Joint Guidance on Federal Title IX Regulations:
Analysis of Section 106.30(a): Actual Knowledge

June 4, 2020

Note: This document focuses on a summary analysis of Section 106.30(a) of the 2020 Final Title IX Regulations,[1] specifically the definition of "actual knowledge". For a full overview of the changes from the Proposed Regulations, see *Title IX Text for Text Proposed to Final Comparison* and *Title IX Summary Proposed to Final Comparison*, available at system.suny.edu/sci/tix2020

§ 106.30(a): Actual Knowledge

In section 106.30(a) The Final Rule defines and applies definitions to the terms "actual knowledge," "complainant," "elementary and secondary schools," "formal complaint," "respondent," "sexual harassment", and "supportive measures." Many terms commonly used in sexual misconduct matters on campuses and throughout the regulations remain undefined, as further discussed throughout the Joint Guidance documents. This memo focuses on the definition of "actual knowledge."

Overview

§ 106.44(a) of the Final Rule requires a recipient with *actual knowledge* of sexual harassment in an education program or activity of the recipient against a person in the United States to respond promptly in a manner that is not deliberately indifferent, meaning not clearly unreasonable in light of the known circumstances.

§ 106.30(a) of the Final Rule defines what exactly constitutes such actual knowledge:

> "Actual knowledge means notice of sexual harassment or allegations of sexual harassment to 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."

In the preamble to the Final Rule, the Department states that it has adopted this "actual knowledge" standard to adopt, in part, a judicial framework developed by the United States Supreme Court. In *Gebser v. Lago Vista Independent School District,* 524 U.S. 274 (1998), and *Davis ex. rel. LaShonda D. v. Monroe County*, 526 U.S. 629 (1999), the United States Supreme Court held that it is a federal funding recipient's misconduct – not the sexually harassing

[1] The effective date for these regulations will be August 14, 2020 and will apply prospectively. The Department has stated it will provide technical assistance during the transition period and after the effective date.

behavior of employees, students, or other third parties – that subjects the recipient to civil liability under Title IX. The precedent established in *Gebser* and *Davis* mandates that Title IX judicial damages are recoverable only where an official, who at a minimum has authority to address alleged discrimination and to institute corrective measures on the school's behalf, has actual knowledge of the discrimination in its programs or activities and fails adequately to respond.

While the *Gebser*/*Davis* judicial framework applies only civil litigation, § 106.30 adapts it to the Department of Education's administrative oversight of funding recipients. The Department notes that its definition of "actual knowledge" accounts for the different needs and expectations of students in elementary and secondary schools, and in postsecondary institutions, with respect to sexual harassment and sexual harassment allegations. The definition differentiates between what constitutes actual knowledge to elementary and secondary schools, and postsecondary institutions.

Vicarious liability or constructive notice theories cannot impute actual knowledge

The "actual knowledge" standard marks a significant deviation from the Department's prior administrative guidance, dating back to 1997 before the Supreme Court's rulings in *Gebser* and *Davis*. That 1997 Guidance, later incorporated into the Department's 2001 "notice and comment" Revised Sexual Harassment Guidance (2001 Guidance), held schools vicariously responsible for the acts of employees and required a school to respond upon its *constructive* notice, which arose when a responsible employee should have known about sexual harassment or sexual harassment allegations.

Subsequently, the 2011 OCR Dear Colleague Letter restated that "[i]f a school knows or reasonably should know about student-on-student harassment that creates a hostile environment, Title IX requires the school to take immediate action to eliminate the harassment, prevent its recurrence, and address its effects." In 2014, in a Question &Answers Document (Q & A), OCR went on to state that a school is deemed to be on notice if a "responsible employee knew, or in the exercise of reasonable care should have known, about the sexual violence." Q & A, at A-4. "Responsible employee" was defined as any employee "who has the authority to take action to redress sexual violence; who has been given the duty of reporting incidents of sexual violence or any other misconduct by students to the Title IX coordinator or other appropriate school designee; or whom a student could reasonably believe has this authority or duty." Q & A, at D-2. This guidance encouraged institutions to designate and train "responsible employees" or "mandated reporters" on campus, which generally included most school administrators, faculty and staff.

The Final Rule §106.30's definition of actual knowledge rejects the Department's prior utilization of vicarious liability or constructive notice theories. It states explicitly that "[i]mputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge."

Which employees have "actual knowledge" under the §106.30 definition?

In the elementary and secondary education context, actual knowledge occurs when "any employee" has notice of sexual harassment or sexual harassment allegations. This wide reach is a significant change for elementary and secondary schools and is markedly different from the definition for postsecondary institutions. The Department states that it has applied this all-encompassing scope because, under *in loco parentis* principles, elementary and secondary school employees have more authority over, and responsibility for, their students, including mandatory reporting of child abuse under State laws for purposes of child abuse services. 85 Fed. Reg. 30026, 30039 (May 19, 2020). The Final Rule does not mandate training for all employees regarding their obligations; however, it is recommended that all employees receive training.

