

# Welcome to ACE's Title IX Final Rule Discussion

(We Will Begin At 2:00pm ET)

- **Audio**

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- **Teleconference**

- To join via telephone, dial: 877-475-4499 or 877-853-5257
  - **Meeting ID:** 983 702 691 **Password:** 969938

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# Discussing the Title IX Final Rule

May 11, 2020



# Amy Foerster, Partner, Pepper Hamilton LLP



PANELIST

**Amy Foerster**

Partner, Pepper Hamilton LLP

**Amy Foerster** is a partner with Pepper Hamilton LLP, where she co-chairs the firm's Higher Education Practice Group. Amy provides litigation, counseling and investigative services to colleges, universities and schools across the country, leveraging her broad higher education experience. She has provided extensive advice to colleges, universities and K-12 schools pertaining to Title IX, as well as the Clery Act, employee and student misconduct, and federal and state regulatory compliance. From 2013-2019, Amy was the general counsel and chief of staff at Bucknell University.

# Anne Meehan, Director, Government Relations, ACE



PANELIST

**Anne Meehan**

Director

Government Relations

As director of Government Relations, Anne Meehan helps formulate strategies designed to attain the legislative goals and policy objectives of the higher education community. In particular, she represents ACE's positions to members of Congress and the administration on matters related to Title IX, student aid, the federal budget and appropriations process, and other higher education-related policy issues.

# Penny Rue, Vice President, Wake Forest University



Penny Rue joined Wake Forest University as Vice President for Campus Life and Professor of Counseling in July 2013, with broad responsibility for the safety and wellbeing of students and their education outside the classroom. Previously, Penny served as Vice Chancellor-Student Affairs at the University of California, San Diego for six years; as Dean of Students at the University of Virginia for eight years; and as Senior Associate Dean of Students at Georgetown University for five years, following seven years as Georgetown's Director of Student Programs.

# Peter McDonough, Vice President and General Counsel, ACE



MODERATOR

**Peter McDonough**  
Vice President and General Counsel  
Office of the General Counsel

Peter McDonough joined ACE in 2015. He focuses on a wide range of higher education legal issues, including student and faculty affairs, athletics, campus safety and security, intellectual property, compliance and institutional governance. For ACE, Peter coordinates the higher education associations' *amicus* briefing in selected cases with broad impact on colleges and universities. He is the former general counsel of Princeton University, where he was responsible for all institutional legal advice and representation.





- Student Loans
- Grants
- Laws
- Data

## Secretary DeVos Takes Historic Action to Strengthen Title IX Protections for All Students

**New regulation defines sexual harassment, requires supportive measures for survivors, restores due process on campus**

MAY 6, 2020

Contact: Press Office, (202) 401-1576, [press@ed.gov](mailto:press@ed.gov)

WASHINGTON — U.S. Secretary of Education Betsy DeVos took historic action today to [strengthen Title IX protections](#) for survivors of sexual misconduct and to restore due process in campus proceedings to ensure all students can pursue an education free from sex discrimination. For the first time ever, the Department's Title IX regulations define sexual harassment, including sexual assault, as unlawful sex discrimination. The new Title IX regulation holds schools accountable for failure to respond equitably and promptly to sexual misconduct incidents and ensures a more reliable adjudication process that is fair to all students. The new regulation comes after years of wide-ranging research, careful deliberation, and critical input from survivors, advocates, falsely accused students, school administrators, Title IX coordinators, and the American people, including over 124,000 public comments.

"Too many students have lost access to their education because their school inadequately responded when a student filed a complaint of sexual harassment or sexual assault," said Secretary DeVos. "This new regulation

### How Do I Find...?

- Student loans, forgiveness
- College accreditation
- Every Student Succeeds Act (ESSA)
- FERPA
- FAFSA
- 1098, tax forms
- More...

### Information About...

- Transforming Teaching
- Family and Community Engagement
- Early Learning

### Search press releases

# **Now???!!!** *(We hear you. The Department didn't.)*

**“Choosing this moment to impose the most complex and challenging regulations the agency has ever issued reflects appallingly poor judgment.**

**We pleaded with the department to hold off issuing these regulations...**

**... [This] incomprehensible mandate to fully implement them by August 14 is as cruel as it is counter-productive.”**

*– ACE President Ted Mitchell, May 6, 2020*



# *Overview of the Final Rule: Key Elements*

## Threshold / Jurisdictional Topics

- Application to students and employees.
- Narrowing of what constitutes “actual knowledge” of sexual harassment, potentially impacting IHEs’ definition of “responsible employees.”
- Application only to sexual harassment in an IHE’s programs or activities, which include “locations, events, or circumstances over which the [IHE] exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized” by the IHE.

