



# OCR-COMPLIANT PROCEDURES

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# YOUR FACULTY



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# TITLE IX OVERVIEW



Title IX of the Education Amendments of 1972 is a federal law intended to end sex discrimination in all areas of education

Ensures sex (and gender?) equity in all institutional programs, events, operations involving employees, faculty, students, visitors, and others

Applies to sexual harassment, sexual assault, and sex- and gender-related relationship violence, stalking, bullying, etc.

# LAWS, COURTS, AND REGULATIONS



- **Laws** passed by Congress (e.g.: Title IX) – Enforceable by Courts and OCR
  - Federal Regulations – **Force of law**; Enforceable by Courts and OCR
    - Regulatory Guidance from OCR – Enforceable only by OCR (e.g.: 2001 Guidance)
    - Sub-Regulatory Guidance from OCR – Enforceable only by OCR (e.g.: 2011 DCL)
- **Federal Caselaw** – **Force of law** based on jurisdiction
  - Supreme Court – binding on entire country
  - Circuit Courts of Appeal – binding on Circuit
  - District Court – binding on District
- **State caselaw** – **Force of law**; binding only in that state based on court jurisdiction

# STAY ABOVE THE FLOOR



- Law, Caselaw and Federal Regulations set the floor
  - OCR Guidance typically elevates the floor
  - States can pass laws that exceed federal requirements (e.g.: NY’s “Enough is Enough” law)
- Regressing to the floor = doing the bare minimum
  - Will continue the cycle of inequity and unfairness
- Civil Rights issues demand more than bare minimum
- Industry standards already exceed the floor
  - Regression to the floor increases risk of lawsuit and negligence-based liability

# INDUSTRY STANDARDS



- The field has adopted numerous practices and created industry standards that exceed basic requirements
- Standards stem from Student Services/Affairs, HR, Legal Affairs, OCR Guidance, Courts, Law, Professional Associations
- ATIXA's policy and procedure model – 1P1P – encompasses industry standards
- ATIXA's publications and resources provide guidance where government does not

# A BRIEF HISTORY OF TITLE IX 1972-PRESENT



- Key Regulatory and Sub-Regulatory Guidance from OCR
  - 1997 Guidance → 2001 Revised Sexual Harassment Guidance.
  - 2011 Dear Colleague Letter (The "DCL").\*
  - Questions and Answers on Title IX and Sexual Violence (April 2014).\*
  - 2015 Dear Colleague Letter, Dear Coordinator Letter & Resource Guide.
  - 2016 Guidance on Transgender Students.\*
  - 2017 Interim Guide: Q&A on Campus Sexual Violence.
- "Not Alone" – White House Task Force to Protect Students From Sexual Assault (April 2014) (disbanded).
- Also: The Clery Act, VAWA 2013: Section 304.
- \*Since rescinded

# OVERVIEW OF OCR SEPT. 2017 ACTION



- Sept. 22, 2017 Dear Colleague Letter
  - Withdrew the April 4, 2011 Dear Colleague Letter
  - Withdrew Q&A on Title IX and Sexual Violence (April 29, 2014)
  - Rulemaking: Called for Notice and Comment on “Title IX responsibilities arising from complaints of sexual misconduct”
  - Provided “Interim Guide” on Campus Sexual Misconduct
- OCR’s stated reasons for withdrawing 2011 DCL/2014 Q&A
  - Released without providing for notice and comment (APA)
  - “Created a system that lacked basic elements of due process”
  - “Created a system that...failed to ensure fundamental fairness”

# OVERVIEW OF PROPOSED REGULATIONS



- November 29, 2018: OCR published proposed amendments to Title IX regulations:
  - Provided 60 days for public comment – open until January 28th
  - OCR will then review comments and finalize the regulations
  - OCR has to respond materially to comments
  - Will amend the Code of Federal Regulations
  - **Will have the force of law once adopted**
  - Proposed amendments are significant, legalistic, and very due process-heavy
  - Will likely go into effect 30 days after final regulations published in Federal Register

