



REPORT ON THE AAAED LISTENING SESSION REGARDING THE NEW TITLE IX FINAL REGULATIONS ON SEXUAL HARASSMENT AND MISCONDUCT

Executive Summary

After the release of the Final Regulations promulgated by the U.S. Department of Education (DOE), Office for Civil Rights (OCR), on Title IX and Sexual Misconduct, the American Association for Access, Equity and Diversity (AAAED) hosted a listening session for college and university Title IX professionals who are responsible for compliance with these new regulations. The listening session was held virtually on May 27, 2020.

Overall, Listening Session attendees, who represented both public and private institutions of higher education in 39 states, were uncertain about how they were going to proceed to comply with these new rules. While some institutions clearly had ideas about how their schools were going to implement the new rules, many did not know or were not sure what they would do.

For many, the required hearing process was of most concern as well as how advisers were going to be appointed. Another major concern related to the resources required to fully implement a program that would be compliant and/or equitable and the short period of time DOE gave schools to implement these rules. The date for implementation was August 14, 2020, three months after the rules were final and in the midst of a pandemic.

Attendees planned to use their own internal resources vs. outsourcing, and most believed the respondent (vs. the complainant) would benefit most from these regulatory changes.

Introduction

On May 6, 2020, the U.S. Department of Education's Office for Civil Rights issued its final regulations related to Title IX of the Education Amendments of 1972 and sexual misconduct. The Department stated that these regulations:

“[strengthened] 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.”¹

On May 27, 2020, AAAED, an association of equal opportunity, affirmative action and diversity professionals, held a Listening Session with 200 members and other individuals with Title IX compliance responsibilities and asked them questions regarding their plans and concerns about implementation of these regulations. The attached PowerPoint presentation report is a summation of the responses given by attendees at the session. One-half of AAAED members work for institutions of higher education and many have responsibilities for compliance with Title IX’s law and regulations. For a copy of AAAED’s news release about the final rules, click here: [AAAED Statement on OCR Final Regulations](#).

According to the Department, the key provisions of the final regulations are as follows: Among other provisions, the regulation reportedly:

- Defines sexual harassment to include sexual assault, dating violence, domestic violence, and stalking, as unlawful discrimination on the basis of sex
- Provides a consistent, legally sound framework on which survivors, the accused, and schools can rely
- Requires schools to offer clear, accessible options for any person to report sexual harassment
- Empowers survivors to make decisions about how a school responds to incidents of sexual harassment
- Requires the school to offer survivors supportive measures, such as class or dorm reassignments or no-contact orders
- Holds colleges responsible for off-campus sexual harassment at houses owned or under the control of school-sanctioned fraternities and sororities
- Restores fairness on college and university campuses by upholding all students' right to written notice of allegations, the right to an advisor, and the right to submit, cross-examine, and challenge evidence at a live hearing
- Shields survivors from having to come face-to-face with the accused during a hearing and from answering questions posed personally by the accused
- Requires schools to select one of two standards of evidence, the preponderance of the evidence standard or the clear and convincing evidence standard – and to apply the selected standard evenly to proceedings for all students and employees, including faculty
- Provides "rape shield" protections and ensures survivors are not required to divulge any medical, psychological, or similar privileged records
- Requires schools to offer an equal right of appeal for both parties to a Title IX proceeding
- Gives schools flexibility to use technology to conduct Title IX investigations and hearings remotely

¹ U.S. Department of Education, Office for Civil Rights, “Secretary DeVos Takes Historic Action to Strengthen Title IX Protections for All Students,” May 6, 2020, <https://www.ed.gov/news/press-releases/secretary-devos-takes-historic-action-strengthen-title-ix-protections-all-students>

- Protects students and faculty by prohibiting schools from using Title IX in a manner that deprives students and faculty of rights guaranteed by the First Amendment²

The deadline for compliance with these far-reaching regulations is August 14, 2020.

The Listening Session Feedback

Overall, Listening Session attendees, who represented both public and private institutions of higher education in 39 states, were uncertain about how they were going to proceed to comply with these new rules. The required hearing process was of most concern as well as how advisers were going to be appointed and overall, lack of resources and time to implement these rules. Attendees planned to use their own internal resources vs. outsourcing, and most believed the respondent would benefit most from these regulatory changes. *See the Title IX Listening Session Summary slides and charts [Title IX Listening Session Summary](#).*

The following is a summary of the responses given during the session.

