

New Title IX Regulations: An Ex-Regent's Perspective

Annual Regents Education Program

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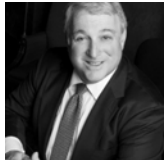
Session – Title IX: What it Means for Your Institution

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A partner in the law firm Spencer Fane LLP, Andy Lester has a civil litigation and appellate practice in both state and federal court. His fields of emphasis include complex business, civil rights, constitutional, higher education, and state and local government law.

Lester served as member of the Oklahoma State Regents for Higher Education, a member and chairman of the OSU/A&M Board of Regents, member of the board of Eureka College (President Reagan's *alma mater*). He has been an Adjunct Professor at Oklahoma City University School of Law, having taught State & Local Government, Employment Law, Criminal Law, and International Law. Author of over 100 articles, papers, and speeches on professional and public policy issues, he has published one book, *Constitutional Law and Democracy*, a collection of speeches he gave in 1993 in the former Soviet Union.

He is a member and former chairman of the Oklahoma Advisory Committee to the U.S. Commission on Civil Rights. He is a former United States Magistrate Judge for the Western District of Oklahoma. In 1980, he served on President Ronald Reagan's Transition Team for the Equal Employment Opportunity Commission and in 2002, he chaired Governor Brad Henry's Law Enforcement/Corrections Transition Team and helped write Governor Henry's first State budget.

Lester attended Ludwig-Maximilians-Universität in Munich, Germany, received his A.B. from Duke University, and his M.S. in Foreign Service and his J.D. from Georgetown University.

*Slides adapted from previous presentation: **New Title IX Regulations Webinar: Practical Implications for Higher Education (July 9, 2020)***

https://www.spencerfane.com/wp-content/uploads/2020/07/07-09-20_New-Title-IX-Regulations-Higher-Education.mp4

History of the Act

- 20 U.S.C. §1681 (enacted in 1972)
- “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”

New Regulations

- Definition of Sexual Harassment
 - Three types of misconduct on the basis of sex, all of which jeopardize equal access to education
 - Any *quid quo pro* harassment by a school's employee
 - Any unwelcome conduct that a reasonable person would find so severe, pervasive, *and* objectively offensive that it denies a person equal educational access (restores standard of *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999))
 - Any instance of sexual assault, dating violence, domestic violence or stalking per definitions in Clery Act and Violence Against Women Act (VAWA)
 - Where unwelcome conduct consists of speech or expressive conduct, schools must balance Title IX against First Amendment

New Regulations

- Responses to Complaints
 - Every school must designate a Title IX Coordinator
 - Institutions of higher education (IHE's) have the discretion to have mandatory reporting for all employees, or to designate some employees to be confidential resources
 - For all schools, notice to a Title IX Coordinator constitutes actual knowledge triggering the school's response obligations

New Regulations

- Geographic Coverage
 - Schools must respond when harassment occurs in a program or activity in the United States—literally taken from language of the statute
 - Does not apply to study abroad programs
 - Must be a program or organization officially recognized by the school
 - *Does* apply to off campus school programs
 - *Does not* apply to off campus housing

New Regulations

- Notice to Community on Reporting Harassment
 - Must have required contact information on Title IX Coordinator(s) website
 - Name and title
 - Office address
 - E-mail address
 - Telephone number
 - Must provide Title IX Coordinator contact information to applicants for admission and employment
 - Must provide to unions or professional organizations with collective bargaining agreements

New Regulations

- Mandatory Response Requirements
 - Schools must respond to sexual harassment in a manner that is not deliberately indifferent
 - Schools must promptly provide supportive measures to complainant
 - Must be non-disciplinary, non-punitive
 - Must be designed to restore or preserve equal access to education program

New Regulations

- Grievance Process
 - No disciplinary sanction may be imposed without following prescribed process
 - Remedies must be designed to protect equal access to education
 - All Title IX personnel must be free of conflicts and bias
 - School must provide robust training for all Title IX personnel
 - Single investigator model prohibited
 - Presumption of innocence is starting point
 - Process must set forth list of possible remedies
 - Must be a prompt time frame for decision

New Regulations

- Investigations
 - Burden of gathering evidence on school not parties
 - Both parties must have opportunity to present fact and expert witnesses
 - Parties must have the opportunity to select an advisor
 - School must appoint an advisor for any party that does not have one
 - Regulations protect privacy of a party's medical and psychological records
 - School must provide parties an investigative report and give them 10 days to respond

New Regulations

- Hearings
 - IHEs required to provide live hearings, with opportunity for cross-examination
 - Cross-examination may not be conducted by the parties
 - Decision maker cannot rely upon statement of witness unwilling to submit to cross-examination
 - At request of either party the school shall provide separate rooms for the parties, with technology that allows them to see and hear each other
 - School must provide audio-visual recording and transcript of hearing to each party
 - Rape shield protection is provided to complainant

New Regulations

- Standard of Proof
 - Process must state whether preponderance of the evidence or clear and convincing standard is required
 - Same standard must be used whether respondent is a student or an employee
 - Decision maker must issue a written decision, including findings of fact, conclusions regarding each allegation, rationale regarding each conclusion, disciplinary sanctions imposed, and remedies provided to the complainant

New Regulations

- Either party may appeal based upon
 - Procedural irregularity
 - New evidence
 - Conflict of interest or bias on the part of the decision maker

New Regulations

- Informal Resolution
 - School may offer informal resolution such as mediation or restorative justice
 - Such resolution may only occur if both parties agree to it in writing
 - Informal resolution not available to resolve allegations of an employee sexually harassing a student

New Regulations

- Retaliation prohibited

Election Day 2020

- Where do we go from here?