

Title IX Proposed Regulations & Potential¹ Applicability at Stanford January 8, 2019

Definitions and Jurisdictional Scope of Title IX:

Proposed Regulations: The proposed regulations define sexual harassment as “either 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; or 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; or sexual assault as defined in 34 CFR 668.46(a), implementing the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act).”² Further the proposed regulations provide that a school must terminate its grievance process with regard to alleged conduct if it “did not occur within the recipient’s program or activity.”³

Potential Impact: These proposed regulations could require definitional changes to Stanford’s Administrative Guide Memos [1.7.1](#) and [1.7.3](#) covering sexual harassment, and sexual violence to align to the federal definitions. That said, nothing in the proposed regulations would prevent a college from using other definitions to hold members of the community responsible for other conduct outside of those definitions. Additionally, while the proposed regulations could limit the jurisdictional authority of the Title IX Office, especially as to off campus activity, there is nothing that would prevent the university from relying on other university policies, such as the Code of Conduct and/or Fundamental Standard, to redress concerning conduct outside of the definitions of the proposed regulations, and the Title IX process.

Hearing Requirements:

Proposed Regulations: The proposed regulations provide that: “For institutions of higher education, the recipient’s grievance procedure must provide for a live hearing.”⁴

Potential Impact: Stanford has two processes that address complaints brought by students. The [Student Title IX Process](#) (applicable when the respondent is a student), and the [Administrative Title IX Process](#) (applicable when the respondent is not a student). The Student Title IX Process does use a hearing model, but the Title IX Administrative Process does not. Potential Impact to the Administrative Title IX Process only -- the administrative process may need to change to a hearing model.

¹ On November 16, 2018, the Secretary of Education released proposed regulations interpreting Title IX, [Proposed Regulations](#) 34 CFR 106; 83 FR 61462. The Department of Education is accepting comments to these proposed regulations until January 28, 2019. This document was drafted at the request of the ASSU Executive by the Office of Institutional Equity and Access; it provides a non-exhaustive, high-level overview of changes to existing Stanford policies and procedures for student-involved complaints that would need to be considered if the proposed regulations were made effective. This memo does not address changes that might need to be made to staff and faculty procedures for matters in which students are not involved. Because the regulations are in a proposed form only, Stanford has not attempted to make any changes to its current policies at this time.

² Proposed Regulation 106.44(e)(1)

³ Proposed Regulation 106.45(b)(3)

⁴ Proposed Regulation 106.45(b)(3)(viii)

a. **Cross-examination by each party's support person:**

Proposed Regulations: The proposed regulations provide that each party's support person may directly question/cross-examine the other party and witnesses.⁵

Potential Impact: Currently the Student Title IX Process provides a hearing in which each party has an opportunity to submit written questions to the panelists and the panelists then ask those questions of the parties and witnesses, rather than the party or the party's representative.⁶ University processes may need to provide a hearing model in which the party's representative is permitted to cross-examine the parties and witnesses.

b. **Video Hearings:**

Proposed Regulations: The proposed regulations provide that schools need to provide technology so that parties can simultaneously see and hear each other throughout a proceeding.⁷

Potential Impact: Currently the Student Title IX Process provides that first one party meet with the panel in person while the second party listens in through an audio conference, and then the process repeats with the second party meeting with the panel while the first party listens in through audio.⁸ The proposed regulations might require hearings using video technology enabling the parties to see each other and witnesses during testimony.

c. **Parties' Access to Evidence:**

Proposed Regulations: A Proposed Regulation provides that a school must make all information gathered during an investigation available to both parties, "including the evidence upon which the recipient does not intend to rely in reaching a determination of responsibility, so that each party can meaningfully respond to the evidence."⁹ It goes on to state, "the recipient must make all such evidence subject herein to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross examination."¹⁰

Potential Impact: Currently the Student Title IX Process provides for an Evidentiary Specialist to review the information gathered by the investigator. The parties are given an opportunity to argue to the Evidentiary Specialist what information should be provided to the panel as relevant evidence. Parties may not refer to information that the Evidentiary Specialist excluded.¹¹ The proposed regulations may require Stanford to review its evidentiary procedures.

Burden of Proof

Proposed Regulations. The proposed regulations provide that schools may use either a "clear and convincing" standard or a "preponderance of the evidence" standard to determine sexual harassment

⁵ Proposed 106.45(b)(3)(vii) provides that a "decision-maker must permit each party to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility."

⁶ Student Title IX Process, XII.B.3

⁷ Proposed Regulation 106.45(b)(3)(vii)

⁸ Student Title IX Process, XII.B

⁹ 106.45(b)(3)(viii)

¹⁰ 106.45(b)(3)(viii)

¹¹ See Student Title IX Process, X, XI and XII.

findings.¹² It goes on to state that the preponderance standard may only be used “if the recipient uses that standard for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction. The recipient must also apply the same standard of evidence for complaints against students as it does for complaints against employees, including faculty.”¹³

Potential Impact: At Stanford, for student disciplinary matters handled under the Judicial Charter, Stanford uses the “beyond a reasonable doubt” standard. Meanwhile, California Education Code 67386(a)(3) provides that each California postsecondary school must have: “A policy that the standard used in determining whether the elements of the complaint against the accused have been demonstrated is the preponderance of the evidence.” Accordingly, Stanford uses the preponderance of the evidence standard in Title IX matters. It is not yet clear what the impact of this proposed regulation could be.

Presumption of Innocence.

Proposed Regulation: A proposed regulation requires that the respondent is presumed innocent.¹⁴

Potential Impact: Stanford does have a presumption of innocence for accused students in matters arising under the Judicial Charter. Under the Student Title IX Process, the parties have a right to neutral panelists “who will not prejudge the outcome of a case because there has been a charge.”¹⁵ Stanford may need to provide an express presumption of innocence for the accused student.

Interim/Supportive Measures.

Proposed Regulation: The proposed regulations provide that support measures can be offered with or without a formal investigation; the support measures cannot be punitive or disciplinary in nature. No contact orders must be mutual.¹⁶

Potential Impact: Stanford would need to revise its policies and procedures relating to interim measures to align to new federal definitions, but other impact is unknown.

¹² Proposed Regulation 106.45(b)(4)(i)

¹³ Proposed Regulation 106.45(b)(4)(i)

¹⁴ Proposed Regulation 106.45(b)(1)(iv)

¹⁵ Student Title IX Process, VIII.C.8

¹⁶ Proposed Regulation 106.44(e)(4)