# *Overview of the Final Rule: Key Elements*

## Grievance Procedures Topics

- During the investigation, the parties are entitled to:
  - Advisor of choice.
  - All evidence gathered during an investigation that “is directly related to the allegations raised in a formal complaint.”
- Requirements for live hearings:
  - Cross-examination must be conducted by advisors.
  - Decision-makers must make relevance decisions.
  - IHEs must allow expert witnesses.
  - Standard of evidence may be preponderance of the evidence or clear and convincing, but must be the same for formal complaints against students and employees.
- Appeals

# *Overview of the Final Rule: Key Elements*

## Other Topics

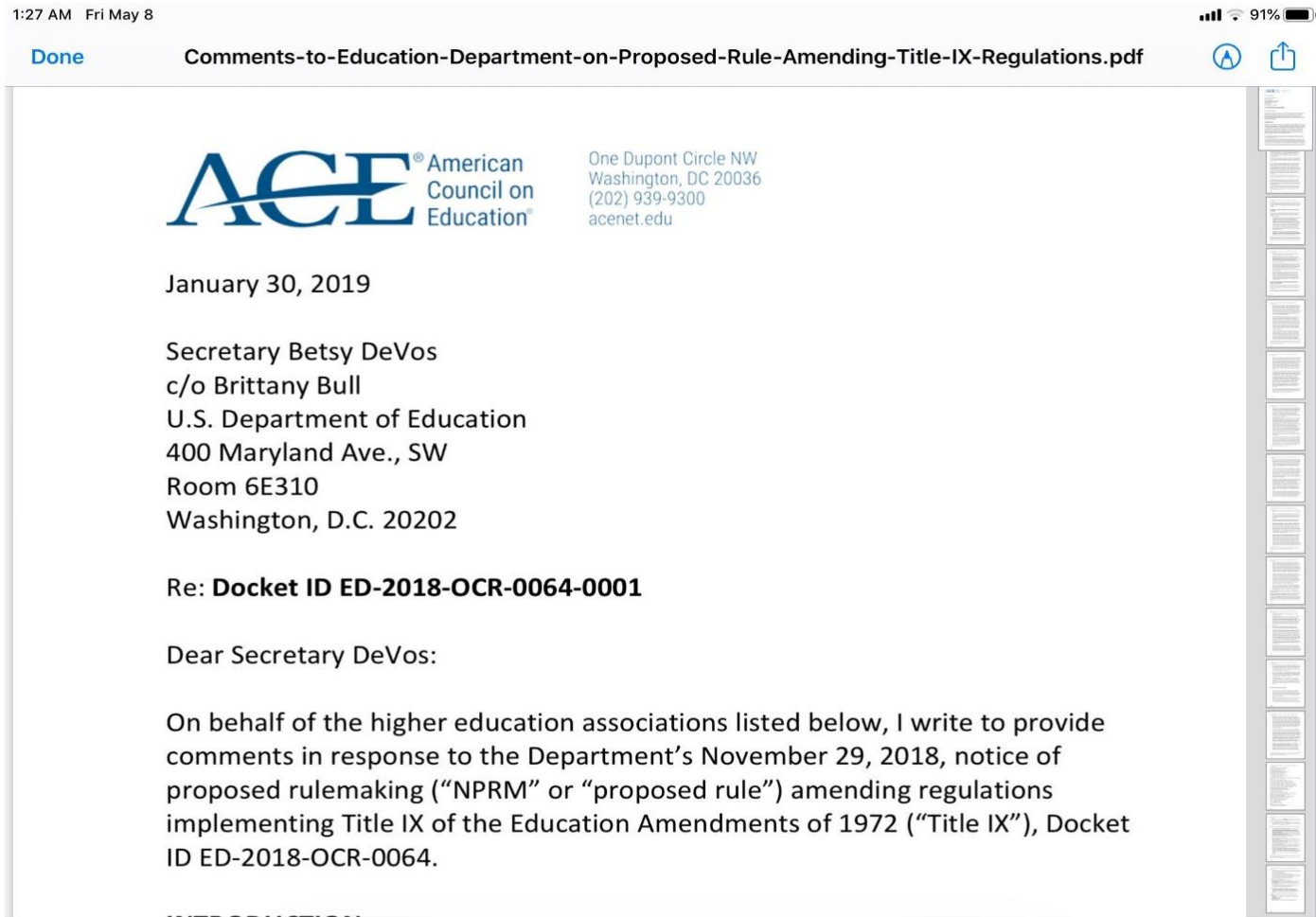
- Limits on emergency removals from campus
- Express statement that the respondent is presumed “not responsible”
- Informal resolution
- Training

## *The Department Did Not Embrace Most of Higher Ed's Requests*

**“[W]e are disappointed that [these regulations] fail to address serious concerns expressed by ACE and our member institutions who must implement them.”**

*– ACE President Ted Mitchell, May 6, 2020*

# Higher Ed Hoped to See Changes Made to the Proposed Rule...



## *ACE's Comment Letter*

*Proposed rule:* Grafts extensive and complex courtroom-like procedures on internal campus disciplinary processes.

