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Change Is the Only Constant: Title IX 3.0

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What we'll cover today

- What is Title IX?
- Refresher on the 2020 Regulations
- New Guidance
- Court Decision
- Proposed Regulations
- What to Expect

What is Title IX?

- A federal civil rights law passed as part of the Education Amendments of 1972
- This law protects people from discrimination based on sex in education programs or activities that receive Federal financial assistance
- Frequently thought of in the context of athletics, but it also covers sexual harassment and sexual assault committed against students
- Applies to federally funded institutions

Prior guidance

- Prior to 2020, the application of Title IX to sexual harassment and assault on campus was limited to sub-regulatory guidance from the Department of Education and Office of Civil Rights.
 - 1994 Title IX applied to sexual assault investigations for the first time
 - 1997 Title IX was determined to apply nationally to sexual assault
 - 2001 Department of Education Office of Civil Rights Guidance
 - OCR's 2011 Dear Colleague Letter on Sexual Violence
 - 2014 Questions and Answers on Title IX and Sexual Violence

New regulations and rescission of prior guidance

- In February 2017, the Department of Education rescinded the 2011 and 2014 guidance, and left the 2001 guidance in place for schools to use while ED conducted rulemaking. In May 2020, when new Title IX regulations were published, the 2001 guidance was also rescinded
- The new Title IX regulations were issued on May 6, 2020 and became effective on **August 14, 2020**.

Overview of 2020 Regulations – applicability

➤ “Actual notice”

- “Responsible employee” vs. “any official of the [institution] who has authority to institute corrective measures on behalf of the [institution]”

➤ “Deliberative indifference” standard of response

- Institutions must respond “promptly in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.”

➤ Applies to “persons in the United States”

➤ Schools are only obligated to investigate if the incident occurred during a school sponsored educational program or activity, and on school’s premises or controlled properties

Overview of 2020 Regulations– new definition

- Move away from focus on sexual misconduct and assault to broadly defined “sexual harassment”:
 - Quid pro quo sexual harassment by employees
 - Sexual assault, dating violence, domestic violence, and stalking, as defined by the Clery Act and FBI criminal codes
 - Any other “unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it denies a person access to the recipient’s education program or activity”

Overview of 2020 Regulations – required response

- Initial response to a report of sexual harassment:
 - The Title IX coordinator is responsible for contacting the victim to offer supportive measures
 - Institutions must conduct an investigation if, and only if, a formal complaint of harassment is filed
- “Formal complaint”
 - A written document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the institution investigate the allegation of sexual harassment
 - Formal complaints can only be filed by a complainant or the Title IX coordinator

Overview of 2020 Regulations – formal complaint and investigation

- What happens once a formal complaint is filed?
 - Institutions are required to dismiss formal complaints alleging conduct that does not meet the new, narrower definition of sexual harassment, but can still respond under the student conduct code.
 - Institutions must comply with the required grievance process when conducting an investigation.
 - If, after conducting a risk analysis and determining that an accused student poses an immediate threat to the health or safety of a student or other individual, institutions are allowed to remove such a student from campus, provided that the student receives notice and an opportunity to respond.
 - Institutions are permitted to place accused employees on administrative leave.

Overview of 2020 Regulations - dismissing a formal complaint

- Institutions are also required to dismiss formal complaints if...
 - The victim withdraws the complaint
 - The accused individual is no longer a student or employee at the institution
 - Circumstances prevent the institution from gathering sufficient evidence to reach a determination

Overview of 2020 Regulations – investigation and grievance procedures

➤ Compliant grievance process:

- Prompt and equitable
- Training for all involved (and training materials must be published online)
 - Schools can use their own employees or outsource
- Objective evaluation of evidence, avoid conflicts of interest
- Presumption that the respondent is not responsible
- Describe the supportive measures, as well as sanctions and remedies, that are available
- Specify the standard of evidence to be used (preponderance of evidence or clear and convincing)
- Detail the procedures available for appeals, if any
- Preclude the use of questions that would violate a legally recognized privilege, unless waived

Overview of 2020 Regulations – informal resolution

- Informal resolution is not an option to resolve allegations that an employee sexually harassed a student, that must be handled through the formal grievance process
- Institutions can offer, but cannot require, an informal resolution process, such as mediation, in lieu of a full investigation and adjudication
- The institution is required to disclose information about the informal and formal resolution processes and receive voluntary written consent from the parties to pursue an informal process

Overview of 2020 Regulations – investigations

- During investigations, institutions are required to:
 - Assume the burden of gathering evidence (note that medical treatment records cannot be accessed or used without consent)
 - Allow both parties an equal opportunity to discuss the allegations, gather evidence and present witnesses
 - Allow both parties to be accompanied to proceedings by advisors of their choice, although an advisor's participation could be limited by the institution
 - Provide written notice and sufficient preparation time for any meetings related to the investigation or disciplinary process
 - Provide equal access to evidence and an opportunity to respond to such evidence
 - Produce an investigative report to be provided to both parties for review and response

Overview of 2020 Regulations – live hearing required

- Institutions are required to provide for a live hearing and must allow advisors for both parties to ask relevant questions and cross-examine the other party and witnesses.
 - Cross-examination may not be conducted by a party personally. If a student does not have an advisor to conduct the cross-examination, the institution must provide an advisor of its choice
 - At the request of either party, an institution must permit cross-examination to occur with the parties located in separate rooms
 - Institutions are not allowed to rely on statements made by a party or witness who does not submit to cross-examination (however, new guidance allows to consider by the decision-maker)
 - Only relevant cross-examination and other questions may be asked of a party or witness, as determined by the decision-maker, who must explain any decision to exclude a question
 - Cross-examination may not include questions about a complainant's sexual behavior or disposition, unless it is offered to establish consent or to demonstrate that another party is responsible for committing the violation

