

Publications

Department of Education Finalizes New Title IX Regulations Governing Sexual Harassment

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The Department of Education recently announced its implementation of new Title IX regulations governing sexual harassment in education programs and activities that receive federal funding. The new regulations will take effect on August 14, 2020.

Key provisions of the new regulations narrow the applicable definition of “sexual harassment,” and limit an institution’s duty to respond, requiring a formal grievance process only for “formal complaints.” Similarly, the new regulations depart from the previous “should have known” standard for when an institutional response was required, now requiring a response only in the more limited instances when the institution has “actual knowledge” of sexual harassment. In yet another limitation, the new regulations expressly decline to extend coverage to incidents occurring off-campus.

However, significant challenges remain for institutions, including in particular the elements required for a compliant grievance process. Under the new regulations, institutions may no longer utilize the “investigator model” for resolving Title IX issues, but must institute a process that includes written notice to both parties. The new regulations also add restrictions on the time frame for resolution, an opportunity for the parties to review and comment on the investigative report, recorded live hearings, cross-examination, a decision maker other than the Title IX coordinator or investigator, and a right to appeal. One area sure to present a challenge is the new regulations’ requirement that parties be able to select an advisor of their choice, who is expressly allowed to be an attorney. The advisors will be permitted to cross-examine witnesses, including the complainant. Thus, the new regulations usher in an era where Title IX proceedings are likely to be dominated by attorney advisors, and where attorney cross-examination of witnesses may be a key characteristic of live hearings, which will be presided over by members of the institution who in most cases have no formal legal training.

Finally, the new regulations add confidentiality requirements. Institutions must keep confidential the identities of any individuals who have made a report or complaint of sex discrimination, any individuals reported to be the perpetrator of sex discrimination, any complainants, any respondents, and any witnesses, except as permitted by FERPA, as required by law, or to carry out the new regulations, including any investigation, hearing, or judicial proceeding.

All of this leaves colleges and universities scrambling to implement new policies and procedures and conduct training during a time when campuses across the nation are closed due to the COVID-19 pandemic and remain uncertain about how and when they will reopen. The ACLU has filed suit on behalf of other activist groups to block the new regulations, and additional suits are expected.

Please contact your Vorys attorney or a member of the Vorys higher education team with specific questions, for assistance with implementation of the Department's new regulations, or for updates on challenges to the new regulations.