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NEW FINAL TITLE IX RULES ISSUED ON SEXUAL HARASSMENT

In 2018, we reported on the United States Department of Education's Notice of Proposed Rule Making ("NPRM") relating to Title IX of the Education Amendments of 1972. The NPRM aimed to overhaul Title IX's language regarding its prohibition of sexual harassment in schools and its procedures for adjudicating sexual harassment complaints in schools.

Generally, Title IX prohibits discrimination on the basis of sex, which includes sexual harassment and acts of sexual violence. Title IX applies to all people in an educational institution that receives federal funding.

After much anticipation, on May 6, 2020, the NPRM became a final rule that will take effect on August 14, 2020. The following is a summary of the implications of the final rule, including some

notes on how the final rule differs from the NPRM. Please note that this summary is not an exhaustive list of the new changes to Title IX:

- One of the NPRM's main goals was to change the timeline for when schools must begin responding to complaints of sexual harassment. Prior to the NPRM, the timeline began when the school should have known about the harassment, which in the legal world is defined as *constructive* notice. The NPRM altered this by making the timeline begin when the school has *actual* notice of sexual harassment or allegations of sexual harassment. The final rule requires this notice to be given to any employee of an elementary and secondary school and to the school's Title IX Coordinator (a new "actor" required by the final rule), while the NPRM only required that the notice be given to a teacher.
- You may recall that the NPRM sought to define "sexual harassment" as: (1) a school employee conditioning

education benefits on participation in unwelcome sexual conduct (*i.e. quid pro quo*); (2) unwelcome conduct on the basis of sex, that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school's education program or activity; or (3) sexual assault, as that term is defined in the Clery Act (which is any sexual act directed against another person, without consent of the victim, including instances where the victim is incapable of giving consent, *i.e.* rape, fondling, incest, and statutory rape). The final rule differs slightly in its definition of "sexual harassment" in that: (1) the severe/pervasive standard must be judged according to what a reasonable person would determine as severe, pervasive, and objectively offensive; and (2) it adds "dating violence, domestic violence, or stalking as defined in the Violence Against Women Act" to what may constitute sexual harassment under Title IX. The Clery Act definition of sexual assault remains in the final rule definition.

- The NPRM provided that a school must respond to

complaints of sexual harassment when it occurs “in the school’s education program or activity.” The final rule now defines “education program or activity” to mean locations, events, or circumstances over which the school exercised substantial control over both the respondent (alleged harasser) and the context in which the sexual harassment occurs.” This calls into question whether a school would need to respond at all if sexual harassment is alleged to have occurred, for example, in an employee’s home or car.

- As stated above, the NPRM and final rule now include a requirement that schools designate a Title IX Coordinator to coordinate the school’s efforts to comply with its Title IX responsibilities. Beginning August 14, 2020, the Title IX Coordinator’s required contact information must be prominently displayed on school websites.
- The final rule differs greatly from the NPRM in that a school’s mandatory response to sexual harassment must

include, but is not limited to: (1) offering supportive measures to the complainant; (2) the Title IX Coordinator promptly contacting the complainant to discuss the availability of supportive measures, considering the complainant's wishes with respect to supportive measures, informing the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explaining the process for filing a formal complaint to the complainant; and (3) following a grievance process that complies with the final rule before the imposition of any disciplinary sanctions or other actions that are not supportive measures, against a respondent (alleged harasser).

- The final rule also differs from the NPRM in that it requires a complainant, at the time he/she files a formal complaint, to be participating in or attempting to participate in the education program or activity of the school with which the formal complaint is filed.

- The final rule contains a new requirement that a complaint hearing's decision maker must weigh the relevancy of a question asked of a party or witness before the party or witness answers the question. Additionally, while the NPRM required elementary and secondary schools' grievance procedure to have a live hearing, the final rule makes the live hearing requirement optional.
- The NPRM provided that a school may choose to offer an appeal from a determination of responsibility or dismissal of a complaint; the final rule makes it mandatory to offer parties an appeal, but only on the following bases: (1) procedural irregularity that affected the outcome of the matter; (2) new evidence that was not reasonably available at the time the determination was made that could affect the outcome of the matter; and/or (3) the Title IX Coordinator, investigator, or decisionmaker had a conflict of interest or bias that affected the outcome of the matter.

- The NPRM allowed schools to choose to offer informal resolution options (such as formal or informal mediation), but only with the voluntary, informed, written consent of both parties. The final rule states that a school may not require that the parties participate in informal resolution, or offer informal resolution, unless a formal complaint is filed. However, the final rule provides that schools must not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.
- The NPRM did not include anti-retaliation provisions, but the final rule does.

As a result of the final rule, schools will need to review their policies and procedures to ensure their compliance with the new Title IX rules. This will largely involve revising your Uniform Grievance Procedure to ensure compliance and, potentially, bestow “Title IX Coordinator status” on the Uniform Grievance Procedure’s already-existing Complaint Manager.

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If you have any questions or concerns about the final rule, provisions not discussed in this priority briefing, or the many potential interpretations of the final rule, please do not hesitate to contact one of your attorneys at Hauser, Izzo, Petrarca, Gleason & Stillman, LLC.