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Initial thoughts about the Title IX regulations

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The Department of Education's Title IX regulations span 2,033 pages, so a full review of their contents, changes, and application will require time and collaboration. Colleges and universities will face challenges as they seek to read and implement the regulations, especially with personnel largely working remotely due to the pandemic. However, in the face of these challenges, the regulations take effect on August 14, 2020, so the evaluation and adoption processes on your campus must start *now*.

We will continue to share our analysis of the regulations. Here, we address topics of significance, based upon our initial review.

Emphasis on training

The Department stresses the importance of training of personnel who will have roles in Title IX response and grievance processes under the oversight of the Title IX Coordinator. All personnel must be trained to understand and stay within the boundaries of their specific roles. The single-investigator model for fact-finding and adjudication is no longer permissible. Distinct responsibilities will be assigned to investigators, decision-makers (i.e., hearing panelists), facilitators (including individuals involved in an informal resolution process), and appeals officers. All of these individuals must be carefully trained on the Title IX process as a whole and fully advised of their individual duties to avoid conflicts of interest and any appearance of bias. The training materials must be posted on the school's website and be publicly available upon request.

Schools must evaluate and designate who will fill each specified role and ensure that those individuals receive their training as soon as practicable. Training programs should reflect not only the regulation's requirements, but also the school's mission, community, and resources. Going forward, Title IX compliance will be enhanced through training that is effectively integrated into the response and grievance processes. Further, the campus community must be notified of the institution's Title IX policies as revised, which should include addressing their requirements in orientation materials at the start of the upcoming academic year and in updated communications thereafter.

Education program or activity

The regulations state that, for Title IX purposes, an “education program or activity” includes “locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.” Thus, unlike the proposed regulations, the final rules confirm that events at the off-campus housing of a recognized fraternity or sorority fall within their provisions. Applying the scope of this definition may present determinations of what constitutes a “program or activity” in online education and remote learning, since factual questions could arise over questions of control and context.

The regulations apply to sexual harassment that occurs in an education program or activity against a person in the United States, and do not cover sexual harassment in study-abroad programs. However, schools may respond to and address sexual harassment in abroad programs under their code of conduct provisions.

Definition of sexual harassment

Sexual harassment, as defined in the regulations, means conduct on the basis of sex that entails *one or more* of the following: (i) *quid pro quo* sexual misconduct by a school employee; (ii) unwelcome conduct that a reasonable person would determine is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school’s education program or activity; or (iii) sexual assault (as defined in the Clery Act), dating violence, domestic violence, or stalking as defined in the Violence Against Women Act (“VAWA”). The Department’s incorporation of the four Clery/VAWA offenses clarifies that a single incident of such misconduct is subject to the regulations.

Regarding the second alternative in the definition, the Department incorporates the Supreme Court’s holding in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), in an effort to bring uniformity to judicial and administrative determinations of what constitutes actionable sexual harassment. Yet, the application of the *Davis* standard may not always be clear-cut, because factual questions about severity, pervasiveness, and objectively offense conduct can result in prolonged disputes in litigation, with judges making varying determinations about actionable sexual harassment. In contrast to the protracted proceedings of civil litigation, school administrators — particularly Title IX Coordinators — will be making real-time assessments of questions that can present nuanced and vexing issues.

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. The Title IX Coordinator must consider the complainant’s wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain the process for filing a formal complaint. Supportive measures should also be available to the person accused of sexual harassment. Supportive measures must be non-punitive and restore equal access to the school’s education programs and activities. The school must keep the supportive measures confidential to the extent that doing so will not impair implementing them.

The Title IX Coordinator must monitor the effectiveness of the supportive measures, particularly after the filing of a formal complaint and during the investigation and adjudication of the case. The regulations require that colleges and universities have “reasonably prompt” periods for carrying out the steps in the Title IX process, so cases will vary in duration based upon their facts and issues. Because the regulations afford the parties the right to inspect and review all of the evidence obtained as part of the investigation, review and respond to the investigative report, and prepare for the hearing, all of these steps could heighten the emotional impacts of the process as it ensues and the parties assess the evidence pertaining to the incident(s) at issue. By necessity, supportive measures will be an evolving process, requiring adjustments as appropriate.

Emergency removal

The regulations permit the removal of a respondent from an education program or activity, but only after an institution undertakes a careful “individualized safety and risk analysis” and determines that the physical health or safety of students or employees justifies the removal action. Any such decision must be cautiously weighed and fully documented, since an improper action would taint and delay the entire grievance process. If an emergency removal is deemed justified, the respondent must be afforded notice and the opportunity to challenge the decision immediately.

