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HIGHER EDUCATION ALERT | NIXON PEABODY LLP

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Addressing Title IX obligations, due process, and student reasonable expectations in the face of the COVID-19 pandemic

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As higher education institutions confront the evolving challenges of the COVID-19 pandemic, their Title IX obligations remain in place. Colleges and universities must effectuate a “prompt and equitable resolution” of student complaints of sexual and gender-based harassment and discrimination. Title IX’s requirements become more vexing with students off campus, while continuing to participate in educational programs and activities remotely through online platforms.

Public institutions must also adhere to their procedural due process obligations, which are subject to a national judicial landscape where courts have not spoken uniformly on what process appropriately fulfills the constitutional mandates of proper notice and an opportunity to be heard. For example, in the Sixth Circuit, public institutions must afford accused students with a right to cross-examine his or her accuser at a hearing, which may be conducted by the accused or a representative to test credibility. By contrast, the First Circuit does not require direct student-on-student cross-examination at a hearing and instead permits public institutions to undertake an “inquisitorial” approach, where a neutral party conducts the questioning. Constitutional due process requirements are more challenging with students, advisors, and witnesses disbursed across the nation or internationally.

Careful attention must be undertaken to guard against the risks of breach of contract claims when implementing substantive code provisions (e.g., does your code expressly state the institution’s jurisdiction over off-campus or online activity?) and grievance resolution procedures (e.g., are the delineated steps and their prescribed time frames sufficiently adaptable to the complexities of the ongoing crisis?). As we have seen in several recent judicial rulings, courts have focused increasingly on the promise of “fairness” in an institution’s educational contract, interpreting its scope based upon a student’s reasonable expectations. The spectrums of what constitutes “fairness” and “reasonable expectations” could easily become subject to differing interpretations during these exigent circumstances.

Succinctly stated, colleges and universities must now be more flexible in their investigative and adjudicative processes. Below are some suggestions to help to enable the proper continuity of responses to and resolutions of sexual harassment and misconduct cases.

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Assess where each case stands

At this challenging time, an institution must assess its pending cases holistically from the perspective of the allocation of available staffing and resources and each case individually to identify its unique issues or concerns. Regarding a case's remaining procedural steps and previously established timelines, administrators must now project as foreseeably as possible what extensions and procedural modifications are justifiable to protect a prompt and equitable process, while possibly confronting differing positions among the student parties as to what changes are justifiable. Institutions must work carefully with information technology personnel to ensure that appropriate measures are in place allowing for the sufficient review of files remotely, while preventing against inappropriate dissemination and invasions of privacy rights.

Also, if a student has been provided with an accommodation (e.g., a student with a disability), administrators must assess how it can be reasonably maintained. Further, a thoughtful evaluation must occur regarding the continuation of support measures, which could entail steps such as effectuating online counseling sessions or directing students to comparable supportive resources in their communities (which may become especially difficult to identify in this time of limited personnel interactions).

Proceed forward incrementally and carefully

To the fullest extent possible and practicable, Title IX and student conduct operations must continue under applicable policies, as impacted by institutional directives in the crisis response and with sufficiently noticed and explained procedures for remote participation. Parties should be instructed to contact immediately clearly identified administrators, if their remote participation in an investigation or adjudication is impaired or prevented by illness, quarantine, or for any other reason.

For communications going forward, all points of contact must be updated continuously, as communication channels will alter, especially with administrators working remotely and the limited forwarding of certain telephone lines. All affected parties must always know whom to contact and where to turn in the protection of their rights.

It is especially important to recognize that new complaints will be submitted while students remain off-campus, whether related to a prior incident on campus or allegations concerning recent off-campus conduct. The institution must provide proper notice and instructions on how a complaint may be filed remotely, including how it will receive and process complaints submitted anonymously.

Reiterate no-contact orders

No-contact orders must remain in place, but will be more challenging to maintain. Administrators must reiterate unequivocally that directives to avoid contact (especially online) continue while students are away from the campus. The notification must stress the vital importance to report promptly any alleged violation of the no-contact requirements, particularly because responsive actions, including additional disciplinary actions, will be more complex to effectuate.

Be clear and document

More than ever, this is a time to speak with clarity and through only appropriate personnel. Don't simply assume that parties will appreciate and understand that there will be alterations in the

process, but rather identify in writing specifically and explain proactively changes in submission deadlines and procedures for participation. Again, recognize that in breach of contract claims, courts will focus on the reasonable expectations of the student, not the institution. With resources strained and administrators facing many constraints professionally and personally, colleges and universities cannot lose sight of ensuring continuously that all participants in the ongoing process receive concurrent and timely notice of where it stands, how it may be altered, and when it is targeted for completion (especially with the uncertainty of when students will return to campuses).

Stay informed

Before the declaration of the national emergency, colleges and universities were awaiting anxiously the promulgation of the new Title IX regulations. According to recent information posted by the Office of Management and Budget/Office of Information and Regulatory Affairs, review meetings were scheduled through April 6. Obviously, circumstances leave in doubt precisely when the regulations will be finalized and will take effect.

Nonetheless, the judicial landscape continues to develop. While courts are closed to physical entry and hearings are being modified to occur through video or telephonic conferences, pending Title IX, due process, and contract cases proceed. For example, on March 11, the Sixth Circuit issued a significant decision (with a strongly written dissent), addressing a university's ongoing obligation to evaluate the adequacy of its responsive measures and the need for additional action, if prior responses appear ineffectual, to prevent further student harassment and avoid Title IX deliberate indifference liability. We will analyze this decision for you in an upcoming alert. Currently, significant issues in respondent lawsuits are under advisement before the Third, Sixth, Eighth, and Ninth Circuits. Impactful and precedential decisions, which will be based upon factual records developed under much different circumstances than the current emergency conditions, will be issued within the next few months.

Also, we could see more judicial filings seeking injunctive relief, challenging whether and how schools should conduct disciplinary cases at this time. Courts will balance the risks and harms to determine whether to cease or alter a student conduct process. Documentation showing proper notice and clarity will be vital to defend against an injunction request, especially to respond to a skeptical judge questioning why the school is moving forward with conduct proceedings.

Stay tuned

The above are just some of the issues facing colleges and universities in their student conduct cases during the COVID-19 pandemic. We will provide updates, particularly on new regulatory or judicial developments, to assist as you navigate through these turbulent times.

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