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# KEY PROPOSED CHANGES TO TITLE IX REGULATIONS: AN OVERVIEW AND ANALYSIS OF U.S. DEPARTMENT OF EDUCATION PROPOSED REGULATIONS

PREPARED FOR THE SOCIETIES CONSORTIUM ON SEXUAL HARASSMENT IN STEMM

## INTRODUCTION

On November 16, 2018, the Trump administration proposed changes to the current Title IX regulations as they relate to sexual harassment of students by employees, other students and third parties. Interested parties have an opportunity to comment on the proposed regulations before January 28, 2019. The changes would modify existing U.S. Department of Education (USED) regulations and policy guidance issued in 1997, 2001, 2011, and 2014.

In 1997 and 2001, USED's guidance followed public review and comment (but was not subject to formal rule making).

### PURPOSE AND SCOPE OF THIS DOCUMENT

This document provides an overview of the major proposed Title IX regulatory changes, reflecting a legal analysis of changes in light of existing rules, as well as preliminary perspectives regarding the potential impact of the changes. Its purpose is to provide a strong, objective foundation to help inform opinions about the proposed changes; it does not express an opinion about the policy reflected in the proposed changes.

### IN THIS BRIEF:



## MAJOR POINTS THAT UNDERGIRD SPECIFIC REGULATORY PROPOSALS DISCUSSED

***Shift in USED enforcement standards to those that govern private litigation***

Proposed regulatory changes are largely a consequence of USED's decision that standards governing private litigation should fully apply to Office of Civil Rights (OCR) administrative enforcement actions.[1] This shift permits significant changes to: How USED defines sexual harassment; the type of notice of sexual

[1] USED previously distinguished standards in private court actions for money damages from OCR enforcement action, justifying the distinction based on the fact that enforcement actions, unlike private court actions: are incremental in nature; provide opportunity for voluntary corrective action; and always provide a school actual notice before issuing a finding of violation or termination of Federal funds. These distinctions are noted approvingly in *Gebser v. Lago Vista Ind. Sch. Dist.*, 524 US 274, 288 (1998) — the holding of which is expressly limited to private litigation seeking *money damages* for violations of Title IX. The *Gebser* court makes clear that: "Of course, the Department of Education could enforce [a] requirement administratively: Agencies generally have authority to promulgate and enforce requirements that effectuate the statute's nondiscrimination mandate [citation omitted], even if those requirements do not purport to represent a definition of discrimination under the statute." *Id*. at 292. The proposed regulations acknowledge that USED could have chosen to enforce Title IX under different standards than those applicable to private lawsuits, but instead choose to "align" with case law based on several rationales, including that students and institutions would "benefit from the clarity of an essentially uniform standard;" and they "are the best interpretation of Title IX."

harassment that triggers a school's obligation to respond; and how USED evaluates a school's response to sexual harassment.

***Limits on applicability***

In apparent recognition of its narrowing of circumstances in which Title IX would apply with respect to OCR enforcement activity, USED "emphasizes that a recipient remains free to respond to conduct that does not meet the Title IX definition of harassment, or that did not occur within the recipient's program or activity, including by responding with supportive measures."

***All school levels included***

The proposed regulatory changes apply to postsecondary and elementary and secondary schools. In contrast to prior USED guidance, the proposal contains few distinctions or allowances in recognition of different types of educational programs and activities, or ages of students involved.

***Gender-based harassment included***

Nothing in the proposed regulations indicates an attempt to exclude "gender-based harassment."[2] To the contrary, USED's proposed new regulatory definition of hostile environment harassment — which refers to unwelcome conduct "on the basis of sex," and makes no mention that the conduct must be "sexual" — signals that gender-based harassment is covered by Title IX[3]

***More robust standards not precluded***

Finally, nothing in the proposed changes prohibits educational institutions from establishing and enforcing formal conduct, notice, prevention and response standards, respecting sexual harassment, that are more robust than proposed by USED. Any such action, of course, must still meet requirements for due process and may not exceed any federal or state statutory (or, for public institutions, constitutional) limitations.

[2] Research indicates that gender-based harassment (e.g., sexist insults, gender-based slurs, denigration or sabotage) can have similar negative effects on women as unwanted sexual conduct or sexual coercion. *See* National Academies of Sciences, Engineering and Medicine, Consensus Study Report "Sexual Harassment of Women: Climate, Culture and Consequences in Academic Sciences, Engineering, and Medicine" (2018) ("*Consensus Study Report*") pp. 42, 72; and, that gender-based harassment, overwhelmingly, is the most common form of harassment faced by women. *Id.* pp. 25-27.

[3] USED's previous guidance identified, but did not address in consequential detail, issues of gender-based harassment, i.e., acts of intimidation, aggression, or hostility based on sex (e.g., sex-stereotyping), but *not* involving conduct of a sexual nature. However, the 1997 and 2001 USED guidance, as well as USED's 2010 Dear Colleague Letter regarding bullying of students prohibited by civil rights laws, and its 2014 Q&As regarding Title IX and Sexual Violence, made clear that such conduct was discrimination based on sex under Title IX, despite not being the focus of those policy documents.