# INTERVENING VARIABLES



- Congress and a newly-installed Democratic House and Committees
- Title IX has become a political football
- Lawsuits & injunctions by:
  - Parties
  - States: Attorneys General
  - Possible enforcement injunctions by Federal judges
- Conflicts between proposed regulations and state laws (e.g.: CA and NY)
- Campus/school protests
- Public perception

# ULTRA VIRES ACTION BY OCR?



- OCR can only enforce within the statutory ambit of Title IX
- Any action exceeding this authority is called *ultra vires*
- Many observers concerned that due process elements in the proposed regulations have no legal basis in Title IX
  - Sex-equity based law – not a due process-based law
  - What is source of OCR authority to require a formal hearing, cross examination by advisors, etc.?
  - Shouldn't due process be up to Congress and the courts?
  - Many due process elements are a best practice, but likely will be up to courts to decide if properly within OCR's regulatory purview
  - Obama's OCR also arguably exceeded Title IX's scope, but only in sub-regulatory guidance, not in regulations.

# OBAMA OCR: (OVER?) ZEALOUS ENFORCEMENT AND EQUITY IMBALANCE



- Dramatically ramped up enforcement; became feared
- Provided extensive sub-regulatory guidance
- Made investigations and outcomes public
- Had a pro-reporting party imbalance to their approach
- Field shifted from an imbalance toward the responding party to an imbalance toward the reporting party
- Resulted in widespread abrogation of due process rights for responding parties

# DUE PROCESS CASELAW



- The pro-reporting party imbalance prompted hundreds of lawsuits by responding parties
  - Wave of John Doe cases with unfavorable findings toward schools
  - Rise in lawsuits alleging selective enforcement, negligence, deliberate indifference, etc.
- Courts began requiring heightened levels of due process
- Sixth Circuit leads this revolt
- Trump-era OCR shifting imbalance back toward responding parties, using courts and due process as their rationale
- Balance will not result from proposed new regulations

# DELIBERATE INDIFFERENCE STANDARD



- In *Gebser* (1998) and *Davis* (1999), the Supreme Court held that a funding recipient is liable under Title IX for deliberate indifference **only** if:
  - The alleged incident occurred where the funding recipient controlled both the harasser and the context of the harassment;  
AND
  - Where the funding recipient received:
    - Actual Notice
    - To a person with the authority to take corrective action
    - Failed to respond in a manner that was clearly unreasonable in light of known circumstances
- OCR has historically used a broader, less stringent standard

# CIVIL LAW SUITS V. OCR ENFORCEMENT & TITLE IX (PRE-2019)



## Lawsuit

- File in federal court
- Monetary damages, injunction
- Requires:
  - Actual notice
  - Employee with authority to take action
  - Deliberate Indifference

## Administrative Action

- Initiated by OCR
- Voluntary compliance or findings
- Requires:
  - Actual OR constructive notice (“knew or should have known”).
  - Investigate
  - End harassment
  - Remedy impact
  - Prevent recurrence

# “NOT DELIBERATELY INDIFFERENT”



- Safe Harbors in the Proposed 2019 Regulations:
  - If the school follows procedures (including implementing any appropriate remedy as required), then not deliberately indifferent.
  - If reports by multiple complainants of conduct by the same respondent, Title IX Coordinator must file a formal complaint. If the school follows procedures (including implementing any appropriate remedy as required), not deliberately indifferent.
  - For IHEs, if no formal complaint and school offers and implements supportive measures designed to effectively restore or preserve the reporting party's access, not deliberately indifferent. Must inform reporting party of right to file formal complaint later.
  - No deliberate indifference merely because OCR would come to different determination based on the evidence. Biases process?