The Department differentiates actual knowledge for postsecondary institutions, limiting such knowledge to only when there is notice to the Title IX coordinator or an official with authority to take corrective measures. The Department explains this distinction, first, because it does not find that *in loco parentis* applies in postsecondary education, and, second, because it promotes a complainant's autonomy, allowing the student or employee to decide with whom to discuss allegations of sexual harassment and whether to a submit a formal complaint to initiate the grievance process. *Id*. at 30040.

In the postsecondary context, notice to the Title IX Coordinator always constitutes actual knowledge. The determination of whether another employee is an "official with authority to institute corrective measures" depends upon the institution's operational structure and the employee's specific roles and duties. *Id*. at 30039.

Finally, for both elementary and secondary schools and postsecondary institutions, the Final Rule §106.30(a) clarifies that actual knowledge does not occur "when the only official of the recipient with actual knowledge is also the respondent."

Postsecondary institutions may designate "officials with authority" to take corrective action

The Department's prior guidance applied a "responsible employee" rubric to trigger response obligations. *See, e.g.,* 2001 Guidance at 13. This guidance stated that a "responsible employee" was an employee who "has authority to take action to redress the harassment," or "who has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees," or an individual "who a student could reasonably believe has this authority or responsibility." A postsecondary institution or an elementary or secondary school was deemed to have notice requiring responsive action when a responsible employee "knew" or "should have known" about possible sexual harassment.

§ 106.30(a) does not define actual knowledge as being received through "responsible employees." It states there is no need to use the responsible employee rubric in elementary and secondary schools because notice to "any employee" triggers a response obligation. 85 Fed. Reg. at 30039. As applied to postsecondary institutions, the Department states that the definition of actual knowledge in the Final Rule retains the first of the three categories of responsible employees under the prior rubric, mandating that actual knowledge occurs when there is notice

to an "official with authority to take action to redress the harassment." *Id*. at 30039 footnote 124. The Preamble specifically states that the Final Rule departs from using the last two categories of "responsible employees" described in prior guidance and limits the definition to the first portion of the definition of responsible employees in the 2001 Revised Sexual Harassment Guidance. *Id*.

The Preamble further states that postsecondary institutions retain the discretion to determine which of their employees (other than the Title IX coordinator and officials with authority to take corrective action by their job titles or functions) may listen to a disclosure of sexual harassment without being obligated to report the allegations to the Title IX Coordinator. A postsecondary institution may authorize as many officials as it wishes to institute corrective measures on its behalf, and notice to such designated officials will trigger the response obligations. *Id*. at 30041.

In the Preamble, the Department notes that institutions *may* publicize its list of officials with authority, but this does not appear to be a requirement. *Id*. at 30106. Further, the Department clarifies that the mere ability or obligation to report sexual harassment or to inform a student how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures. The Department states that it "does not wish to discourage recipients from training individuals who interact with the recipient's students about how to report sexual harassment" and therefore will not "assume that a person is an official with authority solely based on the fact the person has received training on how to report sexual harassment or has the ability or obligation to report sexual harassment." *Id*. at 30043. Again, the postsecondary institution retains the discretion under the Final Rule regarding whom it empowers to serve as officials authorized to institute corrective measures on its behalf.

Postsecondary institutions may designate other mandatory reporters

The definition of actual knowledge in Final Rule § 106.30(a) does not impose universal mandatory reporting obligations upon all postsecondary institution employees. As discuss above, the institution retains its discretion to designate which of its employees must report sexual harassment disclosures and reports to the Title IX Coordinator and which employees should remain as confidential resources. This means that a postsecondary institution may enact policies to require professors, instructors, other employees, or all employees to report to the Title IX Coordinator incidents and allegations of sexual harassment. Specifically, the institution may craft its policies to state which employees must, may, or must only with a complainant's consent, report sexual harassment allegations to the Title IX Coordinator.

Further, the Department states that a postsecondary institution's decisions regarding employee training and mandatory reporting may take into account its Clery Act obligations relating to campus security authorities and whether it is expected to adhere to NCAA guidelines. 85 Fed. Reg. at 30115. As a result of the change from past guidance in the Final Rule, institutions will need to determine whether they will continue to mandate reporting from all employees and continue their on-campus training efforts, or whether they will only require those designated as "officials with authority" to report suspected sexual misconduct to the Title IX Coordinator. Specific areas of concern include athletic coaches and staff, residence life staff, and faculty. In the context of athletics, failure to report sexual misconduct by coaches and assistant coaches has been the subject of several federal Title IX lawsuits against universities and complaints to OCR. A 2014 NCAA Resolution, which intended to bring NCAA up to OCR's guidance at that

time, must also be considered. The Resolution requires "athletics staff, coaches, administrators and student-athletes" to "report immediately any suspected sexual violence to appropriate campus officials."
