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***A New Day on Campus:
The Final Title IX Regulations***

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Agenda

1. What do the final Title IX regulations require?
2. What changes will colleges and universities need to make?
3. What are the next steps for the Department's Office for Civil Rights (OCR)?
4. HMBR Title IX resources at www.hmbr.com:
 - *Summary of Key Provisions in New Title IX Regulations*
 - *Desktop Title IX Guide and Accompanying Glossary*

Final Title IX Regulations Addressing Sexual Harassment

- *Final Title IX Regulations* issued May 6, 2020
- Accompanied by:
 - Press Release
 - Fact Sheet
 - Final Rule Overview
 - Comparison Charts of Major Provisions
 - Videos (Secretary; OCR)
- Available at www.ed.gov



Keep in mind . . .



- Final regulations are largely the same as the proposed regulations with some clarifications
- Focus on regulations – preamble is illustrative, not legally binding
- Official regulations expected to be published in *Federal Register* on May 19, 2020
- Effective date: August 14, 2020
- Stay tuned: litigation filed, possible Congressional action, and national elections looming



Title IX+

Addressing Sexual Misconduct Outside the Scope of Title IX

- Final regulations are a floor, not a ceiling
- Schools may go ***beyond Title IX***
- If the alleged conduct in **a formal complaint** is outside the scope of Title IX (would not constitute **sexual harassment** or did not occur in **an educational program** or did not occur against a **person in the United States**), the school:
 - *Must dismiss* the formal Title IX complaint *as a Title IX matter*
 - *May address* the conduct with *non-Title IX procedures*

What Do the Final Title IX Regulations Require?

Title IX Regulations – What's New or Different?

***Existing* Procedural requirements**

- Relate to Title IX Coordinator, nondiscrimination notice, grievance procedures, and retaliation
- Apply to all sex discrimination matters, including but not limited to sexual harassment
- Updated to reflect more current technology (email, internet)
- Added *new* language relating specifically to sexual harassment in the provisions relating to the Title IX Coordinator, grievance procedures, and retaliation.

New Sexual Harassment Requirements

- *New definitions: Section 106.30, Definitions*
- *New regulation: Section 106.44, Recipient's Response to Sexual Harassment*
- *New regulation: Section 106.45, Grievance Process for Formal Complaints of Sexual Harassment*

General Procedural Requirements relating to Sex Discrimination

Title IX Coordinator

- Requires email address as part of contact information
- *New:* Reports may be made to the Title IX Coordinator by multiple methods at anytime

Nondiscrimination Notice

- Requires posting on institution's website

Grievance Procedures

- General provision applies to “sex discrimination”
- *New:* Section 106.45 applies to “sexual harassment”

Retaliation

- *New:* Retaliation may include bringing charges against an individual for violations related to complaint of sex discrimination

Two New Title IX Provisions relating to Sexual Harassment

New Section 106.44 -

Recipient's Response to Sexual Harassment

Sets forth “deliberate indifference” as the new liability standard to be used by OCR in administrative cases

New Section 106.45 –

Grievance Process for Formal Complaints of Sexual Harassment

- Essentially defines what the phrase, “prompt and equitable”, means in the context of sexual harassment
- Lists 10 specific “basic requirements” for grievance processes for sexual harassment
- Describes specific requirements for the investigation and adjudication of a formal complaint of sexual harassment



New Section 106.44: Response to Sexual Harassment

- A college or university must respond in a manner that is **not deliberately indifferent** to **actual notice** of **sexual harassment** that is in **an education program or activity** and **against a person in the United States**.
- “Deliberate indifference” means “clearly unreasonable”
- Requires recipient to:
 - With or without formal complaint, offer supportive measures to the complainant and, as appropriate, the respondent
 - For formal complaints, follow grievance process required by Section 106.45 before imposing disciplinary sanctions or other actions on the respondent

Obligation to Respond to Sexual Harassment

Is the alleged misconduct within the **scope of Title IX**?

YES

- In **all cases**,
 - *Must* not respond with deliberate indifference
 - *Must* offer supportive measures
- Was a **formal complaint** filed?
 - If yes, *must* also comply with Section 106.45 requirements
 - If no, *must* offer supportive measures

NO

- *Must* dismiss formal complaint as Title IX matter
- *May* address as a non-Title IX matter

Within the Scope of Title IX

- 1. Actual notice**
- 2. Sexual harassment**
- 3. In an educational program or activity**
- 4. Against a person in the United States**

Key Terms

Actual Notice

- Notice of alleged sexual harassment to Title IX Coordinator or other official with authority to institute corrective measures
- Not the same as “responsible employee”
- May be filed *by any person and at any time* with the Title IX Coordinator