# UNIFYING STANDARDS?



- Proposed regulations would mostly unify the court and administrative enforcement standards
  - Would raise administrative enforcement standard to match legal standard of deliberate indifference
  - Would significantly limit OCR's authority (and efficacy?)
  - Will likely lead to a wave of litigation by all parties
- In some ways, OCR going beyond court standard. *Davis* notice-based standard vs. formal complaint standard

# NOTICE, JURISDICTION, & DELIBERATE INDIFFERENCE

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# NOTICE TO THE INSTITUTION



- Proposed regulations would not require a Title IX investigation unless the institution receives actual notice through a “formal complaint”:
  - Actual notice defined as:
    - The reporting party filing a formal, written, signed complaint with TIX Coordinator; or
    - The TIXC may file a formal written complaint on behalf of reporting party
      - Conflict of Interest? Impartiality concern?
  - Eliminates OCR’s constructive notice standard
  - What to do if institution receives notice in some other way?
    - Industry standards

# RESPONSIBLE EMPLOYEE SHIFTING?



- Currently, a **responsible employee** includes any employee who:
  - Has the authority to take action to redress the harassment; or
  - Has the duty to report harassment or other types of misconduct to appropriate officials; or
  - Someone a student could reasonably believe has this authority or responsibility;

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# RESPONSIBLE EMPLOYEES?



- Proposed regulations shift “actual notice” to:
  - Anyone who has the authority to take action to redress the harassment
  - All pre-K-12 teachers when conduct is student-on-student
- This is ONLY the standard for when OCR would deem a school to be on notice; it is the floor.
- ATIXA has not changed its recommendation to require all non-confidential employees to report harassment or discrimination
- Continue to train employees on obligation to report

- Jurisdiction
  - *Davis* standard – control over the harasser and the context of the harassment
  - “occurs within its education program or activity”
- Geography should not be conflated with the Clery Act – education programs or activities can be off-campus, online
- Proposed regulations specify “harassment...against a person in the United States”
  - Unclear effect on study abroad programs or school-sponsored international trips – “nothing in the proposed regulations would prevent...”
- Open question of student/employee harassment of non-student/employee

- Current requirement to address on-campus effects of off-campus misconduct
  - Even if conduct took place outside education program or activity, schools responsible for addressing effects that manifest in the program/activity
  - Students and/or employee conduct outside program, IPV
- Leaked draft of regulations prior to publication indicated schools “are not responsible” for exclusively off-campus conduct but could be responsible for on-going on-campus /in program effects
- Published proposal eliminated this comment, presume *Davis* standard still applies – “nothing in the proposed regulations would prevent...”

# DEFINITIONS

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# DEFINITIONS: SEXUAL HARASSMENT



- Current OCR Definition of Sexual Harassment is “unwelcome conduct of a sexual nature”
  - Includes quid pro quo “requests for sexual favors”
  - When sexual harassment constitutes sex discrimination by causing a hostile environment (discriminatory effect), prohibited by Title IX
- Proposed regulations
  - Conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct (QpQ)
  - 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 recipient's education program or activity (HE)
  - Sexual assault, as defined in 34 CFR 668.46(a)
- No mention of retaliatory harassment in proposed regs

# DEFINITIONS: SEXUAL HARASSMENT



- ATIXA model definitions

- *Quid pro quo* sexual harassment

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature by a person having power or authority over another when submission to such sexual conduct is made either explicitly or implicitly a term or condition of rating, evaluating, or providing a benefit to an individual's educational or employment development or performance.

- *Hostile environment* sexual harassment

Unwelcome sexual, sex-based and/or gender-based verbal, written, online and/or physical conduct that is severe, or persistent or pervasive, and objectively offensive, such that it unreasonably interferes with, denies, or limits someone's ability to participate in or benefit from the institution's education or employment programs.

# DEFINITIONS: SEXUAL HARASSMENT



- ATIXA model definitions (cont.)
  - *Retaliatory* sexual harassment  
When adverse action required by the definition of retaliation takes the form of harassment, the conduct can be both sexual harassment and retaliation. It is also possible that retaliatory actions can take the form of hostile environment harassment.
- Proposed regulations written around a recipient's obligation to respond to sexual harassment
  - Conflate "sexual harassment" with "hostile environment"
- Neglect element of substantial harm within QpQ harassment
- "Unwelcome conduct" lower standard than "hostile environment"

# DEFINITIONS: SEXUAL HARASSMENT



- Confusion regarding “hostile environment” remains
  - Proposed regulations adopt problematic *Davis* definition:
    - Unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive...
  - Vulnerable to interpretation that conduct must be pervasive **and** severe
  - Neglects the difference between persistent and pervasive
- Industry standard aligns with Title VII caselaw & provides clearer standard
  - Unwelcome *sexual* conduct, *or conduct* on the basis of sex, that is so severe *or* pervasive (*or* persistent) **and** objectively offensive...