**TABLE 1.** High-level summary of proposed changes

| Issue | Description |
|---|---|
| **Definition of sexual harassment** | "Severe, pervasive, *and* objectively offensive" conduct that "effectively denies" equal access, replaces "severe, persistent, *or* pervasive, conduct that "alters" or "adversely affects" participation, which will likely narrow the conduct deemed a violation of Title IX |
| **Breadth of circumstances where IX applies** | Narrowed interpretation of "in the education program or activity," replaces broader recognition of consequences and effects of harassment—which will likely limit the circumstances in which institutions must respond to sexual harassment |
| **Threshold for liability with respect to institutional notice** | "Actual notice" to official with "authority to take corrective action," replaces, in most cases, imputed, constructive or actual notice to any "responsible employee," which significantly limits the circumstances in which institutions must respond to incidents of sexual harassment, even when incidents are known to employees with significant responsibility |
| **Threshold for liability regarding institutional action in light of notice** | "Deliberate indifference" standard as measure of institution's response, and a "safe harbor" for IHEs, replace standard of reasonableness, which, particularly when combined with the "actual notice" standard, significantly reduces IHEs' duties to respond under Title IX |
| **Requirements associated with grievance procedures** | Where formal complaint filed, formal investigation and (for IHEs) live hearing required; IHEs granted a "safe harbor" if they follow procedures, which may reduce the filing of complaints, and may result in less effective protection for targets and other affected students |

## DISCUSSION AND ANALYSIS

### 1. The proposed regulatory changes to the definition of hostile environment sexual harassment may result in a consequential narrowing of the scope of relief available under Title IX

**Overview:** The new regulations purport to change the definition of hostile environment sexual harassment, expressly in an effort to rectify, in USED's view, "problems with the current state of the Title IX's application in schools and colleges, including overly broad definitions of sexual harassment."[4]

The proposed regulation adopts the standard announced in the Supreme Court's opinion in *Davis v. Monroe County Board of Education,* 526 U.S. 629 (1999): "Unwanted 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." USED's 2001 Guidance expressed the view that its 1997 guidance, in effect, already reflected the *Davis* definition, but used different language — "severe, persistent *or* pervasive."[5] USED noted that while "in some ways different words are used… Both the Court and the Department's definition are contextual definitions intended to capture the same concept — that

[4] The proposed regulatory changes *cannot* change (to limit) what constitutes harassment prohibited by Title IX according to Supreme Court precedent, or that sexual assault is a violation of Title IX and a crime. However, the regulatory changes here would affect *USED's enforcement actions*.

[5] The *Davis* Court itself recognized the validity of USED's 1997 definition of harassment by referring approvingly to the guidance in its discussion of whether conduct rises to the level of harassment. 526 U.S. at 651. Similarly, the 2001 Guidance adopted language from *Davis* to further refine its framework for examining claims of hostile environment, including, an examination of "the constellation of surrounding circumstance, expectations, and relationships." *See Davis*, 526 U.S. at 651 .

under Title IX, the conduct must be sufficiently serious that it adversely affects a student's ability to participate in or benefit from the school's program."[6]

The proposed regulation would find a potential violation of Title IX only where the harassment is sufficiently "severe *and* pervasive" so that it "effectively denies," "effectively deprives," or "jeopardizes a person's equal access to" an educational benefit, service, or opportunity. The previous guidance would find a violation where the harassment is sufficiently "severe, persistent *or* pervasive" to "alter the conditions of the student's educational environment (1997), "deny or limit," (2001), "alter," and "adversely affect," (2001), or "interfere[] with or limit[],"(2011) a student's participation in, or benefit from, the education program.[7]

The key question is whether Title IX, under the proposed standard, requires a higher, more robust evidentiary basis to establish a violation. In other words, are the uses of "and," (not "or") and the words "effectively denies," analytically consequential?[8] USED's previous guidance indicated a possible Title IX violation where a student experiences sexual harassment but is still able to attend, participate in, or keep up his or her grades, but experiences great difficulty performing due to anger, humiliation, and fear. Moreover, under the previous guidance, a hostile environment could be created not only for the targeted student but those that witness the conduct. The proposed regulations do not expressly reference those interpretations of Title IX. That may indicate a change in USED's interpretation of Title IX, and at least creates ambiguity, but would not limit a court's interpretation.

**Bottom Line:** There is a substantial likelihood that the Administration's insistence that it has altered, for USED enforcement purposes, the definition of harassment, reflects an intent regarding enforcement that will narrow claims deemed violations of Title IX. However, underlying statutory, regulatory, and policy arguments can provide effective counters to that effort in a court challenge.

