Welcome to ACE’s
Title IX Final Rule Discussion
(We Will Begin At 2:00pm ET)

• Audio
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• Teleconference
  • To join via telephone, dial: 877-475-4499 or 877-853-5257
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• Recording: This webinar is being recorded.
Amy Foerster, Partner, Pepper Hamilton LLP

Amy Foerster is a partner with Pepper Hamilton LLP, where she co-chairs the firm's Higher Education Practice Group. Amy provides litigation, counseling and investigative services to colleges, universities and schools across the country, leveraging her broad higher education experience. She has provided extensive advice to colleges, universities and K-12 schools pertaining to Title IX, as well as the Clery Act, employee and student misconduct, and federal and state regulatory compliance. From 2013-2019, Amy was the general counsel and chief of staff at Bucknell University.
Anne Meehan, Director, Government Relations, ACE

As director of Government Relations, Anne Meehan helps formulate strategies designed to attain the legislative goals and policy objectives of the higher education community. In particular, she represents ACE’s positions to members of Congress and the administration on matters related to Title IX, student aid, the federal budget and appropriations process, and other higher education-related policy issues.
Penny Rue joined Wake Forest University as Vice President for Campus Life and Professor of Counseling in July 2013, with broad responsibility for the safety and wellbeing of students and their education outside the classroom. Previously, Penny served as Vice Chancellor-Student Affairs at the University of California, San Diego for six years; as Dean of Students at the University of Virginia for eight years; and as Senior Associate Dean of Students at Georgetown University for five years, following seven years as Georgetown’s Director of Student Programs.
Peter McDonough joined ACE in 2015. He focuses on a wide range of higher education legal issues, including student and faculty affairs, athletics, campus safety and security, intellectual property, compliance and institutional governance. For ACE, Peter coordinates the higher education associations’ *amicus* briefing in selected cases with broad impact on colleges and universities. He is the former general counsel of Princeton University, where he was responsible for all institutional legal advice and representation.
Secretary DeVos Takes Historic Action to Strengthen Title IX Protections for All Students

New regulation defines sexual harassment, requires supportive measures for survivors, restores due process on campus

MAY 6, 2020

Contact: Press Office, 202-401-1574, press@ed.gov

WASHINGTON — U.S. Secretary of Education Betsy DeVos took historic action today to strengthen Title IX protections for survivors of sexual misconduct and to restore due process in campus proceedings to ensure all students can pursue an education free from sex discrimination. For the first time ever, the Department’s Title IX regulations define sexual harassment, including sexual assault, as unlawful sex discrimination. The new Title IX regulation holds schools accountable for failure to respond equitably and promptly to sexual misconduct incidents and ensures a more reliable adjudication process that is fair to all students. The new regulation comes after years of wide-ranging research, careful deliberation, and critical input from survivors, advocates, falsely accused students, school administrators, Title IX coordinators, and the American people, including over 124,000 public comments.

"Too many students have lost access to their education because their school inadequately responded when a student filed a complaint of sexual harassment or sexual assault," said Secretary DeVos. "This new regulation ensures that those days are over for all students.
Now??!!!(We hear you. The Department didn’t.)

“Choosing this moment to impose the most complex and challenging regulations the agency has ever issued reflects appallingly poor judgment.

We pleaded with the department to hold off issuing these regulations...

... [This] incomprehensible mandate to fully implement them by August 14 is as cruel as it is counter-productive.”

-- ACE President Ted Mitchell, May 6, 2020
Overview of the Final Rule: Key Elements

Threshold / Jurisdictional Topics

• Application to students and employees.

• Narrowing of what constitutes “actual knowledge” of sexual harassment, potentially impacting IHEs’ definition of “responsible employees.”

• Application only to sexual harassment in an IHE’s programs or activities, which include “locations, events, or circumstances over which the [IHE] exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized” by the IHE.
Overview of the Final Rule: Key Elements

Grievance Procedures Topics

• During the investigation, the parties are entitled to:
  • Advisor of choice.
  • All evidence gathered during an investigation that “is directly related to the allegations raised in a formal complaint.”

• Requirements for live hearings:
  • Cross-examination must be conducted by advisors.
  • Decision-makers must make relevance decisions.
  • IHEs must allow expert witnesses.
  • Standard of evidence may be preponderance of the evidence or clear and convincing, but must be the same for formal complaints against students and employees.

• Appeals
Overview of the Final Rule: Key Elements

Other Topics

• Limits on emergency removals from campus

• Express statement that the respondent is presumed “not responsible”

• Informal resolution

• Training
The Department Did Not Embrace Most of Higher Ed’s Requests

“[W]e are disappointed that [these regulations] fail to address serious concerns expressed by ACE and our member institutions who must implement them.”