*Final rule:* Unchanged.



## *ACE's Comment Letter*

*Proposed rule:* Mandates a “live” hearing with direct cross-examination.

*Final rule:* Unchanged.

- Cross may not be conducted by parties themselves
- Conducted in real-time, with parties able to hear and see each other
- Decision-maker must rule on relevance of each question

## *ACE's Comment Letter*

*Proposed rule:* Provides parties absolute right to inspect “any evidence . . . directly related.”

*Final rule:* Largely unchanged.

- Includes important protections for medical treatment records and information subject to a privilege.

## *ACE's Comment Letter*

***Proposed rule:*** Institution must provide equal opportunities to appeal, if appeals are permitted at all.

*(we cited this provision approvingly)*

***Final rule:*** Modified.

- Institutions must [at least] allow appeals on three grounds:
  - procedural irregularity
  - new evidence
  - bias/conflict of interest

## *ACE's Comment Letter*

***Proposed rule:*** Institutions “must dismiss” sexual misconduct cases that fall outside of Title IX’s definition or scope.

***Final rule:*** **Modified.**

- Institution may continue to address sexual misconduct falling outside the scope of Title IX under their own codes of conduct.

## *ACE's Comment Letter*

***Proposed rule:*** The new Title IX regulations also graft complex and prescriptive requirements onto faculty and staff processes.

***Final rule:*** Unchanged.

## *ACE's Comment Letter*

***Proposed rule:*** Would effectively result in a single federally mandated evidentiary standard of proof across the institution for all matters.

***Final rule:*** **Modified.**

- Clear and convincing or preponderance of evidence
- Same standard for students and employees/faculty
- Removed requirement to apply across all types of matters carrying the same penalty



## *ACE's Comment Letter*

***Proposed rule:*** No proposed effective date but higher ed requested a *minimum* of eight months.

***Final rule:*** Effective August 14, 2020.

## *The Path Forward: Preparing for August 14th*

**“There is no magic wand that will enable campuses to put these new regulations into effect.”**

– ACE President Ted Mitchell, May 6, 2020

*The Path Forward: Preparing for August 14th*

**Key Considerations as Campuses  
Review and Adapt Policies and  
Procedures to Comply  
With the Final Rule**

## *The Path Forward: Preparing for August 14th*

### Managing Student Expectations

- Jurisdiction
- Standing
- Language
- Informal Resolution
- Lack of acknowledgement of gender non-conforming identities
- Advocacy

## *The Path Forward: Preparing for August 14th*

### Reporting Issues

- Actual knowledge
- Mandatory reporters
- University Police role and responsibility
- Access to supportive services

## *The Path Forward: Preparing for August 14th*

### **Institutional Differences**

- **Public/Private, Urban/Rural**
- **Layers of independence**
- **Access to external resources**



## *The Path Forward: Preparing for August 14th*

### Signaling Concerns

- Publication of all training materials
- “A recipient’s treatment...may constitute discrimination”
- “...complainant’s prior sexual behavior... offered to *prove* consent” [emphasis added]
- “The exercise of rights protected under the First Amendment does not constitute retaliation”

## *The Path Forward: Preparing for August 14th*

### Faculty and Staff

- **Redefining “Responsible Employees”**
- **Applying regulations to faculty and staff:**
  - **Revise staff and faculty handbooks**
  - **Renegotiate collective bargaining agreements**

# *Closing thoughts and questions. . .*



**[P]rovid[ing] campus disciplinary proceedings that are prompt and equitable is at the heart of Title IX, and what all institutions strive to achieve.”**

**“Colleges and universities will continue to strive to create and maintain campus environments that are safe, supportive, and responsive for all students...”**

*– ACE President Ted Mitchell, May 6, 2020*

# ACE's Resource Page: Title IX Regulations

*Visit ACE's website...*

[www.acenet.edu/titleix](http://www.acenet.edu/titleix) \*

\* Also found by typing "Title IX Resources" into the search bar on ACE's website

*The resources on this page include a summary of the final rule prepared by Amy C. Foerster and Michael E. Baughman, of Pepper Hamilton, LLP*



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