[6] USED's 2001 guidance's maintenance of differences in exact language between the *Davis* standard and OCR policy implicitly affirmed that some distinctions in scope could remain. Particular word differences between USED's proposed regulation and existing guidance, therefore, could be used to materially affect how Title IX prohibitions against sexual harassment are enforced by OCR under Title IX.

[7] In addition to these changes, regulatory language is to be given meaning and, consequently, there is likely significance to the proposed regulatory definition including the words "and *objectively offensive*." However, in substance (as opposed to tone and messaging), this modification of the previous standard may be a distinction without a difference. The endnotes to USED's 1997 guidance made clear that its reliance, in part, on a "subjective perspective," when evaluating if a hostile environment had been created for students, was intended to capture the requirement that the student actually perceived the conduct as harassment in order to find that it "altered" the school environment. Moreover, the 2001 guidance made clear that analysis of the hostile environment was based on a 'reasonable student" standard (an objective perspective), and required schools to "use common sense and reasonable judgement" in determining if a hostile environment was created. Moreover, the 2014 Q&As stated that the conduct is evaluated "from the perspective of a reasonable person in the alleged victim's position, considering all circumstances"(an objective perspective).

[8] A challenge can be made against attempts to narrow the definition of actionable harassment by use of the language "effectively denies:" This is because the proposed regulation does *not* purport to eliminate or change the existing regulatory prohibitions in §106.31(b) which expressly prohibits not only "denial" of equal access based on sex, but also:

- The provision of educational programs in a "different manner;"
- Subjecting a person "to different rules of behavior;" and
- "Otherwise limit[ing] any person" in the enjoyment of an educational opportunity.

2. Although USED validates the current regulatory scope of Title IX as applying to "all the operations of a recipient," its discussion of the proposed regulations likely reflects its intention to limit the circumstances to which Title IX would apply.

**Overview:** Title IX regulations apply "to every recipient and to the education program or activity operated by such recipient." The proposed regulations do not change that rule, but, significantly, the Administration makes a point to emphasize that "a recipient is *only* responsible for conduct that occurs within its "education program or activity" (emphasis added).

Previous USED guidance affirmed that Title IX protects students in "all of the academic, educational, extracurricular, athletic, and other programs of the school*, regardless of where they take place*" (emphasis added). The proposed regulation, on the surface, appears consistent with this statement. In its discussion, the Administration refers to court cases that examine whether the recipient school "owned the premises; exercised oversight, supervision or discipline; or funded, sponsored, promoted, or endorsed the event or circumstances," including referencing a case finding Title IX applies to an off-campus fraternity house.

Behind this top line, though, likely consequential changes appear. For instance, USED's previous guidance indicated that harassment not taking place in a school's program must still be investigated, if a complaint is filed, in order to determine if the "continuing effects" of the conduct created a harassing environment "on campus." This could include, for example, online harassment through a student's social media accounts by other students who attend school with the target, or an off-campus rape by a fellow student who the target must see in class or on campus. By contrast, in its discussion of the proposed regulations, USED uses — as an example of sexual harassment that "occurs in a recipient's program, but does ***not*** require any response by the recipient under Title IX — an on-campus rape, by its students, of a non-student, arguing that the target was not participating in the recipient's program. Under previous guidance, an argument could clearly be made that the fact of the on-campus assault — and the school's lack of response — is likely to be perceived as creating a hostile environment in its program and for its students, and thus a violation of Title IX. Also, an educational institution still has a duty of reasonable care respecting the safety of its properties, events, and community, and could still be liable for negligence in a civil tort lawsuit if it fails to take reasonable response and preventative actions respecting such an occurrence.

**Bottom Line:** While it might take time, and actual enforcement, to fully determine the Administration's "working" definition of where Title IX applies, the overall discussion in its proposal indicates substantial likelihood that it will seek to tie "in the program or activity" as narrowly as possible to the initial incident of harassment. Accordingly, incidents that don't meet a strict — narrow as to time, place and parties — definition of harassment (even where they create or perpetuate a culture or climate of hostility in the recipient's program) will not trigger a school's obligation to respond under Title IX. This is a substantial change that, as explained above, shifts the intent of Title IX as reflected in decades of administrative and court interpretations.

Note that USED's interpretation would not foreclose arguments respecting Title IX's and tort law's requirements in court, but pursuing court action, rather than an OCR complaint and investigation, is a greater burden on targets of harassment and assault.

3. Schools' required response to incidents of sexual harassment is likely significantly more limited given that the notice standard would now be "actual notice" — not inclusive of constructive or imputed notice reflected in past regulations.

**Overview:** In the area of sexual harassment, notice to a school, and the school's responsibilities under Title IX, go hand in hand, as it is notice that triggers the recipient's obligation to respond. The proposed regulations make significant changes to current USED guidance: What constitutes notice, and thus triggers a response, is greatly restricted.

