Joint Guidance on Federal Title IX Regulations
Analysis on the Interaction between Title VII and Title IX Requirements

September 17, 2020

Note: This document focuses on a summary analysis of the interaction between Title VII and the Title IX 2020 Final Rule. For a full overview of the changes from the Proposed Regulations, see *Title IX Text for Text Proposed to Title IX Summary Proposed to Final Comparison*, available at https://system.suny.edu/media/suny/content-assets/documents/sci/tix2020/TIX-Regulations-Text-for-Text-Comparison-Chart_v2.pdf

Interaction between Title VII Obligations and the Title IX Final Rule

The Final Rule presents particular challenges in situations where employees are potential complainants or respondents in matters involving sexual harassment or gender discrimination, and when claims involve allegations of discrimination under multiple protected categories, including gender discrimination. Recipients must fulfill explicit new procedural requirements in the Final Rule including requirements which appear to conflict with established Title VII legal principles and practices. The overlap of Title VII law and the Title IX Final Rule potentially became even more complex after the Supreme Court's June 15, 2020 decision in *Bostock v. Clayton County*, *Georgia*, 140 S.Ct. 1731, where the Supreme Court ruled that "sex" under Title VII explicitly includes sexual orientation and gender identity discrimination. Following *Bostock*'s reasoning regarding Title VII, we are likely to see courts confirm that allegations of Title IX violations on the basis of sexual orientation and gender identity discrimination may be considered gender discrimination under Title IX, and therefore may be subject to the Title IX Final Rule grievance process as well.

Institutional Obligations regarding Sexual Harassment under Title VII

To begin, this memo will summarize the institutional obligations regarding sexual harassment under longstanding Title VII case law and guidance from the Equal Employment Opportunity Commission. Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice for a covered employer to discriminate against any individual with respect to the compensation, terms, conditions, or privileges of their employment, because of such individual's race, color, religion, sex, or national origin. Since 1986, the Supreme Court has recognized that sexual harassment may constitute sex discrimination under Title VII when it is "sufficiently severe *or* pervasive to alter the conditions of [the victim's] employment and create an abusive working environment."[1]

[1] See *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) (internal quotation marks omitted) (emphasis added).

Under Title VII, covered employers must investigate claims of sexual harassment by or against employees. This duty exists irrespective of the gender(s) of the parties to the alleged harassment. This obligation to begin an inquiry is triggered once the employer "knew or should have known" that harassment may have occurred. An employer's knowledge under Title VII's "knew or should have known" standard is construed as including notice to any employer representative who supervises or manages employees or contractors.

The Title VII obligation is generally understood to be a *negligence* standard. This obligation to investigate once an employer knew or should have known about allegedly harassing conduct is addressed in two Supreme Court decisions from 1998: *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998). According to the *Faragher* and *Ellerth* decisions, if an employer can provide evidence that it has an effective process for investigating claims of harassment, the employer can rely on the investigation process as an affirmative defense in a Title VII sexual harassment claim. Conversely, if an individual who alleges harassment under Title VII did not utilize an existing investigation procedure, this also can support an employer's affirmative defense to a Title VII sexual harassment claim.

Following the *Faragher* and *Ellerth* decisions, employers face liability for harassment by a supervisor that results in a negative employment action such as termination, failure to hire, or losing wages. They can avoid liability only if they can show they reasonably tried to prevent and promptly correct the behavior, and that the employee unreasonably failed to take advantage of any preventive or corrective opportunities offered by the employer. For harassment by non-supervisors, employers are liable if they knew, or should have known, about the harassment and failed to take prompt and appropriate corrective action.

Apparent Conflict between Title VII and Title IX Grievance Procedures

The Final Rule creates a regime regarding sexual harassment in educational institutions that differs in several significant ways from the Title VII regime, posing potential conflicts in cases that implicate both laws. While the Final Rule section 106.6(f) states that "nothing in this part may be read in derogation of any individual's rights under Title VII … or any regulations promulgated thereunder," in practice the new Rule's highly-specific process may conflict with processes already established for employees under Title VII and corresponding state anti-discrimination laws, as well as federal, state, and local labor relations laws and agreements.