-- ACE President Ted Mitchell, May 6, 2020
Higher Ed Hoped to See Changes Made to the Proposed Rule...

January 30, 2019

Secretary Betsy DeVos
c/o Brittany Bull
U.S. Department of Education
400 Maryland Ave., SW
Room 6E310
Washington, D.C. 20202

Re: Docket ID ED-2018-OCR-0064-0001

Dear Secretary DeVos:

On behalf of the higher education associations listed below, I write to provide comments in response to the Department’s November 29, 2018, notice of proposed rulemaking (“NPRM” or “proposed rule”) amending regulations implementing Title IX of the Education Amendments of 1972 (“Title IX”), Docket ID ED-2018-OCR-0064.

INTRODUCTION
ACE’s Comment Letter

**Proposed rule:** Grafts extensive and complex courtroom-like procedures on internal campus disciplinary processes.

**Final rule:** Unchanged.
ACE’s Comment Letter

Proposed rule: Mandates a “live” hearing with direct cross-examination.

Final rule: Unchanged.

• Cross may not be conducted by parties themselves

• Conducted in real-time, with parties able to hear and see each other

• Decision-maker must rule on relevance of each question
ACE’s Comment Letter

Proposed rule: Provides parties absolute right to inspect “any evidence . . . directly related.”

Final rule: Largely unchanged.
• Includes important protections for medical treatment records and information subject to a privilege.
ACE’s Comment Letter

Proposed rule: Institution must provide equal opportunities to appeal, if appeals are permitted at all.  
(we cited this provision approvingly)

Final rule: **Modified.**

• Institutions must [at least] allow appeals on three grounds:
  -- procedural irregularity
  -- new evidence
  -- bias/conflict of interest
ACE’s Comment Letter

**Proposed rule**: Institutions “must dismiss” sexual misconduct cases that fall outside of Title IX’s definition or scope.

**Final rule**: **Modified.**

- Institution may continue to address sexual misconduct falling outside the scope of Title IX under their own codes of conduct.
ACE’s Comment Letter

Proposed rule: The new Title IX regulations also graft complex and prescriptive requirements onto faculty and staff processes.

Final rule: Unchanged.
ACE’s Comment Letter

Proposed rule: Would effectively result in a single federally mandated evidentiary standard of proof across the institution for all matters.

Final rule: Modified.
- Clear and convincing or preponderance of evidence
- Same standard for students and employees/faculty
- Removed requirement to apply across all types of matters carrying the same penalty
ACE’s Comment Letter

Proposed rule: No proposed effective date but higher ed requested a minimum of eight months.

“There is no magic wand that will enable campuses to put these new regulations into effect.”

– ACE President Ted Mitchell, May 6, 2020
The Path Forward: Preparing for August 14th

Key Considerations as Campuses Review and Adapt Policies and Procedures to Comply With the Final Rule
The Path Forward: Preparing for August 14th

Managing Student Expectations

• Jurisdiction
• Standing
• Language
• Informal Resolution
• Lack of acknowledgement of gender non-conforming identities
• Advocacy
The Path Forward: Preparing for August 14th

Reporting Issues

• Actual knowledge
• Mandatory reporters
• University Police role and responsibility
• Access to supportive services
The Path Forward: Preparing for August 14th

Institutional Differences

• Public/Private, Urban/Rural
• Layers of independence
• Access to external resources
The Path Forward: Preparing for August 14th

Signaling Concerns

• Publication of all training materials
• “A recipient’s treatment...may constitute discrimination”
• “...complainant’s prior sexual behavior...offered to prove consent” [emphasis added]
• “The exercise of rights protected under the First Amendment does not constitute retaliation”
The Path Forward: Preparing for August 14th

Faculty and Staff

• Redefining “Responsible Employees”

• Applying regulations to faculty and staff:
  • Revise staff and faculty handbooks
  • Renegotiate collective bargaining agreements
Closing thoughts and questions...
[P]rovid[ing] campus disciplinary proceedings that are prompt and equitable is at the heart of Title IX, and what all institutions strive to achieve.”

“Colleges and universities will continue to strive to create and maintain campus environments that are safe, supportive, and responsive for all students...

– ACE President Ted Mitchell, May 6, 2020
ACE’s Resource Page: Title IX Regulations

Visit ACE’s website...

www.acenet.edu/titleix *

* Also found by typing “Title IX Resources” into the search bar on ACE’s website

The resources on this page include a summary of the final rule prepared by Amy C. Foerster and Michael E. Baughman, of Pepper Hamilton, LLP
ACE ENGAGE
(ACE’s new peer-to-peer online learning platform)

The recording of this webinar will be available on ACE ENGAGE®!

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Thank You!