Under previous USED guidance, a school was responsible for addressing sexual harassment, regardless of notice, in cases of quid pro quo harassment, and hostile environment harassment by an employee that took place in the context of that employee providing the educational program or activities. In other cases, the school was deemed to have notice to trigger Title IX obligations if a responsible employee had notice of a sexually hostile environment.[9] Finally, a school could be found to have notice if it should have known about the hostile environment, i.e., would have found out through a reasonably diligent inquiry.[10]

By contrast, the proposed regulations limit notice to actual notice to an official with authority to take corrective action. The one exception is in the elementary/secondary level, where, with respect to student-on-student harassment, notice is sufficient if a student reports harassment to a teacher.

As a preliminary matter, it is unclear precisely who will be deemed by the Administration as an official "with authority to take corrective action."[11] The proposal notes only that it will be a "fact-specific" determination, and that notice to the Title IX coordinator will "always confer actual knowledge on the recipient." On the other hand, it is clear that the proposed changes will preclude finding notice to a recipient in many cases where notice would have been found under previous guidance. This includes where harassment is actually reported to a school employee whom a student might reasonably believe has some ability to do something about the problem. Actual notice also will not be found where harassment is known by a school official with a duty to report (e.g., a lawyer for the institution)[12]— if that official does not have, and does not inform someone with, the authority to act.[13]

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[9] In prior guidance, a school was deemed to have notice, if, among other factors, reports were made to a:

- Teacher, principal, campus security officer, bus driver, or staff in the office of student affairs;
- Employees that have a duty to report harassment, or someone a student could reasonably believe has such authority (taking into account the age of the student).

[10] For example if the harassment was wide-spread, well-known, or openly practiced. In addition, a school could receive notice indirectly from information about harassment received from sources outside school, or from flyers posted about an incident.

[11] In *Gebser*, for example, it is unclear whether notice to the school principal, as opposed to school district officials, would have sufficed, in an action for money damages, 524 U.S. at 291 (holding against money damages where, among other facts, "the only official alleged to have had information about [the] misconduct is the high school principal.")

[12] The Administration states explicitly that "the mere ability or *obligation* to report harassment does not qualify an employee, even if that employee is an official, as one with authority to institute corrective measures" (emphasis added).

[13] Other examples of where a recipient may ***not*** be found to have notice under the proposed rule include:

- Cases of quid pro quo harassment, or harassment that occurs by an employee in the context of providing educational services or benefits;
- If a younger student is harassed by a teacher, but only reports the harassment to another teacher;

**Bottom Line:** Under these proposed changes, the school's responsibility to respond to sexual harassment is generally triggered only by actual notice to highest level officials in action-empowered roles.[14] It casts doubt on whether notice to a senior official such as a lawyer who is in an advisory role would suffice. This change will almost certainly reduce the kinds of situations in which a school is responsible to address sexual harassment. It also provides little or no incentive to schools to "keep eyes open" about sexual harassment. (In fact, it can be argued that this change creates incentives for schools to adopt policies limiting personnel positions with authority to act, and that encourage, allow, or have the effect of causing their employees to keep information under wraps.) Another potential shortcoming is that the proposed change fails to reflect a realistic assessment of whom students trust and feel comfortable engaging, as well as how students think about who is "in charge of," or "responsible for," or can take steps to end harassing conduct that takes place in an education program or activity. Importantly, it also fails to take into account "power dynamics" and the "reluctance to report" which are often at play in sexual harassment cases, particularly when the alleged harasser is a well-regarded, or high-placed, employee.

### 4. A school's liability is now gauged based on whether it was deliberately indifferent to actual notice, rather than whether it took reasonable action in response to such notice.

**Overview:** Previous USED guidance determined OCR Title IX liability based on whether a school responded responsibly to incidents of sexual harassment under a reasonableness standard. This meant if a school had actual, imputed or constructive notice of harassment (regardless of a formal complaint) it had to take reasonable steps to: end the harassment; eliminate any hostile environment created, and prevent its

- Where harassment was directly observed by a school employee; or
- The harassment was obvious, widespread, or openly-practiced.

[14] An argument can be made that neither *Gebser* nor *Davis* require the Administration's heightened notice requirement. The requirement, announced in *Gebser,* that actual notice of the harassing conduct be received by "an official of the recipient with authority to take corrective action to end the discrimination," 524 U.S. at 291, was limited to private lawsuits. *Gebser*, a case of sexual harassment by a teacher, expressly distinguished its holding from administrative enforcement actions, noting that in the latter case, notice of the harassment is not the relevant issue because, by nature of the administrative procedure, the recipient will always have had notice of problems that need correction before penalties are imposed. *Id*. at 288. *Davis* applied the requirements of *Gebser* to student-on-student harassment, and in that case, the student reported the harassment to her teachers, who reported it to the principal. Other students also tried to, and were rebuffed by a teacher from, reporting harassment to the principal. The *Davis* court did not indicated which notice (to the teacher, principal, or failed attempts) was the event triggering the school's responsibility to respond, nor did it indicate if notice only to a teacher would have been sufficient. However, the Court cited approvingly a publication from the National School Boards Association — for use by school attorneys and administrators — which warned schools they could be liable where there had simply been "notice to district employees." *Id.* at 647. Accordingly, *Davis* could be read as permitting notice to a broader range of school employees. USED's proposed regulation is consistent with *Davis*, in that, as with the facts of Davis, it has made an exception to its heightened notice requirement, in peer harassment cases, where notice is given merely to a teacher. However, it can be argued that USED's proposal unnecessarily exceeds, without sufficient justification, the requirements of *Davis* and *Gebser* by applying a heightened notice standard in all other cases.