As a threshold matter, the interpretation of legal standards set forth in the new Rule are different than those set forth under Title VII regulations, enforcement guidance, and case law. Recipient employers may be confused about how they can comply with the Final Rule without potentially increasing risk and liability under Title VII. Compliance with the Final Rule appears to directly conflict with some actions required of employers under Title VII, though in the Preamble to the Final Rule, the Department states that "[r]ecipients should comply with both Title VII and Title

IX, to the extent that these laws apply, and nothing in these final regulations precludes a recipient from complying with Title VII." 85 Fed. Reg. 30026, 30451 (May 19, 2020).

Definition of Sexual Harassment

These possible conflicts proceed with the definition of "sexual harassment" under the new Title IX regulations. The Final Rule includes three types of conduct which may constitute "sexual harassment": The Rule recognizes certain "quid pro quo" harassment as *per se* harassment, and also includes as *per se* sexual harassment four types of sexual misconduct which are addressed by the Violence Against Women Act (VAWA) and the Clery Act: sexual assault, domestic violence, dating violence, and stalking.

However, a meaningful difference with Title VII arises with the third type of conduct in the Final Rule's definition of "sexual harassment": conduct based on creation of a hostile work environment. The Final Rule's definition of what constitutes a "hostile work environment" is much narrower than the definition under Title VII.

The Final Rule defines sexual harassment which creates a "hostile work environment" as "… (ii) Unwelcome conduct that a reasonable person would determine is so severe, pervasive, **and** objectively offensive that it effectively denies a person equal access to the educational institution's education program or activity…" Final Rule § 106.30(a) (emphasis added). The Department specifically rejected the option of defining hostile environment sexual harassment as "severe, pervasive, **or** objectively offensive…" This rejected definition aligned more closely to the established Title VII standard, as well as to much of the case law on Title IX and previous interpretations of Title IX by the Department of Education itself.

Because Title IX and Title VII are different laws, the Department does not consider applying different standards for "sexual harassment" under each law to be a conflict. The Department acknowledges in the Preamble, "…Title VII defines sexual harassment as severe **or** pervasive conduct, while Title IX defines sexual harassment as severe **and** pervasive…" and "… Employers are aware that complying with Title IX and its implementing regulations does not satisfy compliance with Title VII." 85 Fed. Reg. at 30451. The Department "…recognizes that other laws such as Title VII may have a different standard and impose different requirements. There is no inherent conflict between Title VII and Title IX, and employers may comply with the requirements under Title VII and Title IX…" *Id*. at 30441. It does not view compliance with multiple legal standards as problematic. Thus, a respondent could be found to have engaged in sexual harassment under Title VII, but not under Title IX's narrower definition due to the differing definitions of "sexual harassment" in the respective regulations for each statute.

Notice of Reports of Sexual Harassment

An additional implementation concern stems from the Final Rule's requirement for when a recipient employer must evaluate and respond to an allegation of sexual harassment. Notice of the potential claim to the recipient, and the recipient's subsequent responsibilities, are a critical component of the differences between the two regulatory schemes.

First, under the Final Rule, a sexual harassment claim only may be considered an actionable Title IX claim if the allegations are brought to the attention of "…a recipient's Title IX Coordinator or any official of the recipient who has the authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school." Final Rule § 106.30(a). Further, a recipient only may conduct a formal investigation of the allegations under Title IX if the complainant files a formal complaint in writing, or the Title IX Coordinator files a complaint. *Id*.

In contrast, under Title VII, an employer is required to take action on a claim of sexual harassment raised in a variety of settings. It can be raised through a formal grievance process, or by a third party. A sexual harassment allegation may be presented verbally under Title VII. An employee may raise a claim to a trusted administrator, faculty member, or supervisor. Multiple reporting options have been recognized as critical to reporting potential sexual harassment claims in the employment context, where the person's direct supervisor or faculty member may be the subject of the allegations.

The previous Title IX regulatory scheme also provided a variation of these reporting options, primarily through the "responsible employee" role. The Department has not prohibited the continued inclusion of the "responsible employee" role in recipient's Title IX policies; however, as mentioned above, it would still require a formal complaint be filed with the Title IX Coordinator for an investigation under the Title IX Grievance Process to be conducted.

