

Practice Update

Title IX Draft Rule Changes Draw Mixed Reviews, Including Sharp Rebukes

May 13, 2019

On Friday, February 15, 2019, the U.S. Department of Education (Department) concluded its comment period for their proposed changes to Title IX. Upon the conclusion date, the Department received over 110,000 comments from stakeholders. The Department is now under an obligation to review and respond to significant comments, which could take months, or longer. Higher education institutions are now grappling with how to respond to proposed changes that radically alter the landscape of Title IX compliance.

Reaction to the proposed rule has consisted of mixed reviews. Victims' rights advocates have asserted that the draft rule will not only discourage victim reporting, but make it much easier for schools to relieve themselves of accountability. Opposing politicians have chimed in as well, with House Speaker Nancy Pelosi quoted as saying "With wanton disregard, this Administration has cruelly codified their utter contempt for survivor justice by making schools unwelcoming and less safe." Further, higher education institutions weighed in, with some arguing that the requirement for live hearings and the elimination of the "single investigator" model as potentially drawing out the timeline and costs for conducting investigations.

Nonetheless, other stakeholders have interposed with support of certain provisions. In a 33-page

Related Work

Higher Education and
Collegiate Athletics

Related Offices

Chicago

letter signed by 60 organizations sent to the Department in January of 2019, the American Council on Education highlighted a few key components which it supports, such as the allowance of a “reasonably prompt timeframe” to complete investigations, as opposed to the 60-day rule under the Obama administration guidance, positing that although institutions should work to resolve allegations promptly, it should not do such “at the expense of a thorough and equitable process.” The letter also went on to support the “actual knowledge” standard of when action is required of a higher education institution, but noting that institutions will continue to act upon sexual harassment “outside of or beyond the regulation’s specific requirements” and that the regulations should be clear inasmuch as they do not “prohibit or inhibit” such action.

Until final rule promulgation, the guidance that controls higher education institutions’ Title IX compliance is within the Department’s 2017 “Q&A on Campus Sexual Misconduct” and “Dear Colleague Letter,” as well as the Department’s 2001 Sexual Harassment Guidance and 2006 “Dear Colleague Letter on Sexual Harassment.” It remains to be seen how, if any, the final rule will change based off of comments received and any political pressure. While some higher education institutions are preparing for compliance with the proposed rule, others are awaiting promulgation of the final rule before officially changing their policies. Even after final rule promulgation, it is almost sure the changes will be challenged on a host of grounds, such as whether the Department has jurisdiction to dictate evidentiary standards used in all misconduct cases (as opposed to just those arising under Title IX).

In the interim, higher education institutions should begin a thorough examination of their Title IX compliance policies and procedures. In doing such, institutions should be mindful of compliance with other federal (e.g. FERPA, VAWA) and applicable state laws. It is imperative that institutional officials

have a firm and thorough understanding of their compliance under the applicable laws and controlling documents listed above, as well as the potential impact the final promulgated rule may have on their policies and procedures.

Akerman's Higher Education and Collegiate Athletics team will continue to monitor the promulgation status of the final Title IX rule and the Department's actions with regard to comments received, as well as provide guidance on proactive measures colleges and universities can enact to ensure compliance in a timely, efficient manner.

This Akerman Practice Update is intended to inform firm clients and friends about legal developments, including recent decisions of various courts and administrative bodies. Nothing in this Practice Update should be construed as legal advice or a legal opinion, and readers should not act upon the information contained in this Update without seeking the advice of legal counsel.