recurrence.[15] The Guidance recognized that a hostile environment can be created, and have negative consequences, not only for the target of the harassment but for students that witness the conduct.[16]

The proposed regulations provide that schools are in violation of Title IX only if they are deliberately indifferent in their response to sexual harassment, based upon actual notice to a required-level official with authority to act.[17]

With the stated intent of "taking into account the wishes of the complainants in deciding whether or not a formal investigation and adjudication is warranted," the proposed regulations create a bright line rule regarding a school's obligation to respond to sufficiently severe, known harassment: If no formal complaint is filed, the proposal says almost nothing about what kind of response is required by the school except that it not be "clearly unreasonable in light of known circumstances."[18] In addition, a higher education institution will have the benefit of a safe harbor if it provides "supportive measures."[19]

Where a formal complaint is filed,[20] formal requirements are triggered, such as the duty to investigate, subject to all the requirements of new §106.45, and, in the case of a postsecondary institution, a live hearing must occur. (With the parties written consent, however, the recipient may, at any point prior to reaching a determination, facilitate an informal resolution process.) If the accused is found "responsible" for harassment, disciplinary action rests within the discretion of the school.[21] Postsecondary institutions

[15] In some cases, i.e., where it failed to respond to known harassment, or its duty to respond was triggered by imputed or constructive notice, the school was also required to take reasonable steps to remedy the effects of the harassment on the student harassed and to prevent its recurrence generally.

[16] Relevant research affirms this point. *See Consensus Study Report* p.78 (discussing studies finding that indirect experiences of sexual or gender-based harassment, or "ambient harassment" can lead to negative outcomes similar to those experienced by the direct target of harassment).

[17]The deliberate indifference standard was announced in the *Gebser* and *Davis* decisions as applicable to private litigation for money damages (but does not apply to relief in the form of court ordered corrective action). The deliberate indifference standard is not binding on USED enforcement activity (*see* fns 1 and 12), and USED acknowledges as much. As with the definition of harassment, borrowed from *Davis,* it nevertheless concludes that the standard is appropriate for administrative enforcement because it provides schools "necessary flexibility;" and allows schools to use their "unique knowledge of the school culture and student body" to address sexual harassment, without "second guessing" by the Department.

[18] Allegedly, this will "give complainants greater confidence to report and expect their school to respond in a meaningful way." No research or other evidence is provided to validate this conclusion.

[19] Supportive measures are:

- Non-punitive, non-fee, measures reasonable available;
- Offered to the target or accused;
- Designed to restore or preserve access (w/out unreasonably burdening the other party); protect safety; deter sexual harassment; and maintained as confidential, to the extent that does not impair the school's ability to provide the measures

[20] This is defined as a signed document alleging sexual harassment in the education program or activity and requesting initiation of the grievance procedure.

[21] The school must also provide remedies to the complainant, "as appropriate," "to restore or preserve educational access."

are granted a safe harbor from OCR enforcement action as long as they follows their own grievance procedures, assuming those requirements comply with new §106.45

**Bottom Line**: In and of itself, the proposed regulatory language does not eliminate a school's obligation to respond to sexual harassment. Even where no complaint is filed — but assuming there is actual notice to an official with authority to act — the school (at least a postsecondary institution) is likely to take some responsive action by providing supportive measures so that it can benefit from the safe harbor.[22] Where a formal complaint is filed explicitly alleging "sexual harassment," the school must investigate and respond under its grievance process.

It can be argued that these proposed changes are more responsive, than current USED guidance, to circumstances where the target of the harassment wishes to avoid a formal investigation. The target may not want a formal investigation and grievance process because she or he may want to maintain her or his confidentiality, or because the target does not seek for the accused to be disciplined, or sanctioned, as long as the harassment stops. However, an open question remains whether or not the proposed standard is less sensitive to the needs of targets, potential targets, and other students, as well as the intent of Title IX, to restore full opportunity and access to participate in and benefit from the educational program and activities.[23]

"Supportive measures" may not result in sufficient protections and remedies for targets. Moreover, since these measures are limited to targets and the accused, it is unlikely to address the effects of a hostile environment on other students, particularly as a "safe harbor" may de-incentivize schools from responding beyond in a "token" or minimal manner, and the duty to investigate is not triggered. Accordingly, a more wide-spread culture of sexual harassment may not be discovered, or may not need to be addressed, and "serial" harassers may go undetected.[24] Again, where physical harm or severe emotional harm (in many jurisdictions with some physical manifestation) is caused, institutions may still be liable for negligence in a civil tort lawsuit for not taking reasonable action to prevent and respond to harm to students and others to whom they have a duty of reasonable care.