Employer's Jurisdiction

Another core distinction surrounds jurisdictional limitations imposed under the Title IX Final Rule. First, even if an allegation is raised in accordance with the Rule's procedural requirements, a recipient employer must evaluate the allegations and make an immediate determination of whether the alleged acts occurred within a recipient's education program or activity, also as defined by the Rule. Under the Final Rule, in general, conduct which occurs off-campus, including in off-campus residences (with an exception for property owned or controlled by certain student organizations and other potential and limited exceptions), as well as conduct which occurs outside the United State (such as within study abroad programs), is not covered. There also could be details of a complaint which constitute procedural deficiencies under the Title IX regulations, such as failure to sign a complaint. If the allegations do not meet that standard, a recipient is required to dismiss the complaint, i.e., not process the allegations

under the recipient's Title IX process. Final Rule § 106.45(b)(3). Finally, if the allegation does not meet Title IX's definition of sexual harassment, the recipient *must* dismiss the complaint. *Id.*

However, this same allegation may meet the threshold standard of an allegation of sexual harassment that a recipient employer is required to investigate under Title VII. If a recipient employer dismisses a sexual harassment allegation entirely under Title IX because it is required to do so, this dismissal could be considered a failure to fulfill its obligation to act under Title VII. As such, and as discussed further below, a recipient employer would need to make sure there was an opportunity to address such a dismissed claim separately for Title VII purposes.

Response to Reports of Sexual Harassment

As mentioned above, a recipient employer's responsibilities for how it evaluates and addresses sex discrimination and harassment complaints also vary under Title VII and Title IX. In fact, the Department recognized that an

> ….employer may need to implement policies to address conduct that goes beyond the definition of sexual harassment in Section 106.30 to fulfill its obligations under Title VII … For example, the *Faragher-Ellerth* affirmative defense requires an employer to exercise reasonable care with respect to supervisor-on-employee harassment, while Title IX requires a recipient not to be deliberately indifferent … Title VII also requires a negligence standard if a co-worker harasses another co-worker. *Id.*

The differing obligations imposed on employers under the two laws means that in some cases, an employer may be precluded under Title IX from taking actions that are required under Title VII. In fact, the required investigatory response is different under Title VII than under Title IX, particularly under the Final Rule.

Under the Title IX Final Rule, an employer recipient's obligation to act under Title IX arises only when the recipient has "actual knowledge." And under Title IX, a recipient fails to meet its obligation to act only if it reacts in a deliberately indifferent manner. The Department incorporated the deliberate indifference standard into the Final Rule even as it acknowledged that this standard is a different standard than an employer's obligation to act under Title VII. Simply put, an employer recipient's obligations to investigate under Title VII are broader, and arise in a broader array of circumstances. In some situations, a recipient employer may be unable to begin an inquiry that satisfies its Title VII obligations within the restrictions of the Final Rule.

Under Title VII there may be situations where the *Faragher/Ellerth* standard requires a claimant to file a sexual harassment claim through the employer's internal process. However, there may be situations under the new Title IX rules where a claimant is required to file with the employer under Title VII to trigger employer liability, but the recipient employer may then be barred from investigating that claim under Title IX if it does not meet the new jurisdictional requirements. A

recipient employer will have to dismiss the complaint under Title IX, then provide a separate process under Title VII for investigating the claim. That process for investigating a Title VII-based claim still might need to incorporate the same standard of proof as the Title IX process[2] as there will be situations where the sexual harassment complaint *does* meet Title IX jurisdictional standards. The Department does not characterize this type of situation as a true conflict between Title VII and Title IX. In fact, its response to concerns about potential conflict between a recipient employer's duty to act under each law (as well as its defenses under *Faragher/Ellerth*) was as follows: "…Employers may not be able to use affirmative defenses to sexual harassment under Title VII for purposes of Title IX, but these final regulations do not in any way derogate an employers' affirmative defenses to sexual harassment under Title VII…" 85 Fed. Reg. at 30451. However, recipients should be mindful that maintenance of multiple complaint processes which overlap in many but not all circumstances may be confusing to parties, the individuals who the procedures are designed to serve, and consider ways to mitigate this confusion.

