THURSDAY, MAY 28, 2020 | SERVING CHICAGO'S LEGAL COMMUNITY FOR 164 YEARS | CHICAGOLAWBULLETIN.COM

Chicago Daily Law Bulletin®

VOLUME 166, NO. 91

LAW BULLETIN MEDIA

All together now – employment law issues in the new Title IX rules

On May 6, the U.S. Department of Education released controversial final regulations implementing Title IX of the Education Amendments of 1972.

Title IX prohibits discrimination on the basis of sex with regard to education programs and activities that receive federal funds. While the department has issued less formal guidance about sexual harassment as a form of sex discrimination, these regulations are the first formal rules for Title IX that directly address the issue. To no one's great surprise, then, this rulemaking process drew widespread scrutiny.

The department devoted most of its 2,033 pages of final rulemaking materials to respond to more than 124,000 public comments. This article looks at the department's responses to five significant issues the public raised about the overlap between Title IX and employment law.

First, the department offered little comfort to those who hoped it would either leave sexual harassment matters involving employees to employment discrimination proceedings under Title VII of the Civil Rights Act of 1964, or otherwise adopt Title VII standards to handle them. The department emphasized that Title IX may apply to sexual harassment matters even when they only involve employees, and regardless of what Title VII rules may also apply. Section 106.6(f) of the final regulations also makes clear that Title IX rights cannot lessen Title VII rights.

The department also disagreed with comments asking it to adopt standards for Title IX that would align it with Title VII. Among other differences, the final Title IX regulations use different standards for what constitutes sexual harassment and what will satisfy the institution's obligation to respond to sexual harassment claims. 34 C.F.R. sec. 106.30, 106.44(a).

These divergent standards may impact litigants in the 7th U.S. Circuit less than in most other circuits, thanks to decisions holding that Title VII provides the only judicial remedy for employment claims involving sex discrimination. Nonetheless, sexual harassment certainly may give employees a basis to make administrative claims under both Title VII and Title IX.

Second, the department addressed concerns about the proposed rules allowing conflicts with standards of evidence for civil litigation under Title VII, state laws, or collective bargaining agreements. The department answered that institutions may use a "clear and convincing evidence" standard under Title IX, despite differing from the standard for most civil litigation, without necessarily running afoul of Title VII requirements. However, it acknowledged that some institutions will not be able to take full advantage of the flexibility it offers.

EMPLOYMENT LAW

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In response, the department did remove a proposed limitation that an institution could use "preponderance of the evidence" for sexual harassment complaints only if it also used that standard for other misconduct claims. Instead, each institution must choose one standard to use for all of its formal complaints of sexual harassment. 34 C.F.R. sec. 106.45(b)(1)(vii). As a result, if a collective bargaining agreement requires a different standard for complaints against employees compared to complaints against students, the institution must reconcile those standards. In addition, Illinois colleges will have to adopt a "preponderance of the evidence" standard for all formal complaints of sexual harassment — not just complaints covered by the Preventing Sexual Violence in Higher Education Act. 110 ILCS 155/1, et seq.

Third, the department allows institutions to place employees accused of sexual harassment on administrative leave during the required grievance process for a formal complaint. Placing any employee on leave, but especially a student-employee, will require careful parsing of any obligations under Title IX, Title VII, federal disability laws, and state statutes, not to mention contractual obligations. Although unpaid leave is sometimes disciplinary and otherwise might violate section 106.44(a), which prohibits disciplinary sanctions before the grievance process, the department intends section 106.44(d) to allow institutions to use paid or unpaid leave for non-student employees. Section 106.44(d) does not give the same flexibility for student-employees. However, the department's rulemaking materials suggest that institutions may place student-employees on leave as a supportive measure for a complainant when the leave "is not punitive, disciplinary, or unreasonably burdensome."

Fourth, the department acknowledged some new procedural requirements may go beyond what Title VII requires. For example, section 106.45(7) requires that the final decision-maker be someone other than an investigator or the Title IX coordinator. For post-secondary institutions, the process for resolving formal sexual harassment complaints must also include a "live hearing" allowing some cross-examination. 34 C.F.R. sec. 106.45(6). The department dismissed concerns about these requirements interfering with at-will employment or labor agreements as the price of receiving federal funds.

Fifth and finally, the department revised its proposed mandatory dismissal requirement to ensure that overlapping claims can continue even if an institution must dismiss part of a complaint. Under section 106.45(b)(3)(i), if a complaint would not meet the new definition of sexual harassment even if proved, the institution must dismiss it "for purposes of sexual harassment under title IX." However, such a dismissal does not prevent the institution from enforcing separate parts of its code of conduct. Thus, if behavior would violate Title VII, but not Title IX, an employer with a code of conduct prohibiting that behavior may still address it.

In summary, these Title IX rules bring significant changes to some institutions' obligations for addressing sexual harassment complaints. Those complaints clearly will continue to pose complex challenges, particularly when employees are involved. Institutions will need legal guidance to plan for and navigate the sometimes subtle implications of the final regulations, which go into effect Aug. 14.