The New Title IX Regulations: What AFA Members Need to Know

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The New Regulations: CONTEXT

• Released in final form by the U.S. Department of Education in early May 2020 after an unprecedented notice and comment period.

• Go into effect on August 14, 2020.

• Are being challenged in court by the ACLU and several state Attorneys General. Expect *Chevron* and *State Farm* battles *inter alia*....

• Could be impacted by the outcome of the 2020 election.
  • Presidential Election/ DOE leadership
  • Congress

• Are considered “controversial” by some in a variety of ways...

• Watch the federal courts...judicial activism?

• Impact of “Close the Frats” rhetoric?
Some of the Major Changes to Title IX—FEDERAL COLLEGE SEX COURT Arrives on Campus

- Reporting requirements (fewer “mandated” reporters)
- Formal complaints and actual knowledge
- New definition of “sexual harassment”
- Informal resolution—the rise of mediation?
- Jurisdiction
  - Title IX or conduct? IFC role?
- Live hearing requirement (no more single investigator models)
- Cross-examination by advisors
- The role(s) of advocates in college court
- Staffing
  - Title IX Coordinator
  - Title IX Investigator
  - Title IX Decision-Maker(s)
  - (These cannot overlap!)
Some of the Major Changes to Title IX Continued

• Can use “clear and convincing” or “preponderance of the evidence”
• Can use videoconferencing for hearings (especially important in light of COVID-19)
• “Deliberate indifference” standard
• Retaliation is expressly prohibited.
• Training materials for Title IX coordinators, Title IX investigators, Title IX decision-makers and those involved in informal resolution must be posted to an institution’s website.
• Conflicts of interest and bias
Sexual Harassment

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

(1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct;

(2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity; or

§ 106.44 Recipient’s response to sexual harassment

“For the purposes of this section, §§ 106.30, and 106.45, “education program or activity” includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.”

Id. at 2016 (emphasis added).
§ 106.30 Definitions.

“... Formal complaint means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment. At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed. . . .”

Id. at 2014 (emphasis added).
Specific Mentions of Greek Organizations in Regs and Commentary

“Commenters raised concerns about off-campus Greek life as hotbeds of sexual misconduct not covered by the NPRM[Notice of Proposed Rulemaking], arguing that students are more likely to experience sexual assault if in a fraternity or sorority, and that men in fraternities are more likely than other male students to be perpetrators of sexual misconduct. Commenters expressed concern that recipients might interpret the NPRM as preventing them from addressing sexual misconduct in fraternities, sororities, and social clubs the recipient does not recognize, or perversely encourage recipients not to recognize Greek letter associations, but that the Department should encourage such relationships because they often entail mandatory insurance, risk management standards, and training requirements to reduce incidents of sexual misconduct.”

Id. at 618 (internal citations omitted).
Specific Mentions of Greek Organizations in Regs and Commentary Continued

“Commenters cited: Jacqueline Chevalier Minow & Christopher J. Einolf, Sorority Participation and Sexual Assault Risk, 15 VIOLENCE AGAINST WOMEN 7 (2009); Jennifer Fleck, Sexual assault more prevalent in fraternities and sororities, study finds, UWIRE.COM (Oct. 16, 2014); Claude A. Mellins et al., Sexual Assault Incidents Among College Undergraduates: Prevalence and Factors Associated with Risk, 13 PLOS ONE 1 (2017).” Id. at 618 n. 846.

“Commenters cited: Jacquelyn D. Weirsma-Mosely et al., An Empirical Investigation of Campus Demographics and Reported Rapes, 65 JOURNAL OF AM. COLL. HEALTH 4 (2017); Cortney A. Franklin, Sorority Affiliation and Sexual Assault Victimization, 22 VIOLENCE AGAINST WOMEN 8 (2016).” Id. at 618 n. 847.

“One commenter who represents a system of postsecondary institutions raised specific concerns regarding the conflict in geographic jurisdiction between the Clery Act and the proposed Title IX rules related to Greek letter organizations at such institutions. The commenter explained that under prior OCR interpretations, institutions would be required to take action if the incidents disclosed at Greek letter housing could limit access to education, regardless of the level of oversight of the group. Under the Clery Act, analogous sexual assault crimes might be reported if they occurred at Greek letter housing, but only if the house was owned or controlled by a student organization that is officially recognized and the deed or lease would have to be held by the organization, as private homes and businesses are not included.”