In the case of formal complaints, while remedies are anticipated and required if a determination of harassment is made, the proposed changes limit remedies to the complainant, and the proposed requirements for pursuing a grievance may reduce the likelihood that a complaint is filed in the first place (*see* discussion in 5. below). Moreover, schools are given discretion regarding discipline/sanctions, and

[22] It should be noted that in the case of elementary and secondary schools, where no safe harbor is provided, the proposed regulations provide no factors or examples to determine what kind of response would be "clearly unreasonable."

[23] This is particularly true when considered in conjunction with other changes discussed above. For example, If the definition of harassment is read as only that which "denies" an educational benefit (discussed in 2. above), a school could find that incidents of sexual harassment were "uncomfortable," "distracting," or "scary" for the target, but did not deny "access" to the educational program or activity. In that case, the school would be required to dismiss the complaint. It would also, presumably, not be required to offer supportive measures. Nor would it be required to investigate a larger problem. Moreover, as discussed in 4. above, schools are much less likely to receive "actual" notice as defined by the proposed regulations because that occurs only when an official with authority to act has notice. Accordingly, schools will, in far fewer circumstances, be "responsible" to address harassment, in any of the ways identified as appropriate in decades of previous Guidance.

[24] It should be noted in this regard, that the proposed regulations require that the Title IX coordinator file a complaint when the recipient has actual knowledge of multiple reports of harassing conduct by the same person.

(for IHEs) a safe harbor from second guessing regarding how they responded. This may result in less actions being taken to eliminate a hostile environment or to prevent its recurrence.[25]

The resulting shift away from a school's responsibilities broadly to address and prevent harassment in its program and activities is likely to be heightened by the "deliberate indifference" standard, which requires ED to take a hands-off approach to assessing a school's response to harassment — and the actual impact it has on all targets or witnesses — as long as the school "follows the rules." In fact, the terms used in the proposed regulations ("deliberate indifference" and "safe harbors") in and of themselves present a different, much changed tone, and schools can read in this an intent by the Administration to "make life easier for them" by lessening their responsibilities for responding to sexual harassment.

### 5. USED's proposal regarding grievance procedures maintains much of USED's previous focus on due process and fundamental fairness, but in practice may reduce the use of those procedures and emphasizes the limited usefulness of formal procedures.

**Overview:** USED's proposed regulatory changes expressly respond to alleged public complaints that past guidance created a system where "hundreds of" students/targets have complained that "their school failed to provide a prompt and equitable process in response to a report of sexual harassment," and, at the same time, "over 200 students have filed lawsuits…alleging that their school disciplined them for sexual misconduct without providing due process protections."

Previous USED Guidance sought to balance these issues, and the Administration's proposed changes, incorporates many of USED's past standards regarding due process and fundamental fairness (*see* text box below).

The Administrations proposed regulatory language would, however, impose certain additional requirements that will likely alter the messaging about, and impact of, the grievance procedures, including:

- A formal investigation, pursuant to the regulatory requirements, is required when, and only if, a complaint is filed. Previously, schools were required to investigate regardless of a formal complaint, but had flexibility regarding the type of investigation, taking into consideration the nature of the incidents, the age of students involved, the size and structure of school, etc. On the one hand, the proposed change ensures a thorough investigation of *formal* complaints. On the other hand, it requires targets to submit to the potential re-trauma of a formal investigation if they want to ensure that remedies are implemented. Moreover, where a formal complaint is not filed, it is unclear what, if any, investigation is required.

- The investigation cannot "restrict the ability of either party to discuss the allegations or to gather and present relevant evidence." Previously, USED required the recipients to consider and balance requests for confidentiality with its responsibility to remedy and prevent further harassment. On the one hand, the proposed change ensures that parties have full and equal access to all information once a formal complaint is filed. On the other hand, if a target wants to ensure an investigation of an incident they must relinquish the ability for the incident and/or parties to remain confidential, which can be a significant disincentive.

[25] Moreover, if the investigation reveals that the conduct, even if proven, would not constitute sexual harassment under the regulatory definition, or did not occur within the recipient's program or activity, the recipient "must terminate its grievance process with regard to that conduct."

