INSIDE HIGHER ED

OCR Is About to Rock Our Worlds

Brett A. Sokolow offers advice for how to respond to the new Title IX regulations that will be published soon.

By Brett A. Sokolow

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ATIXA, the association of Title IX administrators I serve as president, anticipates publication of the final Title IX regulations in the *Federal Register* within the coming weeks. The federal government last issued Title IX regulations in 1975, so this is somewhat unprecedented. The proposed changes are far more sweeping than the 2011 Dear Colleague letter promulgated by the Office for Civil Rights (OCR). The changes coincide with a due process revolution occurring in some federal courts, as well, with respect to college and university disciplinary processes.

What Will These Changes Mean for Higher Education?

Perhaps 75 to 80 percent of the proposed regulations mandate neutral or beneficial changes or clarifications. Many of the more controversial changes will probably be addressed by a future Congress or through litigation. Some of

the proposed changes included in the draft that OCR shared publicly last November may not make it into the final rule.

Most of the changes revolve around due process, which protects all of us, regardless of our campus role or status. They include provisions requiring more substantive written notice to the respondent of the nature of sexual misconduct allegations, the right of the parties to review investigation materials prior to a final determination and the right to a written rationale for the outcome and any sanctions assigned. For the most part, these are rights you would want to protect you if you were accused -- rightfully or wrongfully -- of sexual misconduct.

What Do We Do Now?

We at ATIXA suggest that colleges and universities continue to honor “best practices” commonly adopted by the higher education field, while moving gradually toward implementing the changes that the regulations will require. Some changes, like equitable interim resources and supports for responding parties, can be implemented now without radical alteration of programs. In its 2011 guidance, OCR was explicit about the need for institutions to provide broad-based supports and resources to victims of sex discrimination, such as counseling services, academic accommodation and housing changes. Now, OCR is making clear its expectation that those supports and resources also be offered to respondents. Many colleges already do so, but OCR wants to ensure uniform provision of services by all funding recipients.

Similarly, colleges can act now to extend all VAWA Section 304 rights to parties in sexual harassment cases. In 2014, Congress enacted amendments to the Violence Against Women Act (VAWA), which now are incorporated into the federal Clery Act. These changes codified as law some provisions of Title IX that were previously only proffered as regulatory agency guidance and

added many provisions requiring training and prevention by colleges. Oddly, the protections of VAWA Section 304 only extended to what have become known as the “big four” offenses of sexual violence, dating violence, domestic violence and stalking. That created an asymmetry because Title IX protections include not only these four offenses but also conduct like sexual harassment and disparate-treatment sex discrimination that VAWA does not. Institutions were left with two competing laws that did not fully parallel each other. OCR’s proposed regulation logically aligns VAWA and Title IX so that rights do not vary by the type of sex offense alleged.

Thus, institutions can take steps such as providing written notice of the outcome of an allegation to all parties, not just in the big four offenses, but for sexual harassment, too. Additionally, institutions can ensure equitable provision of advisers across all cases impacted by Title IX, not just for those involving the big four.

These kinds of changes will give administrators a head start on compliance before the regulations are even released. Once released, there will be an implementation grace period of perhaps 90 days to as much as 12 months from publication of the final rule to allow colleges and universities time to move toward compliance. So we’re still some months from an enforcement deadline, even if we are unsure what that deadline will be.

What Do We Do When the Regulations Are Published?

Higher education needs to move toward compliance or to decide to litigate the validity of the regulations against the U.S. Department of Education -- or both. OCR is obligated to address, in aggregate, the nearly 130,000 comments it received during the public notice-and-comment period. The pressure is on for OCR to make it clear in its responses that its rules are rationally related to the

statute, especially with a U.S. Supreme Court that appears increasingly hostile philosophically to agency rules.

Once OCR publishes the final rule, it will expect good-faith efforts to comply. With respect to litigation, it's unlikely that a federal judge will enjoin the regulations fully, and if there is a partial injunction, colleges and universities will still need to comply with those elements of the regulations that are not enjoined. Unless and until a judge says that they don't have to comply, colleges and universities will need to become compliant.

It took the higher education field three to four years to fully implement the 2011 guidance, but that kind of lethargy won't be an option with these new regulations. They will have the force of law behind them rather than simply serving as guidance. Drag your feet on implementation and responding parties will sue the minute you are not according them the full panoply of rights OCR has promised them. Fail to provide the responding party with a copy of the investigation report or sufficient time to prepare for a hearing and you should expect a motion for a temporary restraining order from their lawyer.