# DEFINITIONS: NOTICE



- “Notice” is the benchmark indicating when an institution is required to stop, prevent, and remedy
- Current OCR definition of notice – “knew or should reasonably have known”
  - Incorporates both actual and constructive notice
- Proposed regulations restrict to actual notice exclusively
  - *Actual knowledge* means notice to Title IX Coordinator or any official with authority to institute corrective measures
  - *Respondeat superior* or constructive notice insufficient
  - PK-12 teachers are “officials” – post-secondary faculty are not
  - Mere ability or obligation to report does not qualify as “official”

DUE PROCESS

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# DUE PROCESS OVERVIEW



- Proposed regulations place heavy emphasis on due process protections for the responding party
- New standard of proof mandates
- Notice at various investigation stages
- Collection and production of evidence for review
- Mandate for determination and sanction process
- Live hearings with cross-examination
- Schools provide advisor; must allow advisor questioning of parties/witnesses

# STANDARD OF PROOF

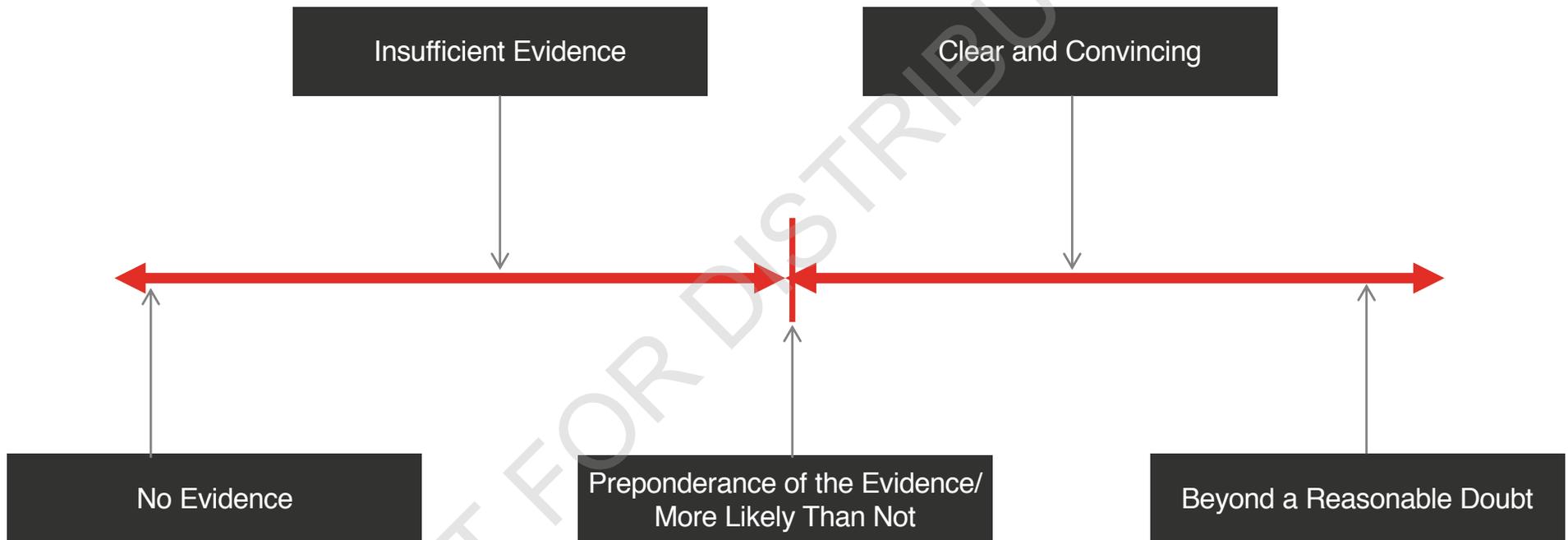


- Current OCR standard – preponderance of the evidence is standard civil court will use to evaluate school’s response
- Proposed regulations allow preponderance only if same for other conduct code violations, otherwise must use clear & convincing
- Effectively mandates clear & convincing for schools with higher standards for other proceedings (i.e. AAUP faculty hearings)
- May create incongruence between school process and court scrutiny (where preponderance will still be the standard)
- ATIXA position – preponderance only equitable standard