- The proposed changes include a requirement that IHEs conduct a live hearing whenever a complaint is filed, including: written notice of allegations (including a statement regarding the presumption of innocence and the right to inspect evidence obtained in the investigation); that the decision maker cannot be the same person that investigated the complaint; a written determination with findings of facts and rationale for each result; evaluation of inculpatory and exculpatory evidence; and cross examination by the parties' "advisors" (which can take place with parties in separate rooms using simultaneous technology.[26] Previously, USED allowed schools flexibility regarding whether or not to conduct a formal hearing, with formal procedures such as cross examination, although due process rights of the accused had to be ensured consistent with the school's responsibility to provide all students a safe, non-discriminatory program. One the one hand, it can be argued that the formality of the proposed procedures ensures transparency and due process. On the other hand, it requires that the target of harassment undertake the difficulties of a formal process if they want to ensure that the recipient takes steps to investigate or fully address the harassment, which can be a significant disincentive.

- Questions about past sexual history are allowed if offered to prove that someone other than the respondent committed the conduct, or to prove consent.[27] Previously, USED prohibited questions about complainant's sexual history with anyone other than the accused, and required schools to ensure that hearings did not inflict additional trauma on the complainant.

- Schools may choose the relevant standard of evidentiary proof — either a "preponderance of the evidence" standard or a "clear and convincing." However, it can only use the preponderance of the evidence standard if it also uses that standard for other conduct violations with similar applicable sanctions. Previously, USED required use of the preponderance of evidence standard, as it was the standard used by courts and OCR in civil rights cases. While the proposed new flexibility would give schools a "choice" of evidentiary standard, which some desired, this conflicts with the Administration's repeated intent to create uniformity,[28] and is likely to result in different outcomes for targets depending on the school they attend. (In this regard, it should be noted that the Administration has asked a "directed question" on whether schools should be given a choice of evidentiary standards.) In addition, while the proposed regulations do not allow an institution to use the preponderance standard for sexual harassment complaints if it does not also use that standard for other code of conduct violations, it does not make clear that the reverse is also true: namely, that institutions should not be allowed to use the clear and convincing standard *only* in cases alleging sexual harassment. Finally, use of the "clear and convincing standard," where, as is often the case, witnesses and other definitive proof are unavailable, makes it nearly impossible to make a finding in favor of the target, presenting another disincentive to target complaints.[29]

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[26] In elementary and secondary schools, a live hearing is not required, however, the decision-maker must ask "credibility" questions if requested by a party.

[27] The Administration states that these provision are intended to be consistent with, "and in the spirit of," rape shield protections, as well as the exceptions to these protections found in federal rules of evidence.

[28] While many of the Administration's proposed changes are expressly intended to make OCR standards consistent with standards in civil litigation, in regard to the evidentiary standard, the Administration has chosen *not* to require use of the civil litigation standard (which it acknowledges is the preponderance of the evidence standard).

[29] There are other problems raised by the standard of evidence provisions. The proposed rules require the same evidentiary standard in complaints filed against students and employees. This fails to account for the different rules

- Informal resolutions, such as mediation, are allowed in all cases, with all parties voluntary, written consent. Previously, USED allowed informal resolution of harassment complaints, as long as there was the involvement of appropriate, trained school personnel. Moreover, in cases of sexual assault, mediation was deemed always inappropriate. One the one hand, allowing informal resolution can be consistent with the wishes of targets of harassment to avoid the difficulties of a formal grievance process. On the other hand, the proposed changes would appear to leave targets on their own, even in cases of alleged sexual assault, to handle this potentially difficult and traumatic experience.

that apply to employees and the differences in the character of an institution's educational relationship with its students and employment relationship with its employees. The administration has asked a "directed question" on whether requirements are unworkable as relates to processes involving employees.

**Overview of USED Pre-2018 Guidance on Grievance Procedures**

*USED's 1997 guidance— Grievance Procedures:*

- Must be adequate, reliable, and provide for impartial investigations, including the opportunity to present witnesses and evidence;
- Reflect that investigations are permitted to be flexible and may vary depending on the nature of the incident, age of the students involved, and the size of the school;
- Must designate reasonable and prompt timeframes;
- Must provide notice of the outcome;
- May allow for the possibility of informal resolution, such as mediation; and
- Confidentiality requests by the victim have to be considered, consistent with the school's responsibility to provide all students a safe environment.

*USED's 2001 guidance:*

- Added a discussion of the need to consider the due process rights of the accused; and
- Raised an "awareness of the confidentiality rights of the accused."

*USED's 2011 guidance provided further specificity regarding the investigation process including:*

- Schools cannot wait for criminal investigation or proceedings to begin their own investigation;
- Must provide equal opportunity to present witnesses and evidence, and equal access to information to be used at a hearing (e.g., if one party is allowed character witnesses, so must the other party);
- If lawyers are allowed, must be allowed equally for both parties;
- An appeal process is permitted, and if provided, must be provided equally to both parties;
- All persons involved require training/experience in handling sexual harassment and sexual violence complaints;
- There can be no conflict of interest between fact-finder, decision maker, and parties, noting that a conflict of interest may occur where a Title IX coordinator also serves on a disciplinary board;
- Who conducts the investigation is not specified, but that person must be appropriately trained;
- Designated time frames are required for major stages;
- Status updates are required;
- Notice of outcome is required to both parties in writing, preferably concurrently.
- "Personal" cross-examination is discouraged; schools can allow parties to submit questions to a trained third-party to ask on their behalf; if cross-examination is allowed, if must allowed equally for both parties
- "Preponderance of the evidence" standard is required; and
- Mediation is not allowed in cases of sexual assault.

