

Insights

WHAT DO YOU NEED TO KNOW ABOUT THE LATEST TITLE IX GUIDANCE?

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SUMMARY

Department of Education Q&A Provides Insights Into Enforcement Priorities

On July 20, 2021, the Biden Administration announced new guidance for the implementation of the 2020 Title IX regulations on sexual harassment, giving institutions of higher education (and K-12 institutions) much-awaited insight into how the Biden Department of Education will enforce the Trump era regulations adopted last year while the administration undertakes its comprehensive review of the Trump era regulations.

For institutions that modified their sexual harassment policies in the lead-up to the August 2020 compliance deadline, yesterday's guidance does not yet provide answers on when and what further policy amendments will be required. The guidance should, however, help focus institutions' attentions on specific compliance mandates and clarify how the existing regulations should be interpreted and applied until the Biden administration announces its new Title IX regulations.

In light of the new guidance, institutions should keep the following in mind in implementing Title IX during this interim period:

- Do **not** apply the policies adopted pursuant to the 2020 Title IX regulations to investigations and proceedings arising from misconduct alleged to have occurred *before* August 14, 2020, when the new regulations went into effect. The guidance clarifies that institutions must apply the rules in effect at the time of the alleged misconduct.
- Virtual or online conduct, even conduct occurring through a student's personal device, can constitute sexual misconduct under the Title IX regulations if they fall within the operations of an institution, are considered part of an institution's programs or activities, or occurred in circumstances over which the institution exercised substantial control.

- Institutions must still fully implement Title IX on campus despite COVID-19-related disruptions. Institutions therefore must conduct investigations, hold live hearings, and offer supportive measures to complainants and respondents in Title IX proceedings.
- Institutions may continue to address sexual misconduct that does not fall within the scope of the definition of sexual harassment under the Title IX regulations. Indeed, the Office of Civil Rights encourages institutions to develop codes of conduct to ensure safe and supportive environments for their students and to address the misconduct not considered sexual harassment under the 2020 Title IX Regulations.
- A formal complaint triggering a duty to investigate is a document with a physical or digital signature describing sexual harassment, whether submitted in hard copy, by email, or through some other online portal. A Title IX coordinator may, and sometimes should, file a formal complaint if no other formal complaint is filed in certain circumstances, e.g., where the institution has actual knowledge of sexual harassment by a person in a position of authority.
- Though witness statements may not be relied upon by the decision-maker if the witness does not subject themselves to cross-examination, non-statement evidence (for example, photographs or video images) may be relied upon by the decision-maker even if witnesses do not submit to cross-examination. Further, text messages or emails may be admitted without the party submitting to cross-examination if the statement itself is the complained-of harassment. If a witness submits to cross-examination by the other party – but does not answer all of the questions of the *decision-maker* – the witness has satisfied the cross-examination requirement for their testimony to be considered by the decision-maker.

We will be monitoring the outcome of the Biden administration's Title IX review and will provide further updates as more guidance becomes available for institutions of higher education. Institutions with questions about how the guidance may impact your policies or procedures, or looking for assistance in conducting an internal audit of affected policies and procedures, can contact sarah.hartley@bclplaw.com or the BCLP Higher Education Team for guidance.

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Sarah Hartley

Washington / Boulder

sarah.hartley@bclplaw.com

+1 303 866 0363

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