# UNDERSTANDING EVIDENCE THRESHOLDS



## EVIDENTIARY STANDARDS



# PROMPT



- Proposed regulations specify “prompt timeframes” written into grievance procedures
- Temporary delays only allowable for “good cause” and with written notice of the delay to parties
- OCR does not appear to contemplate reasonable delays at the earliest points of an investigation
- Responding party may not yet know of investigation or allegations – written notice of delay may be first indication

# WRITTEN, DETAILED NOTICE



- Proposed regulations require several written, detailed notices to the parties
  - Any reasonable delay for good cause
  - Upon receipt of a formal complaint
    - Sufficient details – identity of parties, alleged violations, date, location
    - Sufficient time to prepare a response
  - Informal process requirements, if applicable
  - All hearings, interviews, and meetings requiring attendance with sufficient time to prepare
  - Upon determination of responsibility, including sanctions
- Notice requirements may affect industry standard investigative practices
- *Doe v. Timothy P. White, et. al., (2018)*

# INFORMAL RESOLUTION OPTIONS



- Proposed regulations allow informal resolution at any time prior to a final determination, at discretion of TIXC
  - Requires detailed notice to the parties
  - Allegations
  - Requirements of the process
  - Circumstances which would preclude formal resolution
  - Consequences of participation
  - Obtain voluntary, written consent
- Does not preclude certain offenses from informal resolution
- May restrict restorative practices after a determination

# SUPPORTIVE MEASURES



- Non-disciplinary, non-punitive individualized services
- Must not unreasonably burden other parties
- Proposed regulations address mutual restrictions, neglect unilateral or individualized restrictions
- Appears to anticipate, but also prohibit, that one party will sometimes be restricted more than the other
- May chill reporting if automatic mutual restrictions limit access to education program

# BURDEN OF PROOF ON FUNDING RECIPIENT TO GATHER EVIDENCE



- Burden of proof and burden of gathering evidence on the school, not the parties
- “Sufficient to reach a determination” = appropriately thorough?
- Unclear if all relevant evidence must be collected
- Parties may be able to request certain evidence be obtained
- Evidence collected by law enforcement is admissible
- Who determines what evidence is relevant and sufficient?

# “PRESUMPTION OF INNOCENCE”



- Proposed regulations require published grievance procedures include a presumption of innocence for the responding party
- No change from effective procedures – determination has always been based on evidence
- Presumption is a legal framework, may create inequity
- Unclear how presumption will work procedurally
- Should there be an equitable presumption that the reporting party is telling the truth?

# CONFLICT OF INTEREST, OBJECTIVITY, AND BIAS



- Existing mandate for impartial resolutions with fair procedures
- Proposed regulations prohibit conflicts-of-interest or bias with coordinators, investigators, and decision-makers against parties generally or an individual party
- Training mandates apply to PK-12 as well as higher ed
- Unclear how prohibition of bias against reporting/responding parties establishes equity under Title IX or falls within OCR's statutory authority
- Due process mandate does not distinguish public v. private

# INVESTIGATION AND RESOLUTION MODELS



- Treatment of reporting/responding parties may constitute discrimination
- The end of the single investigator model – live hearing required for all postsecondary resolution proceedings
- Must allow advisor to be present at all meetings, interviews, hearings
- If no advisor, school must provide one
- Statutory authority exceeded with procedural mandates?