Prohibitions on Retaliation and Restrictions on Parties

The Final Rule's definition and discussion of retaliation may be at odds with some procedural tenets of Title VII. Section 106.71 of the Final Rule protects parties and witnesses who refuse to participate in the Title IX process. A party or witness may avoid some or all of the Title IX investigation process. However, an employee-party's option not to cooperate is contrary to established Title VII procedure. Under Title VII, which focuses on the employer-employee relationship, an employer can compel an employee to participate in an investigation of a gender discrimination or harassment complaint under Title VII.

The Final Rule is also inconsistent with the Equal Employment Opportunity Commission's rules about restrictions on discussing complaints under investigation. Section 106.45(b)(5) of the Final Rule states that a recipient may not restrict a party or witness' ability to discuss the allegations under investigation. Conversely, a party or witness who discusses a matter under investigation could find themselves the subject of a retaliation claim. As a practice tip, a recipient may advise parties and witnesses to take care when and if they discuss a complaint or information shared through the Title IX investigation process, if at all. The recipient should explain the reason to use caution is that discussion of a complaint and/or the investigation process, may be perceived as retaliatory conduct.

In fact, in its discussion of responses to Directed Question 3 (Application to Employees) put forward by the Department of Education in its Notice of Proposed Rulemaking, the Department emphasized its addition of the Retaliation section to the new Title IX regulations as a solution for addressing potential conflicts between (an already-existing) complaint process which complies

[2] Under the Final Rule, a recipient employer may opt to implement either a clear and convincing or preponderance of the evidence standard of proof in its Title IX policy. However, the same standard of proof must apply whether a party is a student or employee (including faculty). Prior to the Final Rule, some college and university employers had differing standards of proof in the student code of conduct, employee handbook, faculty handbook, and/or collective bargaining agreements.

with Title VII, and the new definitions and procedures set forth in the Final Regulations. *See, e.g.,* 85 Fed. Reg. at 30440-30441. The reasoning for how the Retaliation section addresses this conflict is not crystal clear. The Department does state that the Retaliation section is related to the availability of supportive measures to complainants and respondents. *Id*.

As previously mentioned, the Department noted that "…these final regulations provide in Section 106.6(f) that nothing in this part shall be read in derogation of an individual's rights including an employee's rights, under Title VII or its implementing regulations…" 85 Fed. Reg. 30451. The Department emphasizes this language in Section 106.6(f) in answer to potential conflicts between the language of Title VII and Title IX regulations. However, it is too soon to know if and how this statement resolves conflicts in practice as claims are adjudicated which implicate both statutory schemes.

A Proposed Solution for Recipients

The Department of Education received numerous comments during the Notice and Comment period about apparent conflicts in definitions and requirements to act under the proposed Title IX Rule and established law under Title VII. In response, the Department argued that there is no inherent conflict between Title IX and Title VII enforcement schemes and stated it "will construe Title IX and its implementing regulations in a manner to avoid an actual conflict between an employer's obligations under Title VII and Title IX." 85 Fed. Reg. 30439. It also rejected the positions of commenters that recipient employers cannot comply with Title VII regulations, caselaw, and statutory schemes *and* the new Title IX regulations.

Instead, the Department maintained that where a claim may implicate employees as complainants or respondents, recipients can process claims through the specific grievance process in the new Title IX regulations, and also process a claim through a Title VII grievance process. The Department characterizes this option as handling the non-Title IX allegations through "another provision of the recipient's code of conduct…" Final Rule § 106.45(b)(3). The Department stated more specifically:

> "If a recipient has a code of conduct for employees that goes beyond what Title IX and these final regulations require (for instance, by prohibiting misconduct that does not meet the definition of "sexual harassment" under Section 106.30, or by prohibiting misconduct that occurred outside the United States), then a recipient may enforce its code of conduct even if the recipient must dismiss a formal complaint (or allegations therein) for Title IX purposes. These regulations do not preclude a recipient from enforcing a code of conduct that is separate and apart from what Title IX requires, such as a code of conduct that may address what Title VII requires. Accordingly, recipients may proactively address conduct prohibited under Title VII, when the conduct does not meet the definition of sexual harassment in Section 106.30, under the recipient's own code of conduct,

> as these final regulations apply only to sexual harassment as defined in Section 106.30…" 85 Fed. Reg. 30205.

