

UNITED STATES DEPARTMENT OF EDUCATION PROPOSES TITLE IX REGULATIONS RELATING TO SEXUAL HARASSMENT

© Robert B. Smith
DeMoura | Smith LLP

Well known even among those of us not well versed in the laws of physics, Newton's third law states: "For every action, there is an equal and opposite reaction."

In April 2011, United States Department of Education ("DOE") issued a "Dear Colleague" letter which purported to be a "guidance" to colleges and universities concerning DOE's interpretation of their obligations under Title IX. The "Dear Colleague" letter quickly took on the force of law and sent institutions of higher education scrambling to comply and adopt new procedures. Millions of gallons of ink were spilled by commentators and lawyers, including me, when I wrote:

"But while the 18-page missive began with the cordial salutation "Dear Colleague," it was anything but a casual communication sent from one friend to another. Backed by the full force of the law, this detailed directive set new standards for the resolution of sexual assault claims at colleges and universities. It was formulated, moreover, without hearings, comment periods or other mechanisms aimed at avoiding unintended consequences that could cause more harm than good."

RealClearPolitics.com

Route 128 Office

607 North Avenue, Suite F
Wakefield, MA 01880
781.914.3777
781.914.3780 (facsimile)

One International Place 14th Floor

Boston, Massachusetts 02110

617.535.7531

617.535.7532 (facsimile)

www.demourasmith.com

North Shore Office

310 Broadway, 2nd Floor
Revere, Massachusetts 02151
781.914.3776
781.914.3780 (facsimile)

**UNITED STATES DEPARTMENT OF EDUCATION
PROPOSES TITLE IX REGULATIONS RELATING TO SEXUAL HARASSMENT**

More than seven years later, and after hundreds of lawsuits filed by students claiming to have been wrongfully disciplined for sexual assault without due process, the DOE has proposed new regulations replacing the 2011 “guidance.”

This article highlights some of the significant changes facing colleges and universities under the proposed regulations, specifically the new definition of sexual harassment, the more defined limitations on a school’s jurisdiction to investigate, and the additional procedural and substantive rights provided to students accused of sexual misconduct.

New definition of Sexual Harassment.

The proposed regulations include a new definition of sexual harassment. If promulgated, schools will only have the authority under Title IX to act if the conduct meets a narrower definition of sexual harassment. The proposed regulations define sexual harassment as (a) conditioning an educational benefit or service on a person’s participation in unwelcome sexual conduct (“quid pro quo harassment”, (b) unwelcome conduct based on sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school’s educational programs or activities (“hostile environment”), or (c) sexual assault. This alters the broad guidance letter definition of sexual harassment as “unwelcome conduct of a sexual nature.”

**UNITED STATES DEPARTMENT OF EDUCATION
PROPOSES TITLE IX REGULATIONS RELATING TO SEXUAL HARASSMENT**

School's Obligation to Investigate.

The proposed regulations alter the authority of colleges and universities to use Title IX to investigate sexual misconduct allegations. In order to institute proceedings, a school must have actual knowledge of the alleged harassment and the harassment must involve conduct that occurred within the school's own education program or activity. A school has actual knowledge of sexual misconduct when notice is provided to a school official who has authority to take corrective action. There is no interpretative or definitional guidance in the regulations concerning what constitutes a school's "own education program or activity" however one would expect that these activities would include study abroad programs and internships, but arguably not include incidents occurring in private, off-campus housing. It is likely that courts will have to weigh-in on "jurisdictional" challenges to a school's effort to conduct a Title IX investigation of alleged sexual harassment if the connection to the school's program or activity is minimal or lacking.

New Procedural and Substantive Rights.

The most controversial and expansive changes to Title IX sexual harassment proceedings relate to the procedural and substantive rights created by the new regulations. The regulations require more formal investigative and adjudicative proceedings. All parties to a sexual harassment proceeding under Title IX will be entitled to be represented by an advisor, who may be an attorney, during the investigation and adjudication of the complaint. The accused will have a

**UNITED STATES DEPARTMENT OF EDUCATION
PROPOSES TITLE IX REGULATIONS RELATING TO SEXUAL HARASSMENT**

presumption of non-responsibility (a bureaucratic way of saying “innocence”) throughout the process. During the investigative process, the accuser and accused must be provided with equal access to review all the evidence that the school investigator has collected relating to the complaint, and give each party ten days to respond regarding their review of the evidence prior to finalizing the investigative report. The parties must also be provided with the final investigative report at least ten days prior to any adjudicative hearing of the complaint. If the investigation results in a formal hearing, the school must select a hearing officer who is not the Title IX coordinator nor the investigator of the complaint. The hearing must be conducted in-person. The hearing officer must permit cross-examination of the witnesses to be conducted by the advisors for the accused and accuser and not the actual parties and cannot consider any evidence offered by a witness who fails to appear to be cross-examined. Each party at the hearing must be afforded the right to present witnesses and other inculpatory and exculpatory evidence. The hearing officer must conduct an “objective evaluation of all relevant evidence, including both inculpatory and exculpatory evidence” with the burden of proof remaining at all times on the school and not the accuser or the accused.

Conclusion

In contrast to the April 2011 “Dear Colleague” letter, the proposed DOE regulations comply with the Administrative Procedure Act by, among other things, providing for a period of public comment and review before the regulations may

**UNITED STATES DEPARTMENT OF EDUCATION
PROPOSES TITLE IX REGULATIONS RELATING TO SEXUAL HARASSMENT**

take effect. The DOE has issued an interim guidance for college's pending formal adoption of the regulations. [Interim Guidelines](#)

The obligations of colleges and universities to investigate and adjudicate sexual misconduct allegations are permanently affixed in higher education's constellation of regulatory affairs. Clearly schools must immediately begin preparing for the new regulations by reviewing, revising and implementing new policies and procedures designed to comply. The clock is ticking.