# PROVIDING PARTIES WITH COPIES OF ALL EVIDENCE



- All relevant evidence considered – inculpatory and exculpatory
- No restriction on discussing case or gathering evidence
- Equal opportunity to inspect all evidence, including evidence not used to support determination
- May chill reporting if irrelevant information must be provided to either party
- Unclear at what point in process evidence must be provided
- No limits on types/amount of evidence offered
- Creates possible equitable limits on evidence for both parties

# PROVIDING COPIES OF INVESTIGATION REPORT FOR REVIEW AND COMMENT



- Proposed regulations mandate creation of an investigation report
- Must fairly summarize all relevant evidence
- Provided to parties at least 10 days before hearing or other determination
- Parties may review and submit written responses to report
- Unclear if analysis (including credibility) and findings of fact should be included
- Unclear if a full report or a summary is required

# LIVE HEARING



- Proposed regulations mandate live hearing for postsecondary institutions, optional for PK-12
- Parties must attend hearing, otherwise all testimony submitted by absent party must be excluded
- Hearing administrator may not be Title IX Coordinator or the investigator
- Must allow live cross-examination to be conducted exclusively by each party's advisor (separate rooms still allowed)
- Unclear how irrelevant questions will be screened, but rationale for excluding questions required (verbal or written?)

# ADVISORS



- Advisor can be anyone – no restrictions in proposed regulations
- If a party does not have an advisor to conduct cross-examination, the school must provide one
- Advisor must be “aligned with the party”
  - “Defense” and “prosecution” advisors?
- No prior training required, no mandate for school to train
- ED presumes no financial impact because all parties retain counsel; not at institutional expense
- Mandate for higher education only – PK-12 may still conduct indirect cross-examination through hearing administrator

# APPEALS



- If schools offer appeals (not required), must be made available equitably
- All parties receive notification of any appeal
- Opportunity for all parties to support or oppose outcome
- Written decision with rationale delivered simultaneously to all parties
- Appeal decision-maker cannot have had any other role in the investigation or resolution process
- “Reasonably prompt” timeframe for producing appeal decision

# IMPACT ON EMPLOYEES



- Proposed regulations often refer exclusively to “students,” but employees are also affected
- Tenured faculty cross-examining students at a live hearing
- Faculty found responsible – sanctions affirmed by committee?
- Union employees – diminished right to an advisor because of union representation?
- Extensive due process protections for at-will employees accused of misconduct
- Potential inequity in employee processes for Title VII-based sexual harassment
  - More due process for sex discrimination than race discrimination

# OTHER ELEMENTS IN THE PROPOSED REGS



- Remedial action required by OCR for noncompliance with Title IX will not include money damages
  - OCR clarifies that reimbursements or compensation do not fall within the meaning of this provision
- Institutions may presume religious exemption
  - If under OCR investigation, may then be required to submit exemption justification in writing
  - Allows institutions to avoid public assertion of exemption from certain civil rights protections
  - Problematic for students/employees who deserve to know if certain protections are not honored at their institution

# OTHER ELEMENTS IN THE PROPOSED REGS



- Statement that proposed regulations do not restrict or deprive rights under the First, Fifth, and Fourteenth Amendments, FERPA, the Clery Act, or Title VII of the Civil Rights Act.
  - Clery/VAWA and FERPA considerations?
  - Clery Act provisions do not apply to PK-12 – the proposed regulations extend many Clery Act requirements to PK-12

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# OPERATING OUTSIDE THE TIX FRAMEWORK



- *Ultra vires?*
  - Require signed formal complaint rather than actual notice
  - Prescribed standard of evidence for Title IX procedures
  - Mandated standard of proof for other conduct procedures
  - Extension of Clery/VAWA definitions and requirements to PK-12
  - Require live hearings for Title VII sexual harassment procedures
  - Individualized safety and risk analysis prior to interim suspension on an “emergency basis”
  - Treatment of responding party may constitute discrimination
  - Regulation of due process elements in internal procedures – blanket application to public and private institutions
  - Notice requirement upon receipt of formal complaint
  - Mandatory live hearing at public and private higher education institutions
  - Recordkeeping requirements

# QUESTIONS? CONTACT US

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