participate in a school-controlled education program or activity in the United States. The prior rule required schools to investigate all student complaints, regardless of whether the harassment occurred on or off campus. The practical effect of this change will be to drastically reduce the numbers of complaints that a school is required to investigate. Survivors who are assaulted while studying abroad, at an unrecognized sorority/fraternity house or off-campus apartment, will be ineligible for a Title IX case with the school. This change also brings up questions for online programs.

Schools **MUST** dismiss the complaint if the incident does not occur in an eligible location or meet the definition of sexual harassment. They may dismiss if the respondent graduates, if they cannot gather sufficient evidence to make a determination, or if the complainant requests a dismissal. Rather than the previous 60-day timeframe for the grievance process, there is now no longer an encouraged or mandatory timeframe for resolving complaints.

Creates Onerous Process for Victims

Heightens Standard of Evidence with Heavier Burden of Proof on Victims

The new Final Rule tilts the scale in favor of respondents by offering schools the option of using a “clear and convincing evidence” standard in their Title IX cases. This is a higher burden and a dramatic deviation from the “preponderance of the evidence” standard that has previously been deemed appropriate and used by courts in all civil rights cases. This puts a heavy burden of proof on victims to prove their case and denies equality in the process. Additionally, the rule requires that schools begin investigations with the presumption that no harassment occurred. The presumption of innocence is a criminal law concept which has no place in an administrative proceeding, and perpetuates a culture of disbelieving survivors’ claims. Under this new rule, survivors are held to the same burdens of proof that prosecutors must follow, without any of the stature and resources.

Erodes Victims' Right to Privacy

According to the Final Rule, schools are not permitted to restrict the ability of the parties to discuss the allegations or gather their own evidence, including the alleged perpetrator. This allows perpetrators to make public an incident that most survivors would prefer be kept private and within the confines of a confidential investigation and hearing. Additionally, the new Final Rule requires that investigations objectively evaluate all relevant evidence, inculpatory and exculpatory, which raises even more concerns about erosion of privacy, potentially leading to a chilling effect on reports.

Imposes a Dangerous Hybrid Process on Investigations

Prior Title IX guidance required that all aspects of the process be prompt, equitable to both parties and governed by consistent procedures. This included a recommended 60-day timeframe for investigations to be concluded. According to the new Final Rule, however, schools are not given any specified timeframe, and hearings will now be required to offer a live cross examination, with either party's advisor doing the questioning. The advisor doesn't have to be an attorney, nor are there evidentiary rules to consider or follow, as would exist in any other court proceeding that includes cross examination. If the victim or witness does not submit to cross-examination at the live hearing, all of their statements will be disregarded from consideration.

This new process provides a dangerous hybrid in which criminal court procedures are imposed on an administrative process, with none of the normal protections afforded to witnesses. It strips away the concept of equity, and is out of step with any precedent for school-based investigatory processes for other types of student or employee misconduct.

Denies Long-Established Rape Shield Protections

Every state has adopted protections in the criminal justice process, known as rape shield laws, which recognize that a victim's sexual history is irrelevant to determining consent in an incident of alleged rape. When properly followed, rape shield laws promote the vital interest of prosecuting sexually violent crimes and mitigating potential trauma of rape victims in the court process. In Texas, where rape shield laws were adopted in the 1970s, courts have consistently found that evidence of a victim's sexual history in a sexual assault case is irrelevant to the question of consent. Nevertheless, the new Final Rule provides opportunities for schools and respondents to offer evidence in the Title IX hearing about the complainant's prior sexual behavior with past sexual partners and previous sexual contact with the respondent. This flies in the face of established evidentiary standards nationwide. Underlying the rule is a biased, harmful, and outdated assumption that if a person willingly engages in sexual contact on one occasion, they must have done so for all occasions.

Provides an Undefined Mediation Process in Lieu of Investigations

The rule sets out the option for student complainants and respondents to enter into an "informal mediation" process in lieu of pursuing a formal investigation into sexual harassment. Mediation in these types of cases is inappropriate because it assumes that both parties share responsibility for the conduct in question, and it opens the door for school administrators and assailants to coerce victims into the process. Further, no minimum standards are outlined in the Final Rule for who may conduct this process or how it should take place.

Limits School's Duty to Respond

Significantly Scales Back the Number of Employee Reporters

Title IX guidance previously dictated that schools address harassment that they knew or should have known about, and this duty of reporting such awareness of harassment was imputed to “responsible employees.” The term “responsible employees” was broadly interpreted to include any employee that students believed had the authority to deal with the incident or duty to report the conduct. The new Final Rule significantly reduces a school’s duty to respond to harassment occurring on campus, only requiring a response when a school has actual knowledge of the harassment from a formal notice to a Title IX Coordinator or to an official “with authority to institute corrective measures.” This permits schools to turn a blind eye to harassment if the complainant does not tell one of a very small subset of employees.

Lowers the Standard for Institutional Responses to Sexual Harassment

The prior Title IX guidance required schools to respond reasonably to complaints of sexual harassment, through prevention and investigatory efforts, and provision of reasonable accommodations to the complainant. The Final Rule has altered the way this “reasonableness” standard is applied. Now schools must simply respond in a way that is not “clearly unreasonable” or “deliberately indifferent,” which is a lower standard of response. It also presents questions about how claims filed by student employees, who may be covered by both Title IX and Title VII, will be handled, given the conflicting standards.

Allows for Discrimination in the Name of Religion

The new rule allows schools that are governed by a religious organization to completely opt out of the Title IX rules, protections and process by asserting that the law is inconsistent with the religious tenets of the organization. Any institution receiving Federal funding may submit a letter to the Office of Civil Rights claiming a religious exemption, even AFTER an investigation has begun or a complaint has been filed. This effectively allows schools to discriminate on the basis of sex in the name of religion, and denies students any advance notice of prospective discriminatory practice.

These rules are set to be in effect August 2020. There are policy differences between these rules and the new sexual violence reporting laws that Texas passed in 2019. Institutions will need to examine both as they move forward with policy changes and disciplinary responses to sexual violence.