

Recently Released Title IX Regulations Mandate Significant Policy Review and Revisions

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Higher Education Alert

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The U.S. Department of Education recently announced its long awaited regulations under Title IX of the Education Amendments Act of 1972 (Title IX). The regulations take effect on August 14, 2020, providing higher education institutions little time to implement policy review and changes while managing unprecedented issues related to the ongoing COVID-19 pandemic.

The following list highlights many of the key areas that institutions should focus on when reviewing, revising and implementing their Title IX policies and procedures:

- **Title IX Jurisdiction.** Institutions must address "sexual harassment" in their programs and activities, including locations, events or circumstances over which the institution exercises substantial control over both the respondent and the context in which the alleged sexual harassment occurs. Notably, per the new regulations, Title IX does not apply to programs or activities outside of the United States and complaints related to such programs or activities must be dismissed for purposes of Title IX. Institutions should determine whether to develop policies to address conduct that falls outside the scope of Title IX under their Code of Conduct.
- **"Sexual Harassment" Defined.** The new regulations define "sexual harassment," to include (1) the conditioning of an aid, benefit or service of the institution on an individual's participation in unwelcome sexual conduct (*i.e., quid pro quo*); (2) unwelcome conduct determined by a reasonable person to be so severe **and** pervasive, as well as objectively offensive that it effectively denies a person equal access to the institution's education program or activity; and (3) sexual assault, dating violence, domestic violence and stalking. Policies must be updated to incorporate this definition.
- **Formal Complaint Requirement.** Per the new regulations, institutions must investigate cases only where a formal complaint alleging sexual harassment is made, either filed by the complainant or signed by the Title IX coordinator, and the complainant is participating in or attempting to participate in the education program or activity of the institution with which the formal complaint is filed.
- **Employees.** Title IX applies not only to students, but also to employees. Employment-related policies and handbooks must be updated to incorporate Title IX requirements. Institutions need to consider whether faculty contracts comply with these new legal protections.
- **Implementation and Monitoring of Supportive Measures.** In response to a report of sexual harassment, the Title IX Coordinator must promptly contact the complainant for a confidential discussion about the availability of supportive measures. Supportive measures must also be available to the respondent. The Title IX Coordinator must monitor the effectiveness of the supportive measures.
- **Notice.** Institutions must provide both parties with written notice of the allegations. The notice must include a statement "that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process." Institutions must develop a form notice to ensure compliance and consistency.
- **Timeliness.** There is no longer a requirement that investigations and determinations be completed within 60 days. Institutions are required to have "reasonably prompt time frames for conclusion of the grievance process." Institutions should develop a realistic time frame for resolving complaints while ensuring policy language allows for the time frame to be extended for appropriate cause, with notice and an explanation to the parties.

- **Training.** Title IX Coordinators, investigators and decision-makers must receive training on a number of topics, including how to serve impartially. Institutions should develop training that is consistent with their revised policies and carefully consider the written content of training materials because they will be potential exhibits should a matter be litigated by a party.
- **Live Hearing.** Institutions must hold live hearings to adjudicate formal complaints where advisors conduct cross-examination. If a party will not submit to cross-examination, the decision-maker must not rely on that party's statements. Only "relevant" questions may be asked during a hearing. Proper training must be provided to enable decision makers to have the proper foundations to understand, evaluate and apply the evidentiary principles of "relevance."
- **Advisor.** Parties may have an advisor of choice, including an attorney. If a party does not have an advisor at a hearing, the Institution must provide one solely for the purpose of conducting cross-examination. Institutions should determine who it will make available to serve as an advisor.
- **Standard of Evidence.** Institutions may use preponderance of the evidence **or** clear and convincing evidence standards. The standard for complaints against students and employees must be the same.

As colleges and universities review and apply these new regulations and further guidance is released, we will issue continuing alerts that focus on particular provisions and provide recommendations and guidance about implementation. In the interim, we offer these initial highlights to assist in the review and revision process that needs to take place in the next few months.

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