- 1. Attendees and States Represented** (Slides One and Two): Of the approx. 200 attendees, 39 states were represented.
- 2. Institution/Organization Type:** Two-thirds (67%) worked for public institutions of higher education; seventeen percent worked for private colleges and universities. The balance worked for the federal government, K-12 institutions and state agencies.
- 3. Which Change in the Rules Caused the Greatest Concern for You?** A little more than two-thirds reported that the mandated live hearing process caused the greatest concern. Change in the actual knowledge and reporting requirements was a distant second (14%) and the revised definition of sexual harassment was third (10%).
- 4. What is the greatest concern about implementing the new rules?** More than half (55%) responded that a lack of resources, financial or personnel, was the greatest concern, followed by not having enough time (25%).
- 5. Do you believe the rules benefit one party over another?** Sixty percent replied that the respondent was favored by these rules. A distant second responded that neither party benefitted.
- 6. If you anticipate needing more staff to be compliant with the new rules, please specify the roles that you anticipate needing?** Nearly half (46%) responded that they will need more advisors. Twenty-four percent (24%) stated that they will need more hearing officers.
- 7. Do you anticipate your campus outsourcing all or some of your Title IX functions?** Nearly two-thirds (61%) responded that they plan to handle the functions internally. Only nine percent stated that they plan to hire an outside vendor.
- 8. The advisors that you are required to provide each party (unless the party provides their own), will likely come from...?** Consistent with the above question, thirty-eight percent (38%) of respondents stated that the advisors that they will provide each party will come from the institutions' internal

² Ibid.

community. Thirty-four percent (34%) stated that they were not sure. Sixteen percent (16%) said that the advisors will come from a variety of places.

9. For cases that do not rise to the level of being a Title IX claim, we are going to... Thirty-seven percent (37%) reported that they will use a separate anti-discrimination or harassment policy. This may occur when different civil rights laws are implicated, including Title VI or Title VII of the Civil Rights Act of 1964.

10. For states that have definitions or requirements that you believe will conflict with the new rules, your institution will? The top two responses are evenly divided. Thirty-seven percent (37%) said that there is no conflict between state law and the Title IX definitions. Another thirty-seven percent (37%) said that they will incorporate both definitions and make them work.

11. What will be the standard of evidence that is used in Title IX matters for both faculty/staff and students? Eighty-eight percent (88%) replied that the preponderance of evidence standard will be applied. Only seven percent responded that they did not know and the others will use whatever the Legal or Compliance Office chooses.

12. During the hearings, who will serve as hearing officers? Slightly more than one-third (35%) indicated that they were not sure who would be the hearing officers. Twenty-eight percent (28%) indicated that a panel appointed by the president or designee would serve in that role.

13. During the hearings, who will you provide as advisors? Forty-six percent (46%) said they would provide advisors from a list of trained employees. Others (36%) said they were not sure.

14. At what point will your institution provide an advisor? Nearly sixty percent (59%) indicated that they would provide an advisor at the beginning of the process. A smaller percentage did not know when they would provide advisors or when a party requested an advisor.

15. How will you handle a Title IX complaint that includes other form(s) of discrimination e.g., racial harassment? Little more than a third (34%) responded that the two issues would be separated at the beginning of the process. Slightly less said that they were not sure (33%) and nineteen percent said the issues would be adjudicated under the same process.

16. Since the decision maker cannot be an investigator or Title IX coordinator, our 1st level decisionmaker will be ... There was some uncertainty about this question. The largest percentage reported that they were not sure (28%), but others were more definitive: twenty-five percent (25%) said that the decisionmaker would be a designee of the president and nine percent (9%) said that there would be a hearing panel of employees and students.

17. Since we are required to have an appeals process, the person that will likely be our 2nd level decision maker will be ____. Nearly half of attendees reporting (48%) said that a senior administrator, VP and above, would serve in that role. Twenty-seven percent (27%) were not sure.

18. When the parties enter into informal resolution and that effort fails, what happens to the information collected? Uncertainty was the majority response. Fifty-eight percent (58%) were not sure what would happen to the information. Twenty-one percent reported that the information would not be shared with the investigator.

19. **The new rules will have _____ impact on your institutions mandatory reporter policy.** Slightly more than a third (35%) reported that the rules will have some impact, both positive and negative and twenty-six percent (26%) believed the rules would have a negative impact. Most appeared to be unsure what kind of impact the rules would have or that the impact will be both positive and negative.

20. **On your campus, faculty will _____ mandatory reporters.** Slightly more than half (57%) of faculty will remain reporters according to the survey. Fifteen percent were unsure.

21. **On your campus, coaches will _____ mandatory reporters.** Respondents were more definitive about this question. Seventy-seven percent (77%) said that coaches will remain mandatory reporters. The remainder were unsure.

Follow up Discussion at the AAAED 46th National Conference - Virtual

At its 46th National Conference – Virtual on October 7th, AAAED will host a panel on compliance with the new Title IX regulations. This panel will provide additional information on what Title IX staff have done to meet the August 14th deadline and what more needs to be done to be in compliance. For more information about the conference, go to: [AAAED Conference Agenda](#).

For more information about AAAED and its work in support of members responsible for enforcing Title IX and other EEO Laws, go to: www.aaed.org. Email: execdir@aaed.org.

Founded in 1974 as the American Association for Affirmative Action (AAAA), AAAED is a national not-for-profit association of professionals working in the areas of equal opportunity, compliance and diversity. The longest-serving representative of individuals in the equal opportunity and diversity professions, AAAED has 46 years of leadership providing quality professional training to practitioners and promoting understanding and advocacy of affirmative action and other equal opportunity laws. Nearly one-half of its membership is composed of EEO professionals working for academic institutions.