

Proposed Extension of Time – Title IX Policy

Recommendation

The Administration recommends that the Board of Governors extend the period of time through during which the administrative policy governing Title IX remains in place until December, 2021, or as soon thereafter as a suitable policy may be presented to the Board of Governors for consideration and adoption.

Background

In June of 2020, the United States Department of Education adopted a ‘Final Rule’ departing in significant ways from previous Federal guidance regarding how Title IX was to be interpreted and applied by universities and other covered entities. The Final Rule was adopted as a Federal Regulation with an effective date of August 14, 2020. Numerous legal challenges were brought to the Final Rule, which was seen as changing the relationship between victim, alleged perpetrator and decision-maker in ways that are inconsistent with the underlying Federal law, and as having been adopted in a procedurally defective manner.

Because the status of the Final Rule was uncertain, the Board agreed, at its meeting of September 25, 2020, to delegate to the Administration authority to adopt an interim policy regarding this matter. That policy may be found at <https://policies.wayne.edu/appm/10-13-interim-title-ix-sexual-misconduct>, and closely tracks the requirements of the Final Order, which are largely prescriptive and very detailed. The Administration proposed that a Title IX policy was to be brought back to the Board for consideration within six months of the disposition of the lawsuits challenging the Final Rule.

The lawsuits were unsuccessful in enjoining the Final Rule. A major lawsuit, *Commonwealth of Pennsylvania, et al v Elisabeth DeVos, et al*, which includes as plaintiffs 17 State attorneys general including the Michigan attorney general, continues. On November 18, 2020, the United States District Court in Washington, DC, issued a scheduling order for the filing of dispositive motions in the case. Under that order, written motions and briefs will not have been filed until April of 2021, after which the Court will entertain oral arguments and presumably issue a decision.

The incoming Biden Administration has repeatedly indicated its dissatisfaction with the Final Rule, and its intention to issue new policy that will build on the former guidance provided under the Obama administration. Because as the Final Rule is a Federal Regulation, which is difficult to modify quickly, it is particularly difficult to suppose what shape the incoming Title IX guidance will take, or when it will be effective.

In sum, the future status of the Final Rule is in considerable doubt. It would not be possible to present a new draft policy to the Board with any degree of confidence that the policy will comply with Title IX as it will be interpreted on a Federal level.

Accordingly, we request that the Board extend the period of its delegation in this area, so that once there is guidance from the new administration (or a judicial determination), we may consult with appropriate student and faculty stakeholders and present to the Board a policy appropriate for Wayne State University.