Id. at 1798.
"The commenter argued that the Clery Act definition is inconsistent with the proposed Title IX rules and expressed concern that this conflict will create confusion among institutions. The commenter expressed additional concerns that some institutions may be incentivized to no longer recognize Greek letter associations or reduce their recognition so that they would not be considered a program or activity based on the tests drawn from cases included in the proposed Title IX rules. The commenter argued that recognizing such associations can come with requirements such as mandatory insurance, risk management standards, and training requirements, which can reduce incidents of sexual harassment and assault so there are reasons for the Department to incentivize such recognition."

*Id.* at 1798-1799.
“The Department agrees that with respect to Greek letter organizations, recipients of Federal financial assistance may have different obligations under these final regulations, implementing Title IX, than under the regulations implementing the Clery Act. These obligations, however, do not present a conflict, and the commenter does not identify any specific conflict with respect to Greek letter organizations.”
“The Department recognizes that each recipient may have a different arrangement with Greek letter associations active at its institution and that the application of these final regulations will differ based upon the relationship between the recipient and the Greek letter association. Whether the Greek letter association is an education program or activity of the recipient will depend on the relationship between the recipient and the Greek letter association. These final regulations provide clarity and not confusion as to what an education program or activity includes, as § 106.44(a) states that for purposes of §§ 106.30, 106.44, and 106.45, an education program or activity includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.”

*Id.* at 1799 (emphasis added).
The Department acknowledges that many but not all Greek letter associations are student organizations that own or control a building. As more fully explained in the “Section 106.44(a) ‘education program or activity’” subsection of the “Section 106.44 Recipient’s Response to Sexual Harassment, Generally” section of this preamble, recipients may dictate the terms under which they recognize student organizations that own or control buildings, and the reference in § 106.44(a) to “buildings owned or controlled by a student organization that is officially recognized by a postsecondary institution” as part of a recipient’s “education program or activity” for purposes of responding to sexual harassment under these final regulations, includes buildings that are on campus and off campus. By contrast, the Clery Act’s definition of noncampus property excludes from Clery geography “a fraternity or sorority house that is located within the confines of the campus on land owned by the institution.

Id. at 1799 – 1800 (internal citation omitted).
Specific Mentions of Greek Organizations in Regs and Commentary Continued

“The Department does not intend to encourage or discourage recipients from recognizing Greek letter associations, and each recipient must determine what its relationship should be with Greek letter associations. However, where a postsecondary institution does choose to officially recognize a Greek letter association, buildings owned or controlled by that fraternity or sorority are part of the postsecondary institution’s education program or activity under these final regulations.”

_id. at 1800 (emphasis added).
Specific Mentions of Greek Organizations in Regs and Commentary Continued

“The revised language in § 106.44(a) also specifically addresses commenters’ concerns about recognized student organizations that own and control buildings such as some fraternities and sororities operating from off-campus locations where sexual harassment and assault may occur with frequency.”

_id. at 625._
Specific Mentions of Greek Organizations in Regs and Commentary Continued

“The revised language further addresses commenters’ questions regarding whether postsecondary institutions’ Title IX obligations are triggered when sexual harassment occurs in an off-campus location not owned by the postsecondary institution but that is in use by a student organization that the institution chooses to officially recognize such as a fraternity or sorority. The revisions to § 106.44(a) clarify that where a postsecondary institution has officially recognized a student organization, the recipient’s Title IX obligations apply to sexual harassment that occurs in buildings owned or controlled by such a student organization, irrespective of whether the building is on campus or off campus, and irrespective of whether the recipient exercised substantial control over the respondent and the context of the harassment outside the fact of officially recognizing the fraternity or sorority that owns or controls the building.”

