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The New Title IX: A World of Uncertainty

The new Title IX regulations are a game-changer. Their entry into force on August 14, 2020—just three months after they were first issued—left many schools scrambling to draft and implement new, compliant Title IX policies and procedures. Meanwhile, various organizations and attorneys general from 18 different states filed lawsuits challenging the regulations, putting their legal status into question. And to top it off, President-elect Joe Biden has vowed to put a "quick end" to them, but the process for doing so could be lengthy and uncertain. Schools must now come to grips with a dramatically changed Title IX landscape whose future is unclear, making compliance challenging.

Title IX of the Education Amendments Act of 1972 prohibits discrimination and harassment on the basis of sex in education programs or activities that receive federal financial assistance. The new regulations promulgated this year are the first since 1975, and they significantly alter educational institutions' Title IX obligations. Among other things, they redefine key terms and concepts, and they also require extensive procedural changes to the complaint resolution process. In general, these changes serve to narrow what qualifies as Title IX sexual harassment as well as to limit when schools must respond to it; at the same time, they incorporate significant, additional due process requirements designed to offer further protections primarily to respondents in Title IX proceedings.

The definition of "sexual harassment" is one of the biggest changes the 2020 regulations introduce. "Sexual harassment" is not defined in Title IX itself, but previous guidance developed a three-pronged definitional approach, which includes (i) "quid pro quo" type behavior (conditioning a benefit on an individual's participation in unwelcome sexual conduct); (ii) "unwelcome conduct" that is so "severe, pervasive, or objectively offensive" (emphasis added) that it "effectively denies a person equal access to the school's education program or activity"; and (iii) sexual violence, such as sexual assault. The new regulations maintain the three-pronged approach, but significantly alter the second prong. In order to qualify as "sexual harassment," "unwelcome conduct" must now be "severe, pervasive and objectively offensive" (emphasis added)—a considerably higher threshold, whose effect remains unclear but could be dramatic. In addition, the regulations establish that in general, only on-campus conduct involving persons in the United States is covered. This means conduct occurring on study abroad programs, which might otherwise qualify as sexual harassment, is not governed by Title IX. The regulations do, however, arguably broaden what constitutes Title IX sexual harassment by confirming that relationship violence, such as domestic violence and stalking, are covered conduct.

Other key Title IX terms and concepts have also changed. The 2020 regulations limit the situations in which schools are required to respond to sexual harassment under Title IX. Previous guidance called upon schools to take responsive measures if they "reasonably should have known" of covered sexual harassment, but the new regulations incorporate an "actual knowledge" standard, defined to mean "notice to the Title IX Coordinator or any official with authority to institute corrective measures on behalf of the school." The standard of proof for resolving complaints under Title IX has changed as well: Where before, schools were instructed to use a "preponderance of the evidence" standard, schools now have the option of using the more demanding "clear and convincing" standard of proof, provided they apply the same standard to all Title IX proceedings. In addition, reportedly in an effort to make Title IX terminology more neutral, the new regulations refer to the alleged victim and perpetrator of challenged sexual conduct as the "complainant" and "respondent." Further, they require schools to notify both parties that the respondent is presumed not to be responsible for the alleged conduct unless and until a formal determination has been made regarding responsibility.

The changes that have received the most attention, however, are procedural in nature. The new Title IX regulations do away with the "single investigator model," delineating separate roles for the investigator, the hearing officer(s) and the person(s) presiding over any appeals, and making clear that different individuals must fill each of these roles. The regulations also

emphasize repeatedly that each of these individuals must be well trained and free from any bias or conflict of interest, suggesting schools may find it appropriate in certain situations to seek outside assistance in resolving Title IX complaints.

A significant group of changes concern live hearings with mandatory cross-examination, which are now required at the postsecondary level in order to adjudicate a Title IX complaint. Colleges and universities must now provide complainants and respondents with advisors at the school's own expense, and those advisors must be permitted to cross-examine all witnesses at the hearing directly, orally and in real time. Should a witness refuse to submit to cross-examination, the penalty is heavy: That witness's testimony must not be considered by the hearing officer in determining responsibility. The presiding hearing officer must also be prepared to decide on the spot whether questions posed to witnesses are relevant, and to explain on the record (which must be preserved for at least seven years) the reasons for any decision to exclude testimony. All of these new requirements make the Title IX adjudication process much more adversarial and court-like in character than it was under previous guidance.

The new regulations also require schools to offer appeals on specific grounds, including procedural irregularities, newly discovered evidence, and purported conflict of interest or bias of Title IX personnel. In addition, schools are given the option to provide for appeals on other grounds, such as insufficient evidence, so long as they offer such appeals equally to both complainants and respondents.

Schools are, however, offered one avenue to resolve Title IX complaints outside of formal hearings and appeals procedures. The new regulations explicitly permit informal resolution options, such as mediation or restorative justice, provided both parties give voluntary, informed, written consent. This opportunity is a departure from previous guidance, which frowned upon mediation. It is also a potential boon for schools, which, depending on the interest of the parties and the quality of the mediator, may be able to achieve just results without the time and expense associated with formal Title IX procedures. Informal resolution is not permitted in situations involving allegations that an employee sexually harassed a student.

The changes outlined above are significant and far-reaching, and they require schools to take considerable steps in order to remain in compliance with Title IX. They only apply, however, to conduct governed by Title IX. Schools are free to maintain their own, separate policies governing conduct that may not fall into the narrowed Title IX definition of sexual harassment, but for which schools determine disciplinary proceedings may still be appropriate. As a result, many schools have implemented parallel tracks governing sexual harassment complaints, either of which may apply depending on whether the allegations fit into the new parameters of Title IX.

The amount of time this state of affairs will persist is uncertain. In 2021, everything may change all over again if the Biden administration takes steps to undo the new Title IX regulations. Since they have the force of law and were enacted after a years-long notice and comment period in accordance with the Administrative Procedures Act, however, they will be difficult to dismantle unless Congress elects to do so statutorily. Going back to the previous Title IX standards would likely require a similarly involved and time-consuming process. As an interim measure, Biden's administration could signal to educational institutions that it will ignore violations of the new rules, but this would not prevent students from filing suit against their schools for failing to follow required procedures. Consequently, to avoid litigation risk and for the foreseeable future, educational institutions are best served to apply policies and procedures that comply with the new Title IX regulations, and to take care that those who investigate and preside over Title IX complaint resolution processes are neutral and well versed in Title IX's requirements.

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