Overview of 2020 Regulations – record keeping

- Institutions must create an audio recording or transcript of the live hearing and make it available to the parties
- The decision-maker, who cannot be the Title IX coordinator or investigator, must issue a written determination regarding responsibility
- Institutions must maintain complete records about all investigations, appeals, informal resolutions, training materials, and supportive measures for seven years

Overview of 2020 Regulations – appeals

- Either party can appeal the decision of the hearing official based on:
 - procedural irregularities
 - new evidence
 - any bias or conflict of interest on the part of the Title IX coordinator, investigator, or decision-maker
- Appeal cannot be heard by the same official that made the original decision

New Guidance

- Executive order in March 2021
 - Emphasized importance of protecting students from gender discrimination, including gender identity and sexual orientation discrimination
 - Review of Agency actions to include review of existing regulations, guidance, and policies to determine alignment with Biden's EO
- Letter to schools in April 2021
 - ED OCR explaining plans to implement EO
- New Q&A document published in July 2021

Legal challenges to 2020 regulations

- In *Victim Rights Law Center et al. v. Cardona*, the US District Court for the District of Massachusetts upheld most of the provisions of the 2020 amendments.
- The Court vacated a provision of the live hearing requirement for the grievance process.
 - 2020 regs included a prohibition on relying on the statements of a party if the statements were not subject to cross-examination at hearing.
 - Criticized by organizations concerned that it would, among other things, unfairly advantage respondents who made admissions of culpability prior to the grievance hearing and then declined to submit to cross-examination during such hearing.
 - Now a Title IX decision-maker may consider otherwise permissible statements made by parties or witnesses, even if those parties or witnesses do not participate in cross-examination at the live grievance hearing.

Legal decision follow-up

- Following *Victim Rights Law Center et al. v. Cardona*, the Department issued another Letter in August 2021 indicating that they would immediately cease enforcement of the rescinded provision of law.
- Not mandatory to remove it from Title IX policy, but advisable.

Title IX Proposed Rule – definitions

- July 11, 2022, USDOE released the proposed Title IX rule and solicited public comment.
 - 60 day comment period
 - Deadline for comments was September 12, 2022
- Overview of proposed changes:
 - Obligation to respond to “any sex discrimination that has occurred in its education program or activity, prevent its recurrence, and remedy its effects.”
 - “On the basis of sex” interpreted more broadly to include sexual orientation, gender identity, sex characteristics, sex stereotypes, pregnancy and related conditions

Title IX Proposed Rule – definitions

- Expands definition of “quid pro quo” harassment to include “explicit” or “implicit” unwelcomed sexual conduct
- Expands definition of hostile environment harassment to include both subjective and objective evaluation of “totality of circumstances” when evaluating whether the person was denied or limited ability to participate in the educational program or activity
- Harassment no longer needs to occur in the US if it occurred during the educational program or activity

Title IX Proposed Rule – notice and responsibilities

- Significantly expands which employees must notify Title IX Coordinator of any conduct that may constitute sexual harassment
 - Anyone who has authority to take corrective action or, for incidents involving students, has responsibility for administrative leadership, teaching, or advising in the recipient's education program or activity must report to Title IX Coordinator
 - All other employees are obligated to notify the Title IX Coordinator or provide an individual with the Title IX Coordinator's contact information and information about reporting
- Once notified Title IX Coordinator would be required to take certain steps even if there is no request to initiate the grievance process
- Must provide supportive measures to both parties
- May remove a respondent from school in limited circumstances
- May place employee on administrative leave for the duration of the investigation

Title IX Proposed Rule – informal resolution and grievance process

- Could use informal resolution process for certain complaints with agreement from both parties and must use a facilitator (cannot be a decision-maker or an investigator)
- Title IX Coordinator must initiate a grievance process for any “complaint” which includes any “oral or written request to the institution to initiate the institution’s grievance procedures.”
- Notice of the complaint must be provided to both parties including relevant details (names, details of the allegation, date, place, etc.)

Title IX Proposed Rule – grievance process and live hearing

- Both parties may choose to have advisors of choice
- Both parties must be given reasonable time to review evidence gathered during the investigation
- Decision-maker(s) must be able to ask questions to both parties and witnesses during meetings or a live hearing
- Cross examinations are permitted, but questions are not required to be asked by advisors of choice

Title IX Proposed Rule – determination of responsibility, appeal and training

- Must provide written notice on determination of responsibility to both parties
- Must provide ability to appeal to both parties
- Expands training requirements for all employees, including additional specific trainings for Decision-Makers, Facilitators, Investigators. Title IX Coordinator must be trained on all specific duties
- Schools must prohibit retaliation

Title IX Proposed Rule –pregnancy

- Pregnancy must be treated the same as any other temporary disability
- Must inform students on prohibition of discrimination based on pregnancy or related conditions
- Provide access to reasonable modifications to activity or program
- Allow for voluntary leave of absence
- Provide private space for lactation

What to Expect?

- Over 240,000 comments were submitted
- USDOE must review and respond to each comment
- Final Rule anticipated in Spring/Summer 2023
- Implementation late Summer 2023

Questions?

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