The catch-22 is that when you move to compliance, activists will sue to argue that the regulations are ultra vires and anti-victim expansions of agency authority. They will surely challenge provisions that require disclosure to responding parties all evidence provided by reporting parties, even when that evidence is not admissible or used to support a decision. This rule will create a chilling effect on reporting parties and, it will be argued, is beyond the scope of OCR's authority to enact under the statute. Similar arguments could be made to collaterally attack OCR's proposed requirements for live hearings and cross-examination facilitated by the parties' advisers. In fact, activists aren't the only cohort likely to attack such provisions, as some private colleges are

also planning to litigate any attempt to impose a live hearing requirement on them, and have already funded a significant war chest to do so.

Within this highly politicized crucible where any action or inaction will catalyze litigation, institutions need to form committees, task forces and Title IX teams now, so that administrators can study the regulations and commentary when they are published and change what needs to be changed. Faculty grievance processes will be an issue that administrators will have to face and resolve now, if they didn't back in 2011. OCR is forcing the issue, and Title IX offices are probably going to be between a rock and a hard place -- with faculty members who advocate for additional protections, such as clear and convincing evidence as a standard of proof for those accused of sexual assault, while others strongly advocate for preponderance of the evidence.

What Do We Do If We Don't Agree With Some Provisions Within the Regulations?

About 20 to 25 percent of the regulations are potentially very detrimental to the cause of sex and gender equity in education, and we will need as a field to find ways to work within those requirements, challenge them in court or find clever work-arounds. Proposed provisions on notice, mediation, mandated reporting, live hearings and cross-examination could create significant chilling effects on the willingness of those who experience discrimination, harassment and sexual violence to report it to administrators and pursue formal resolution pathways.

Let's drill down on each of these proposed provisions a bit. OCR seeks to limit the ways in which recipients are legally put on notice of sex discrimination. Institutions might see this as a welcome safe harbor, but why would colleges and universities want to make it harder to report and respond to incidents? The opening of access and "no wrong doors" approach to intake has been

one of the most valuable and enduring legacies of the 2011 guidance, and it has resulted in substantial increases in reporting of incidents for most colleges.

OCR also now plans to remove the “soft ban” on mediation of sexual violence it implemented in 2011. The vast majority of sexual harassment claims can and should be resolved informally, but we need to be sure that the parties are participating voluntarily and not being pressured to minimize the severity of what has happened to them. And many in the field are rightfully concerned about whether colleges and universities have access to mediators skilled enough to resolve allegations of violence. Lower-level sexual harassment is very amenable to resolution via mediation, but the data on whether the same is true for violent incidents is much less conclusive.

Live hearings and cross-examination are the most controversial provisions of the proposed regulations. Of the nearly 130,000 comments submitted to OCR on the draft regulation, most were negative, with a particular targeting of OCR’s desire to turn educational resolution processes into mini-courtrooms that mirror criminal trials. Part of the reason many victims/survivors don’t choose to report campus sexual violence to law enforcement is because they prefer the less formal and less adversarial resolution processes in place at schools and colleges. It will take a strong person to be willing to go through a process where they will be subject to cross-examination by the other party’s lawyer. And, importantly, no research indicates that cross-examination creates more accurate results than other ways of allowing the parties in a sexual misconduct allegation a full and fair opportunity to review and contest all evidence prior to a final determination.

In light of all of this tumult, perhaps the healthiest mind-set is to view the regulations mostly as setting a floor for compliance and to institutionally

commit to aim for the ceiling of best practices. Many organizations, including ATIXA, will continue to offer the field extensive guidance on how to evolve exemplary programs within the framework OCR is establishing, and outside it, where we can.

What is clear is that the pendulum is about to swing too far, again. The regulations have the potential to create significant public backlash, especially if colleges are seen as institutionally deprioritizing Title IX compliance in the coming months and years. Potential victims need to see you strengthening your program, not backing down. They are likely to perceive barriers to coming forward in the new rules, and administrators need to do everything possible to reassure potential victims that the Title IX office is still here for them, and that you'll do everything not prohibited by the regulations to make reporting easier, offer services and resources, establish a process that is transparent and user-friendly, and avoid revictimization.

Regardless, some activists may turn some of their frustration with OCR on you, and we encourage you to be sympathetic, to encourage their voices and to be thoughtful about the ways that remedies-only and informal resolutions may be used to ameliorate or exacerbate the effects of the changes that OCR is catalyzing.

One thing is for sure -- defining and maintaining sex and gender equity programmatic excellence in an environment of regulatory change, politicization of Title IX and fervent litigation will be among the most pressing challenges facing colleges and universities in 2020 and for some time to come.

Bio

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