Sexual Harassment

1. Quid pro quo
2. VAWA: sexual assault, domestic violence, dating violence, stalking
3. Hostile environment - harassment that is:
 - From the perspective of a reasonable person
 - So severe and pervasive and objectively offensive
 - That it effectively denies equal access to education program of activity

Key Terms (continued)

In an education program or activity

- Locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurs
- Any building owned or controlled by a student organization that is officially recognized by the school (e.g., fraternity or sorority)
- Off campus included only if part of education program or activity or unless further conduct occurs within program or activity

Against a person in the United States

- No extraterritoriality
- Does not apply to study abroad programs


Supportive Measures

- Non-disciplinary, non-punitive individualized services
- Designed to restore or preserve equal access to the education program or activity without unreasonably burdening the other party
- Must consider complainant's "wishes"
- Must be offered as appropriate, reasonably available, & confidentially:
 - To the complainant and the respondent
 - When there is an allegation of misconduct within the scope of Title IX
 - Before or after filing of formal complaint or if no formal complaint
 - Without fee or charge
- Title IX Coordinator is responsible for coordinating the implementation and for contacting complainant about supportive measures



Formal Complaint of Sexual Harassment

- May be *filed by* Complainant or *signed* by Title IX Coordinator
- Complainant may file electronically with physical or digital signature
- Complainant – must be participating in or attempting to participate in the education program or activity
- Respondent – formal complaint may be dismissed if respondent is no longer enrolled or employed
- Title IX Coordinator is not a complainant or party to proceeding even if he/she signs the formal complaint



New Section 106.45: Grievance Process for Formal Complaints of Sexual Harassment

- Allows informal resolution
- Requires written notice to the parties upon receipt of a formal complaint
- Lists bases for mandatory and permissive dismissals
- Essentially defines what “prompt and equitable” means in the context of sexual harassment:
 - Specifies 10 “basic requirements” for grievance processes for sexual harassment and emphasizes that any other rules adopted as part of a grievance process must apply equally to both parties
 - Describes specific requirements for the investigation and adjudication of a formal complaint of sexual harassment
 - Prohibits discriminatory treatment of either party in response to a formal complaint

Informal Resolution

- Optional process for investigation
- Available at any time after issuance of the initial written notice to the parties and prior to issuance of a written determination regarding responsibility
- Notice to parties required of allegations, the informal resolution process, and right to withdraw from informal process and resume formal process
- Full disclosure to parties required
- Voluntary written consent of parties required
- *New: May not be used to resolve allegations that an employee sexually harassed a student*

Dismissal and Consolidation of Formal Complaints

Dismissal “for Title IX purposes”

- *Must* dismiss formal complaint if not within the scope of Title IX (does not meet definition of sexual harassment, did not occur in education program or activity, or did not occur against person in the United States)
- *May* dismiss if:
 - Complainant requests to withdraw
 - Respondent is no longer enrolled or employed
 - “Specific circumstances prevent the recipient from gathering evidence sufficient to make a determination”
- *May* still address misconduct in dismissed formal complaint using non-Title IX policies

Consolidation

- Permitted for multiple complaints and/or multiple respondents when allegations “arise out of the same facts or circumstances”



Basic Requirements for Grievance Process for Formal Complaints of Sexual Harassment

- Treat complainants and respondents equitably
- Objective evaluation of all relevant evidence
- No bias or conflict of interest
- Training for Title IX Coordinator(s), investigator(s), hearing officer(s), any other decision-maker(s), & informal resolution facilitator(s)
- Presumption that the respondent is not responsible
- Reasonably prompt timeframes, extensions for good cause
- Standard of evidence: *Preponderance* (more likely than not) or *Clear and Convincing* (highly probable)
- Possible disciplinary sanctions and remedies
- Appeal procedures (newly mandatory)
- Supportive measures available to both parties
- Restrictions relating to privilege



Additional Requirements for the Investigation and Adjudication of a Formal Complaint

1. Initial and continuing notice to parties
2. Burdens of proof and of gathering evidence rest on school
3. Equal opportunity for parties to present witnesses, including fact and expert witnesses, as well as inculpatory and exculpatory evidence
4. No gag orders
5. Advisor of choice
6. Written notice of hearings, interview and meetings
7. Access to evidence: equal opportunity to inspect and review
8. Investigation report: must “fairly summarize evidence” and be provided to the parties for review and response at least 10 days prior to the hearing
9. Live Hearing, with opportunity for cross-examination
10. Written determination regarding responsibility



Live Hearings

- Live hearing required in every case
- To be conducted by the decision-maker(s), who are
- either the hearing officer or multiple hearing officers (a hearing panel)
- May be held in the same geographic location or virtually
 - Location to be determined by recipient
 - Technology must allow the parties (and their advisors) to see and hear one another and any witnesses
- Recording or transcript of hearing required
- School must provide free advisor for a party at a hearing if the party does not have an advisor for the hearing – just for cross-examination?

