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Proposed New Regulations on Sexual Harassment and Sexual Violence From The U.S. Department of Education

On Friday, November 16, 2018, the U.S. Department of Education issued proposed Regulations that would alter what constitutes sexual harassment, what triggers a duty to respond, due process afforded to individuals and procedural responses to complaints, among other things. The Regulations are available for public comment for 60 days.

During President Obama's administration in 2011, the Department of Education issued policy guidance addressing Title IX's protections against sexual violence and harassment, including procedural requirements that applied to resolve complaints. The 2011 guidance was in lockstep with the Obama administration's increased enforcement of investigating violations through the Office for Civil Rights and the Department of Justice. Again in

2014 and 2015, the Obama administration issued additional guidance to address policies, practices, roles and responsibilities for investigating complaints and following Title IX.

Upon her appointment to the position of Secretary of Education, Betsy DeVos signaled that she would take up issues relating to Title IX, and started doing so in September 2017 when she revoked the 2011 and 2014 guidance documents. Since that time, the U.S. Department of Education has utilized guidance from 2001 and 2006, as well as an interim guidance document. Last Friday, DeVos released proposed Title IX Regulations that would, for the first time, address the issue of sexual violence and harassment through binding regulation. If implemented, the Regulations would change multiple current aspects and practices of Title IX, including what constitutes sexual harassment, what triggers a duty to respond, due process afforded to individuals and procedural responses to complaints.

Changes of Note

School Obligations Triggered by Actual Knowledge: Under previous guidance, a school had an obligation to investigate and

address sexual harassment when the school should have known about the harassment – something called constructive notice. **Proposed Regulation Section 34 C.F.R. 106.44 provides that schools would only have an obligation based on actual knowledge of sexual harassment.** Actual knowledge is notice of sexual harassment or allegations of sexual harassment to an official of the school who has authority to institute corrective measures on behalf of the school. Accordingly, it is only when a school makes an intentional decision not to respond to third-party discrimination that the school can be said to subject another to discrimination. Stated another way, constructive notice is no longer sufficient to establish obligations or claims of discrimination under Title IX.

Limitation on Responsibility for Response: **Section 34 C.F.R. 106.44 would act to limit the responsibility of schools for responding to sexually harassing and violent conduct to only that which occurs within the school's education program or activity.** The Regulation Notice suggested that in determining whether conduct occurs within a school's education program or activity, the school should consider whether the conduct occurred in a location or context under the purview of the

school, whether the school exercised oversight, or whether the circumstance was funded, sponsored or promoted by the school.

Delineation of a Deliberate Indifference Standard: **The Regulations would implement a standard whereby schools must respond in a manner that is not deliberately indifferent.** Deliberate indifference is defined as a response to sexual harassment in a manner that is clearly unreasonable in light of the known circumstances. Previous guidance held a school responsible if it knew or should have known about the harassment.

Formal Complaint Procedures: **Proposed section 34 C.F.R. 106.45 would address required grievance procedures for complaints of sexual harassment.** The procedures include (a) treating complainants and respondents equally, (b) requiring an objective evaluation of all evidence, (c) selecting a complaint investigator who does not have a conflict of interest or bias for or against complainants or respondents, (d) an equal opportunity for parties to present witnesses and other evidence, and (e) a presumption that the respondent is not responsible for the alleged conduct until a determination of responsibility is made. The Regulation also would have schools describe in policy

or procedure the standard of evidence to be used to determine responsibility, but only permits schools to use a preponderance of the evidence standard (what is used in most civil litigation) if the school uses that standard for other conduct violations that have the possibility of similar disciplinary outcomes as a sexual harassment violation.

Notice of Allegations and Procedures: The Regulations would require that all parties receive notice of the allegations and grievance procedure utilized for an investigation. The notice of the allegations must include sufficient details such as the identities of all parties involved and the conduct allegedly constituting sexual harassment.

Hearing or Written Question/Answer: 34 C.F.R. 106.45(b)(3) would require schools to afford the parties with the opportunity for a live hearing or an opportunity to submit written questions, provide answers to questions and allow limited follow-up between the parties. This requirement emphasizes an opportunity for additional due process of cross examination before a finding is made. Importantly, Sections 106.45(b)(3)(vi) and (vii) would prevent harassing or irrelevant questions about a complainant's sexual behavior or

predisposition.

Inspection of Evidence: The Regulations would provide both parties an equal opportunity to review evidence obtained as part of the investigation – including evidence that might not be relied upon in reaching a determination. Schools must take caution to send each party any evidence prior to the completion of an investigative report and provide at least 10 days for the parties to provide any written response. This written response must be considered by an investigator in making any determination.

Written Determination: The Regulations would require that all determinations be made in writing and include: (a) identification of the section of any policy/procedure/code that is alleged to have been violated; (b) a description of the procedural compliance with the Regulations; (c) findings of fact supporting the determination; (d) application of policy to the facts; (e) a statement and rationale for any sanctions to be imposed; and (f) the procedure and permissible bases for an appeal. The written determination must be provided to the parties simultaneously.



Supportive Measures: The Regulations address that supportive measures are to be appropriately offered to the complainant or respondent of a claim of harassment or violence and may include protective changes to ensure the safety of all parties, counseling, extensions of deadlines, modifications of class or work, escorts, leaves of absence, increased security or other measures.

Recordkeeping: 34 C.F.R. 106.45(b)(7) would impose upon schools a record-keeping requirement whereby they must maintain relevant records connected to the investigation for a period of 3 years.

Impact on Illinois Schools

The regulations will have widespread impact on schools. First and foremost, most schools will need to amend Board Policies 5:20, 7:20 and 2:260 to fall in line with the new requirements. For Boards of Education who subscribe to PRESS Policy Subscriptions, we anticipate that there will be forthcoming changes to those sections, and possibly others, after implementation of the Regulations.

One area of the Regulations that may pose a problem to schools



is the requirement to have a complaint investigator who does not have a conflict of interest or bias in the investigation. It is unclear whether school personnel will be presumed to have an implicit conflict or bias or whether a third-party investigator will be required for complaints.

Because of the additional due process afforded to respondents, including notice of allegations and an opportunity to review investigatory evidence, schools will have to be very careful to address any confidentiality requirements that are required by law. In addition, investigators should be prepared to encounter witnesses who are more reluctant to share information due to the requirement that investigatory materials be shared with the parties.

The written determination required by the Regulations would require a statement and rationale for any sanctions imposed upon any party. This requirement may pose a frustration to schools whose determinations of certain discipline for students and employees must be made at the Board level and not by a complaint investigator or administrator.

The Regulations require additional investigative, hearing, due

process, recordkeeping and written determinations requirements that do not presently exist. Districts will need to ensure that their leadership, complaint managers, investigators and human resources professionals are appropriately trained on the changes in order to ensure compliance with the many procedural changes. Schools may find it beneficial to coordinate with a third-party investigator to ensure compliance with the Code changes.

Comment and Codification

A copy of the proposed Regulation is available [here](#). The proposed Regulations are open for comment for the next 60 days and the deadline for commenters to provide feedback is January 15, 2019. To submit comments electronically, visit www.regulations.gov or send letters directly to the U.S. Department of Education: Attention Brittany Bull, U.S. Department of Education, 400 Maryland Avenue S.W., Room 6E310, Washington, D.C., 20202.

If you have any questions, please contact our attorneys in our Flossmoor Office at 708-799-6766 or our Oak Brook Office at 630-928-1200.