Before exercising the option to remove a student on an emergency basis, schools should evaluate the full usage of alternative supportive measures. If they do not take this step, increased activity in the courts is likely, where removed respondents will seek injunctive relief to challenge the sufficiency of the safety and risk analysis and the justification for the removal action. Also, the regulations instruct that schools must remain cognizant of the respondent’s rights under Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act. The emergency removal provisions do not preclude a school from placing a *non-student employee* respondent on administrative leave during the pendency of an investigation.

Cross-examination at the hearing

In future alerts, we will delve into the regulation’s requirements for the filing and receipt of formal complaints, and the ensuing processes for investigations and hearings. One of the most widely discussed aspects of the regulations is the establishment of a right to cross-examine the parties and witnesses at a hearing. At the request of either party, the school must provide for the required live hearing to occur with the parties located in separate rooms, with proper technology to enable the decision-makers and parties to see and hear the witnesses testify. Training in the usage of such technology should occur before the hearing to ensure proper execution.

The party’s advisor, not the party, is designated to conduct the cross-examination, with only “relevant” questions allowed. Again, training will be vital to enable the decision-makers to have the proper foundations and confidence to understand, evaluate, and apply evidentiary principles of “relevance.” Decision-makers must provide an explanation for excluding a question.

The regulations incorporate “rape shield” protections into this analysis. Questions about predisposition or prior sexual behavior are deemed not relevant, unless such questions and evidence about the complainant’s prior sexual behavior are offered to prove someone other than the respondent committed the alleged conduct, or if the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent. Such challenging evidentiary rulings will require quick determinations by non-judicially-trained presiding panelists, and could become strong points of contention during the

hearing. Also, the requirement of hearings for employee respondents may be different from existing human resources policies and practices.

Remote hearings allowed

Live hearings may be conducted with the parties physically present in the same geographic location or, at the school's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually. Some schools have conducted remote hearings during the pandemic, and courts have authorized their usage with assurances of fairness in their application. Again, the proper training of participants and adequacy of the technology will be vital. Also, consideration must be given for allowing parties to confer privately with their respective advisors, who may be in different locations (such as through the use of private "e-rooms").

Whether conducted live with all participants present or with some or all participating remotely, the school must create and maintain an audio or audiovisual recording, or a transcript, that will be available to the parties for inspection or review.

Standard of evidence

The school's grievance process must state the standard of evidence that will be applied to determine responsibility. In crafting its policy, the school has the option of selecting the preponderance-of-evidence standard or clear-and-convincing standard. However, it must apply the same standard of evidence for formal complaints against employees, including faculty. Consequently, this requirement of uniformity necessitates that the school must consider applicable requirements under its existing faculty rules and collective bargaining agreements. The school's choice of the applicable standard should not be made without full consideration of all implications, because it will apply to formal complaints against both students and employees.

Appeals

The school must offer both parties an appeal from a determination regarding responsibility. In addition, there is a new and significant aspect of the required appeal processes with respect to dismissals of complaints or allegations. If the Title IX Coordinator determines, before the hearing stage, that the conduct alleged in the formal complaint — even if proven — does not constitute sexual harassment (as defined above), or that the alleged misconduct did not occur in the school's program or activities, then the school must dismiss the formal complaint under Title IX (although it may take other action under its code of conduct). Discretionary dismissals are also allowed when a complainant informs the Title IX Coordinator that they wish to withdraw the formal complaint or any allegations, the respondent is no longer enrolled or employed by the school, or specific circumstances prevent the school from gathering evidence sufficient to reach a determination about the formal complaint or any of its allegations. The school's appellate process must allow for the appeal of its dismissal of a formal complaint or any of its allegations.

The permissible bases for appeal include: procedural irregularity that affected the outcome; new evidence that was not reasonably available at the time the determination of responsibility or dismissal was made that could affect the outcome; and/or the Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias that affected the outcome. A school may offer an appeal, equally to both parties, on additional bases.

Recordkeeping

The regulations impose a seven-year records retention requirement. Specifically, the period applies to records of supportive measures, the investigation of a formal complaint, the hearing, an appeal, an informal resolution, and training materials. While some schools may already keep such records for this time period or even longer, all records retention policies and protocols should be reviewed and modified as appropriate to ensure compliance and prevent improper or inadvertent destruction.

Looking ahead

As colleges and universities review and apply the regulations, we will issue alerts focusing on particular aspects, and provide recommendations and guidance about proper implementation. In the meantime, we offer these initial thoughts to highlight important topics for consideration as you move forward.

For more information about the content of this alert, please contact your Nixon Peabody attorney or:

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