

Insights

ANOTHER CHALLENGE FOR EDUCATIONAL INSTITUTIONS: IMPLEMENTING THE NEW TITLE IX REGULATIONS

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As colleges and universities across the country deal with the challenges of remote learning and try to plan for the next academic year in the midst of the uncertainty created by the ongoing pandemic, they now need to add to the litany of challenges adapting their processes for handling reports of sexual harassment.

In 2017, Secretary of Education Betsy DeVos withdrew previous guidance on how institutions should implement Title IX, which prohibits discrimination on the basis of sex in education programs or activities receiving federal financial assistance. In November 2018, DeVos released draft regulations for public comment and, until now, left institutions in limbo as to how to properly implement Title IX on their campuses.

On May 6, 2020, Secretary DeVos finally issued the long-awaited final regulations governing the investigation and adjudication of complaints of sexual harassment for higher education institutions. These new regulations significantly change the way educational institutions must handle complaints of sexual harassment, redefining the scope of coverage and imposing additional process requirements. Though the new rules purport to limit institutions' liability for the failure to respond to Title IX issues on campus to incidents of which the institution has actual knowledge (as opposed to those of which the institution "reasonably should have known" under the Obama-era rules), retaining strong Title IX reporting, investigation, adjudication, and education programs on campus remains essential to ensuring the safety and equal educational opportunities of all students.

To ensure preparedness for the August 14, 2020 effective date, Title IX offices across the country need to prioritize reviewing and revising their policies and procedures for addressing and redressing sexual assault and harassment on their campuses, as well as their training materials for students, staff, and other campus personnel. Presuming students will be back on campus in the fall, and that no challenges are effective in defeating the regulations or delaying their implementation, institutions must take steps now to adapt their Title IX programs to the new mandate.

The key questions to be emphasized in every institution's Title IX policy and procedure review process should include:

- ***Who is a “responsible employee” to whom notice triggers the institution’s Title IX response obligations?*** For all institutions, notice to an institution’s Title IX coordinator or “any official . . . who has authority to institute corrective measures on behalf of the” institution provides actual knowledge triggering the duty to respond. Institutions may, but do not have to, designate coaches and personnel within their athletics departments as “officials with authority.”
- ***What is sexual harassment for purposes of Title IX enforcement?*** The definition of *sexual harassment* is: (1) an employee conditioning aid, benefit or service upon an individual’s participation in unwelcome sexual conduct; (2) “unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the [institution’s] educational program or activity;” or (3) sexual assault, dating violence, domestic violence, or stalking as defined under the Clery Act.
- ***What sexual harassment allegations must be investigated?*** Institutions now are required to investigate only complaints filed through their formal processes for episodes that occurred within their programs and activities. A formal complaint may be filed by a complainant or by a Title IX officer. Institutions are responsible for responding to conduct alleged to have occurred in institution-owned or controlled locations and events, and for off-campus sexual harassment that occurs in facilities owned or under the control of institution-sanctioned organizations like fraternities and sororities. An institution’s Title IX jurisdiction does not, however, extend to students studying abroad.
- ***How will the pre-hearing Title IX adjudication process be different?*** Every accused must be provided written notice of the allegations against him or her, must be provided the right to an advisor, and must be permitted to submit evidence. Every accused student must be provided a written assurance that he or she is presumed innocent. Furthermore, before any interview, meeting or hearing, written notice that a party’s participation is invited or expected must be provided.
- ***Can any disciplinary measures be imposed before the hearing?*** An accused may be removed from the educational institution before a hearing and resolution of a Title IX complaint “on an emergency basis” after determining, based on “an individualized safety and risk analysis . . . that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal,” so long as the accused is provided notice and an opportunity to challenge the removal decision.
- ***What requirements will apply to the hearings?*** Institutions will be required to hold a live hearing to resolve Title IX complaints within a reasonably prompt time frame. The hearing panel may not include the individual who performed the investigation. Given the current pandemic, it is worth highlighting that the rules permit the use of technology to hold the hearings remotely, so institutions should make express provision for videoconferencing for some or all participants in a hearing. The parties each will be entitled to present and challenge evidence at the hearing,

including through cross-examination of witnesses by the parties' advisors. The hearing panel must determine if questions are relevant before requiring any response.

- ***What standard of proof must be applied to proceedings?*** Previously, institutions were required to use the “preponderance of the evidence” standard. The new rules permit institutions to adopt either the “preponderance of the evidence” standard or the more rigorous “clear and convincing evidence” standard. Institutions will need to decide whether to adopt the more stringent evidentiary standard or maintain the existing standard.
- ***Do we need to provide written decisions?*** A written determination regarding responsibility must be provided to each party simultaneously, with findings of fact and conclusions regarding the determination of responsibility and resulting sanctions.
- ***What appeal rights must be offered?*** Each party must be provided the opportunity to appeal dismissals of formal complaints and determinations regarding responsibility. An appeal may be based on procedural irregularities, new evidence not reasonably available at the time of the decision, or conflicts of interest or biases by the Title IX coordinator, investigator(s) or decision-maker(s), to the extent any of those affected the outcome of the matter.

This list is by no means exclusive, and institutions should be on guard for the additional record-keeping and student support requirements mandated by the regulations.

RELATED CAPABILITIES

- Higher Education

MEET THE TEAM



Sarah Hartley

Washington / Boulder

sarah.hartley@bclplaw.com

[+1 303 866 0363](tel:+13038660363)

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