Id. at 625 - 626.
“The Department makes this revision to promulgate a bright line rule that decisively responds to commenters and provides clarity with respect to recipient-recognized student organizations that own or control off-campus buildings. Official recognition of a student organization, alone, does not conclusively determine whether all the events and actions of the students in the organization become a part of a recipient’s education program or activity; however, the Department believes that a reasonable, bright line rule is that official recognition of a student organization brings buildings owned or controlled by the organization under the auspices of the postsecondary institution recipient and thus within the scope of the recipient’s Title IX obligations.” Id. at 626.
“As part of the process for official recognition, a postsecondary institution may require a student organization that owns or controls a building to agree to abide by the recipient’s Title IX policy and procedures under these final regulations, including as to any misconduct that occurs in the building owned or controlled by a student organization. Accordingly, postsecondary institutions may not ignore sexual harassment that occurs in buildings owned or controlled by recognized student organizations. The Department acknowledges that even though postsecondary institutions may not always control what occurs in an off campus building owned or controlled by a recognized student organization, such student organizations and the events in their buildings often become an integral part of campus life.” *Id.* (emphasis added).
“The Department also acknowledges that a postsecondary institution may be limited in its ability to gather evidence during an investigation if the incident occurs off campus on private property that a student organization (but not the institution) owns or controls. A postsecondary institution, however, may still investigate a formal complaint arising from sexual harassment occurring in a building owned or controlled by a recognized student organization (whether the building is on campus or off campus), for instance by interviewing students who were allegedly involved in the incident and who are a part of the officially recognized student organization.”  *Id.* at 626-627.
“Thus, under the final regulations (e.g., § 106.44(b)(1)) a postsecondary institution must investigate formal complaints alleging sexual harassment that occurred in a fraternity or sorority building (located on campus, or off campus) owned by the fraternity or sorority, if the postsecondary institution has officially recognized that Greek life organization. Further, under § 106.44(a) the recipient must offer supportive measures to a complainant alleged to be the victim of sexual harassment occurring at a building owned or controlled by an officially recognized student organization.”  Id. at 627.
“Where a postsecondary institution has officially recognized a student organization, and sexual harassment occurs in an off campus location not owned or controlled by the student organization yet involving members of the officially recognized student organization, the recipient’s Title IX obligations will depend on whether the recipient exercised substantial control over the respondent and the context of the harassment, or whether the circumstances may otherwise be determined to have been part of the ‘operations of’ the recipient.” Id.
Specific Mentions of Greek Organizations in Regs and Commentary Continued

We note that the revision in § 106.44(a) referencing a “building owned or controlled by a student organization that is officially recognized by a postsecondary institution” is not the same as, and should not be confused with, the Clery Act’s use of the term “noncampus building or property,” even though that phrase is defined under the Clery Act in part by reference to student organizations officially recognized by an institution. For example, “education program or activity” in these final regulations includes buildings within the confines of the campus on land owned by the institution that the institution may rent to a recognized student organization. As discussed in the “Clery Act” subsection of the “Miscellaneous” section of this preamble, the Clery Act and Title IX serve distinct purposes, and Clery Act geography is not co-extensive with the scope of a recipient’s education program or activity under Title IX. Id. at 627 – 628 (internal citations omitted).
With respect to a commenter’s assertion that the final regulations may perversely incentivize recipients to not recognize fraternities and sororities, the Department believes this conclusion would require assuming that recipients will make decisions affecting the quality of life of their students based solely on whether or not recipient recognition of a student organization such as a fraternity or sorority would result in sexual harassment that occurs at locations affiliated with that organization falling under Title IX’s scope. The Department does not make such an assumption, believing instead that recipients take many factors into account in deciding whether, and under what conditions, a recipient wishes to officially recognize a student organization. \textit{Id.} at 634.
Whether or not these final regulations alter postsecondary institutions’ decisions about recognizing Greek life organizations, the Department has determined that the scope of Title IX extends to the entirety of a recipient’s education program and activity, and with respect to postsecondary institutions, the Department is persuaded by commenters’ contentions that when a postsecondary institution chooses to officially recognize a student organization, the recipient has implied to its students and employees that locations owned by such a student organization are under the imprimatur of the recipient, whether or not the recipient otherwise exercises substantial control over such a location.

_Id._ at 634 – 635.
SOME SALIENT QUESTIONS and ISSUES

• Clear, or more confusing?
• Rules of evidence?
• Multi-party issues and group responsibility
• Recognition and relationship agreements
• Where is *Healy v. James*? Associational freedoms
• Title IX as dialectic between complainants and respondents....
• Lawyering up; outsourcing and implications
• Title IX in the context of COVID-19 and the “Great Disruption”
• Opt out? Religious institutions and arbitration...
Questions & Answers