

# 2020's TITLE IX OVERHAUL: Views From the Bar and the Bench



# What is Title IX?

- Federal civil rights law passed as part of the Education Amendments of 1972
- Protects students and employees from
  - discrimination based on sex
  - in education programs or activities
  - that receive federal financial assistance
- Enforced by the Department of Education's Office for Civil Rights ("OCR")

# What Does Title IX Require Concerning Sexual Harassment?

- With or without a formal complaint, schools:
  - with “actual knowledge” of potential Title IX “sexual harassment”
  - occurring in an education program or activity of the school
  - against a person in the United States
  - must respond promptly in a manner that is not “deliberately indifferent”
- In response to a formal complaint of sexual harassment, schools:
  - must follow a Title IX formal complaint process
  - compliant with the new standards in the 2020 regulations

# The New Title IX “Final Rule”

- The first new regulations promulgated under Title IX since 1975 were issued on May 6, 2020 and entered into force on August 14, 2020
- The 2020 Title IX regulations significantly alter the Title IX landscape
  - Redefine certain key terms and concepts
  - Require extensive procedural changes

# New Definitions for Key Terms (1 of 2)

- Sexual Harassment
  - Three prongs: quid pro quo, unwelcome conduct and sexual violence
  - “Unwelcome conduct” must now be “severe, pervasive, and objectively offensive”
    - previous guidance required it to be “severe, pervasive, or objectively offensive”
  - Explicitly includes relationship violence such as dating violence, domestic violence or stalking

# New Definitions for Key Terms (2 of 2)

- “Actual knowledge”
  - No more constructive knowledge standard
  - “Actual knowledge” means “notice to the Title IX Coordinator or any official with authority to institute corrective measures on behalf of the school”
- Standard of proof
  - Choice between “preponderance” and “clear and convincing”
    - Chosen standard must be applied consistently
  - Presumption of respondent’s non-responsibility
- “Complainant” and “Respondent” versus alleged victim and perpetrator

# Procedural Changes: Investigations

- No more “single investigator model”
- Title IX coordinator, investigator, hearing decision-maker and appeal decision-maker have separate functions
- No Title IX investigations required for conduct on study abroad programs
  - Only conduct occurring against persons in the United States is covered
  - Note that other sources of potential liability may still make investigations of conduct abroad advisable

# Procedural Changes: Hearings

- Live hearings are now required at the post-secondary level
- Parties must be provided with advisors at the school's expense
- Advisors must be permitted to cross-examine witnesses
  - Absent cross-examination, testimony is excluded
- Cross-examination must be conducted directly, orally and in real-time by the party's advisors, not by the parties themselves
- Hearing decision-makers must decide whether questions are relevant and explain any decision to exclude questions



# Procedural Changes: Appeals

- Schools must offer appeals on specific grounds
  - procedural irregularities
  - newly discovered evidence
  - conflict of interest or bias of Title IX personnel
- School may offer appeals equally to both parties on additional bases

# Procedural Changes: Mediation

- Previous guidance provided for a “soft ban” on mediation of sexual harassment complaints
- The new regulations explicitly permit “informal resolution options” like mediation
- Both parties must give voluntary, informed, written consent
- Not available with respect to allegations that an employee sexually harassed a student

# VIEWS FROM THE BAR AND THE BENCH

## Title IX Discussion with Chief Justice (Ret.) Chase Rogers and Daniel Schwartz



# Title IX Litigation: Doe v. Purdue University (1 of 2)

- Doe v. Purdue University, 928 F.3d 652 (7th Cir. 2019)
- Held that a male student who was suspended from a state university for sexual misconduct had pled a plausible Title IX discrimination claim against the university where he alleged, among other things:
  - university's dean of students chose to credit accuser's account without hearing directly from her
  - majority of disciplinary panel members appeared to credit accuser based on her unsworn accusation alone
  - two members of the panel admitted they had not read the investigatory report
  - the panel refused the male student permission to present character and alibi witnesses

# Title IX Litigation: Doe v. Purdue University (2 of 2)

- Decision suggests courts are closely scrutinizing the adequacy of complaint review procedures and their compliance with Title IX directives
- See also Doe v. Columbia Univ., 831 F.3d 46 (2d Cir. 2016) (suspended male student's Title IX claim against university survived motion to dismiss where he alleged university's investigator and disciplinary panel declined to seek out favorable witnesses he identified, failed to follow university procedures and were motivated to favor accusing female student due to criticism from student body and public media).

# Title IX Litigation: Doe v. Rensselaer (1 of 2)

- Doe v. Rensselaer Polytechnic Inst., No. 1:20-CV-1185, 2020 WL 6118492 (N.D.N.Y. Oct. 16, 2020)
- OCR stated in the Preamble to the new regulations and in other guidance that the new regulations are not retroactive, but courts are not necessarily bound by such statements
- In Rensselaer, the respondent to a sexual harassment complaint filed suit against the university, alleging that its refusal to use its 2020 policies in the pending proceedings against him amounted to sex discrimination in violation of Title IX

# Title IX Litigation: Doe v. Rensselaer (2 of 2)

- Court sidestepped the retroactivity issue, but enjoined the school from using its 2018 policies to address alleged misconduct that predated the new regulations, where new 2020 policies and procedures had already been designed and could easily be implemented
- Suggests that in practice, the safer route may be for schools to apply Title IX policies and procedures developed in response to the new regulations even where the conduct at issue pre-dates the new regulations

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Questions?





# Contact Information

| Team Member           | Title   | Experience  |
|-----------------------|---------|---|
| Christopher F. Droney | Partner | Former Judge, U.S. Court of Appeals for the Second Circuit and U.S. District Court for the District of Connecticut                          |
| Chase T. Rogers       | Partner | Former Chief Justice of the Supreme Court of Connecticut  |
| Daniel L. Schwartz    | Partner | Extensive experience with labor & employment law and representing educational institutions; former Deputy District Attorney, Alameda County |
| Heather Weine Brochin | Partner | Extensive experience with labor & employment law and representing educational institutions  |

# Contact Information

| Team Member            | Title                   | Experience   |
|------------------------|-------------------------|--|
| Jennifer M. Palmer     | Counsel                 | Extensive experience with litigation and labor & employment law  |
| Stanley A. Twardy, Jr. | Former Managing Partner | Former U.S. Attorney, District of Connecticut  |
| Steven A. Cash         | Counsel                 | Former Assistant District Attorney, New York County; former Chief Counsel for the United States Senate Judiciary Committee |

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