Live Hearings – Cross-examination

- *Advisors* must be allowed to cross-examine parties and witnesses
- Must be conducted directly, orally, and in real time
- If a party or witness does not submit to cross examination at the live hearing, the hearing officer or panel must not rely upon any statement in reaching a determination regarding responsibility



Live Hearings - Relevancy

- Only *relevant* cross-examination and other questions allowed
- Hearing officer(s) must make a determination as to relevancy -- before party or witness answers any question
- Hearing officer(s) must explain any decision to exclude a question as “not relevant”
- Questions about the complainant’s prior sexual predisposition or prior sexual behavior are not relevant, unless:
 - offered to provide someone else committed alleged misconduct, or
 - offered to prove consent and the evidence concerns specific incidents between the parties and is offered to prove consent
- Hearing officer(s) must receive training on issues of relevancy and evidence

Written Determinations

- Hearing officer(s) must issue written determination to the parties simultaneously
- Hearing officer(s) cannot be the Title IX Coordinator or investigator(s)
- Must include:
 - Allegation(s)
 - Procedural Steps
 - Findings of fact
 - Conclusions
 - Statement and rationale for each allegation, including determination regarding responsibility, any disciplinary sanctions for respondent, and any remedies for complainant
 - Appeal procedures

Appeals

- Opportunity to appeal required for both parties (including opportunity to submit written statement)
- Appeal decision-maker(s) cannot be same as decision-maker regarding responsibility or dismissal, Title IX Coordinator, or investigator(s)
- Appeals may be made of determination of responsibility and of dismissal of case – appeals of disciplinary sanctions or remedies?
- Bases for appeals:
 - Procedural irregularity that affected outcome
 - New evidence not reasonably available previously that could affect outcome
 - Title IX Coordinator, investigator(s) or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome

Recordkeeping

- Extensive recordkeeping required: investigation, disciplinary sanctions, remedies, appeals, informal resolution, and training materials
- Records must be maintained for seven years
- Training materials must be posted on school website



What Changes do Colleges and Universities Need to Make?



Revised Policies and Procedures for Title IX Sexual Harassment

- ✓ Must apply to students and employees
- ✓ More limited Title IX scope, including revised sexual harassment definition and more limited jurisdiction
- ✓ Supportive measures for both parties
- ✓ Specific grievance process requirements for formal complaints – including live hearing and cross-examination
- ✓ Preponderance or clear and convincing standard of evidence
- ✓ Informal resolution opportunities
- ✓ Mandatory Training for involved officials
- ✓ Mandatory Appeals, including bases and procedures
- ✓ Recordkeeping (7 years, including training materials)



Organizational Structure

- ✓ Employees – Title IX requirements apply (even to at-will employees)
- ✓ Title IX Coordinator
 - Cannot be decision-maker
 - Responsible for coordinating overall Title IX compliance
 - Responsible for implementing “effective” supportive measures
- ✓ “Official with authority to take corrective action”
- ✓ “Responsible employees”
- ✓ Investigator(s)
- ✓ Decision-maker(s) – determinations of responsibility; appeals
- ✓ Hearing officers or hearing panels
- ✓ Advisors for cross-examination at hearings



Campus Culture

- ✓ New training for:
 - Students
 - Employees, including “those with authority to take corrective action” and “responsible employees”
 - Mandatory training -- to be posted on website -- for:
 - Title IX Coordinator
 - Investigator(s)
 - Decision-maker(s), including hearing officers or panels
 - Informal Resolution Facilitator(s)
- ✓ Community expectations – be clear in communications about continued commitment to prevent and address sexual harassment

Next Steps for OCR

Harassment Cases

No *retroactive enforcement* of final regulations.

- Open Cases
- Resolution Agreements
- New Complaints

Technical Assistance

- Outreach, Prevention, Education and Non-discrimination Center – New OCR technical assistance office
- Videos on Final Title IX regulations, by Secretary Betsy DeVos and OCR Assistant Secretary Kenneth Marcus, available at www.ed.gov

HMBR Title IX Compliance

HMBR Services

- Title IX advice & consult
- External investigations
- Compliance audits
- Policies & procedures
- Independent consultants
- External Hearing Officer
- Advisors
- Mediators
- Training, including for hearing officers



HMBR Resources (www.hmbr.com)

- *Summary of Final Title IX Regulations*
- *Desk Top Guide and Glossary on Final Title IX Regulations*
- Webinars (to be announced)
- SUNY Joint Guidance: <https://system.suny.edu/sci/tix2020/>

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