*In 2014, USED clarified that:*

- Title IX does not require a live hearing;
- If one party is allowed to present third-party expert testimony, so must the other party be allowed;
- Allowances should be made so that the alleged victim and perpetrator do not need to be in the same room during a hearing; and
- Questioning about a complainant's sexual history with anyone other than the alleged perpetrator is not allowed; and that schools should recognize that previous consensual relations do not by themselves imply consent.

**Bottom Line:** The key question regarding proposed changes to the formal complaint and resolution process is whether they fairly address, balance, and protect against trauma, and protect both the rights of complainants/targets and respondents/accused. While there is much consistency between the previous guidance, generally applicable legal standards, and the proposed regulations regarding specific requirements for equitable process, the newly explicit emphasis on "due process," including presenting "exculpatory" evidence, and the requirements for cross examination or "credibility determinations," as well as the explicit reference to a "presumption of innocence," may likely cause the perception that the Title IX grievance process has shifted in favor of the accused.

In addition, an open question remains whether targets are less likely to file formal complaints under the new regulations, and what, if any, consequences that will have for effectively addressing and preventing sexual harassment in school programs and activities. The bright line rule triggering a formal grievance process — which (unless at some point the parties consent to an informal resolution) must include cross-examination and/or credibility determinations; the creation of a written investigative report; the admission of sexual history to prove consent; and, in the case of IHEs, a required formal live hearing to follow the investigation — are likely to discourage targets from filing complaints. In the case of elementary and secondary students, the formality of the required investigation is likely to be overwhelming to students and inappropriate in many circumstances. Even at the postsecondary level, the formal process may be daunting and re-traumatizing. This is particularly true as a formal investigation seems to eliminate any place for confidentiality.[30]

Finally, a question remains regarding whether the stated intent of the proposed regulations, to "promote flexibility" in how schools may respond to harassment, has been achieved. The proposed grievance procedure requirements are, in fact, quite rigid as to the requirements for grievance procedures and investigations. This is problematic at every educational level, and particularly so at the elementary and secondary level. The previous guidance contained greater *actual* flexibility to consider the type and circumstances of incident at issue, the age of the harassed, requests for confidentiality, and to use common sense in responding, with the caveat always to balance these concerns against its continuing responsibility to provide a safe and nondiscriminatory environment for all students.[31]

## CONCLUSION

The proposed regulations are likely to change the landscape for Title IX enforcement by USED, in large part because the Administration has proposed a significant policy shift to using standards from private litigation in the administrative enforcement process, and has significantly elevated the threshold that triggers response and preventative action. This is particularly true where the Administration proposes adoption of actual notice and deliberate indifference standards as it changes both the rules — and incentives — for how a school should/will respond to sexual harassment. This will likely also prove true if, as the proposed regulatory language suggests, the Administration pursues a narrowed working interpretation of "in the program or activity" of a recipient.

[30] Under the proposed regulations, the investigation cannot "restrict the ability of either party to discuss the allegations or to gather and present relevant evidence" (§106.45(3)(iii).

[31] It should be noted in this regard that the Administration has asked a "directed question" on whether the proposed rules in any part are "unworkable at the elementary and secondary school level," or should be modified based on the level of education or age of the students involved.

In the case of the definition of sexual harassment, an argument can be made that nothing has changed; statutory and case law wording differences that are similar to the wording differences between prior regulatory guidance and the proposed regulatory changes have not been attributed with significance. However, an intentional wording change in the regulatory arena has been proposed and that likely signals an intent to narrow the circumstances in which administrative enforcement will find sexual harassment. Certainly, regulations cannot change the law itself, as interpreted by the Supreme Court and targets may still bring lawsuits to enforce the law. However, requiring targets to bring lawsuits is indeed a greater burden than filing an administrative complaint and pursuing an administrative investigation.

Regarding grievance procedures, despite much discussion to the contrary, due process and fundamental fairness are legal requirements that already apply, regardless of the regulatory provisions. Institutions are already being sued and investigated for failure to meet those standards by targets and accused students alike, suggesting that current guidance was in some ways flawed and in some cases insufficiently responsive to targets' wishes. However, the shift in tone; an increased rigidity of required process with a bright-line distinction between filing and not filing a formal complaint; as well as the elevation of the evidentiary standard and an expanded use of sexual history, among other provisions, are likely to have consequences for whether sexual harassment is effectively addressed campus wide.

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