

CLIENT NEWS BRIEF

New Title IX Regulations Issued by the Department of Education Take Effect August 14, 2020

On May 6, 2020, the United States Department of Education (DOE) issued much-anticipated Regulations (Regulations) addressing how schools and colleges (referred to as Recipients) must respond to claims of sexual harassment covered by Title IX of the Education Amendments of 1972 (Title IX). Title IX is the federal law which prohibits discrimination on the basis of sex in educational settings. The Regulations make significant changes to current requirements and practices and require compliance by August 14, 2020. Some of the most notable changes imposed by the Regulations are detailed below.

Sexual Harassment is Narrowly Defined

Sexual harassment is now narrowly defined to mean conduct on the basis of sex that satisfies one or more of the following:

1. Any employee of the Recipient conditioning the provision of an aid, benefit, or service of the Recipient on an individual's participation in unwelcome sexual conduct;
2. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it denies a person equal access to the Recipient's educational program; or
3. Sexual assault (as defined in the Clery Act (20 U.S.C. § 1092(f)(6)(A)(v)), or dating violence, domestic violence, or stalking (as defined in the Violence Against Women Act (20 U.S.C. § 12291(a)).

A Single Investigator/Decision-Maker Model is Prohibited

The Regulations clearly provide that the decision-maker, or the person(s) responsible for determining responsibility, cannot be the same person as the Title IX Coordinator or the investigator. Moreover, in the event of an appeal, the appellate decision-maker cannot be the same person who served as the Title IX Coordinator, investigator, or decision-maker making the original determination. Among other things, the decision-maker must also issue a written determination regarding responsibility in accordance with the Regulations at section 106.45(b)(7).

Disclosure of Evidence

As part of the formal grievance process, detailed within section 106.45 of the Regulations, both parties and their advisors must be given the opportunity to inspect, review, and respond to all evidence that is directly related to the allegations in the formal complaint, before the investigator completes the investigation report. Additionally, the final investigative report must be provided to the parties and their advisors at least 10 days before any hearing, if there is one.

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As the information contained herein is necessarily general, its application to a particular set of facts and circumstances may vary. For this reason, this News Brief does not constitute legal advice. We recommend that you consult with your counsel prior to acting on the information contained herein.

Live Hearings Are Required for Postsecondary Recipients

Post-secondary Recipients must have live hearings that permit the cross-examination of the involved parties and witnesses. Cross-examination must be conducted by the advisor, and not by the parties themselves. If a party does not have their own advisor, one must be provided by the Recipient at no cost. The decision-maker overseeing the hearing must determine whether each question posed by the advisor is relevant and explain any decision to exclude a question. Live hearings may be conducted with all parties physically present in the same location, or may be conducted virtually. If a party or witness does not submit to cross-examination at the live hearing, the decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility.

Under the Regulations, K-12 Recipients have the option of conducting live hearings, though live hearings are still mandated under California Education Code section 48900 et seq. prior to the expulsion of any student. For K-12 Recipients, whether a hearing is conducted or not, once the investigative report has been sent to the parties and before reaching a determination regarding responsibility, the decision-maker must afford each party the opportunity to submit written questions they want asked of any party or witness. Answers to relevant questions must be provided along with additional, limited follow-up questions from each party.

Recipients Must Choose and Consistently Apply the Standard of Evidence

A Recipient can decide whether the standard of evidence to be used during the grievance process is the “preponderance of the evidence” or the “clear and convincing evidence” standard. The standard used must be consistent whether the respondent is a student or an employee, and with all other formal investigation processes.

The Option to Appeal Must Be Afforded to Both Parties

Both complainant and respondent must be offered the opportunity to appeal a determination regarding responsibility, and from a dismissal of a formal complaint or any allegation therein. Appeals may be based on (i) procedural irregularity; (ii) new evidence that was not reasonably available at the time of the determination or dismissal; or (iii) conflict of interest or bias of the involved Title IX personnel.

Records Must Be Maintained for 7 Years

A Recipient must maintain for a period of seven years, all records relating to sexual harassment investigations, any appeal and the results therefrom, any information resolution and the results therefrom, and all materials used to train Title IX Coordinators, investigators, decision-makers, or any person who facilitates an informal process.

Takeaways

The over 2,000 page document presents sweeping changes that are required for Recipients in their implementation and handling of Title IX complaints. The above highlights some of the key changes, though by no means is an extensive or complete outline of the Regulations. By August 14, 2020, all Recipients will need to update their policies and procedures, train personnel, and in some cases add personnel to their Title IX teams. It is important that the new requirements be included in student discipline procedures, as well as employee complaint and discipline procedures.

If you have any questions about the new Title IX Regulation, Investigations or Title IX in general, please contact the authors of this Client News Brief or an attorney at one of our [eight offices](#) located statewide. You can also subscribe to our [podcast](#), follow us on [Facebook](#), [Twitter](#) and [LinkedIn](#) or download our [mobile app](#).

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