The Department's comment about "a code of conduct that may address what Title VII requires" appears intended to equate the broader universe of employment law-based complaints with the broader universe of student conduct which may be addressed in a recipient's general code of student conduct. College and university administrators and counsel know, however, that corralling employment disputes under a general "code of conduct" umbrella glosses over the array of procedures which exist to handle employment discrimination and retaliation claims and which must be considered. For example, under Title VII, gender discrimination and harassment claims must meet the requirements for filing a claim via the Equal Employment Opportunity Commission ("EEOC"). In many states, a claimant and a recipient employer would have to meet the standards set forth in state antidiscrimination statutes and state agency regulations. These state laws and procedures generally track the EEOC's rules.

Considerations for Handling Claims Involving Multiple Bases for Discrimination

Finally, in the Preamble to the Final Rule, the Department addressed comments about why an employment gender discrimination claim must be investigated and adjudicated under the highly specific process mandated by the Department for Title IX claims, where this process is not mandated for claims of employment discrimination under other protective classes; "…for example, [a] commenter stated, if allegations also involve racial discrimination then it is unclear whether the recipient must carve out the non-sex discrimination issue and proceed without a live hearing yet address the sex-related claims with a hearing." 85 Fed. Reg. 30449. One commenter suggested that Title VII be considered the exclusive forum for bringing discrimination claims that arise in the employment setting, including for sex discrimination claims. Another commenter suggested that Title VII claims preempt Title IX claims in this setting.

The Department rejected these suggestions. Going forward, recipients should be mindful of the possibility that some members of a recipient's community might perceive that sex discrimination claims are taken more seriously than claims of other types of employment discrimination, even in terms of the exponentially greater amounts of resources and attention which are directed toward Title IX claims (conversely, it may appear to some that the onerous requirements of the Final Rule mean that institutions are taking these violations less seriously, or addressing them in a less meaningful way). As stated above and elsewhere in the Joint Guidance, the Supreme Court's *Bostock* decision likely also means that employee sexual orientation and gender identity discrimination complaints must be adjudicated through the Final Regulations' grievance process.

Where a complainant may allege race and gender discrimination, a recipient would need to investigate the gender discrimination claim through the Title IX process; one interpretation of the Final Rule and Preamble is that the race discrimination claim could not be investigated under the Title IX process as it does not meet jurisdictional requirements. Under such an interpretation, a recipient employer would need to process the gender discrimination complaint under the Final

Rule's grievance process, and investigate the race discrimination complaint under a different internal grievance process.

Based on the Department of Education's discussion in the Preamble, such a claim potentially arising under both Title IX and Title VII could be investigated either concurrently with the Title IX process, or under Title VII after the Title IX process is complete. This could result in a situation where two hearings might be needed – one before a determination in a Title IX matter, and another hearing arising under an employee or faculty handbook, state law, or a collective bargaining agreement. Such hearings are held when there is a challenge to an employer's adverse action after that adverse action has been issued. Alternatively, a recipient employer would need to adopt a process which mirrors the Title IX grievance process outlined in the Final Rule § 106.45 for all types of discrimination, and/or all types of employment discrimination. The Final Rule requires a hearing according to its precise rules before an adverse action may be imposed under Title IX. Final Rule § 106.44(a).

Within this context, an individual investigator could investigate a complaint under both the Title IX and Title VII standards. However, an investigator would need to be mindful and explicit about when they are applying Title IX processes and definitions, and when they are applying standards which exist under employment discrimination (Title VII-based) procedures, when collecting and evaluating evidence. A hearing officer also must be explicit in the same way when they are evaluating evidence. Such a dual application could occur if all types of complaints are investigated under a procedure which adheres to the Title IX procedural requirements. Alternatively, a complaint could be assessed under Title IX-specific procedures, and also under a recipient employer's nondiscrimination policy and procedures.

Finally, it is notable that the Department of Education rejected requests for the Department to coordinate with the EEOC, which implements Title VII regulations. In rejecting a coordinated response with the EEOC, the Final Rule correspondingly prohibits use of informal resolution procedures where a student alleges sexual harassment by an employee. Such a prohibition does not mirror the availability of mediation or other alternative dispute resolution procedures at the EEOC and/or state nondiscrimination agencies. The Department further stated that because it is not responsible for implementing Title VII regulations, it would not comment in detail about how a recipient could coordinate and/or meet its current obligations to comply with Title VII and the new obligations set forth in the new Title IX regulations.
