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New Title IX Rules: Navigating Compliance Across Campus

Client Alerts

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On April 19, 2024, the US Department of Education issued the final version of its new and long-awaited Title IX regulations. The Final Rule's release follows a notice-and-comment period that drew over 240,000 comments from interested parties after the initial Notice of Proposed Rulemaking was issued in June 2022. The new regulations modify the regulatory regime introduced in 2020 by the Trump Administration, especially with respect to investigative and disciplinary proceedings for cases of sexual misconduct. They also expand the scope of institutional obligations in several respects. They will take effect on August 1, 2024.

This article highlights key changes introduced by the Final Rule and provides practical guidance for educational institutions as they work to come into compliance over the next three months.

1. Adapting to the Rules' Expanded Scope

The new regulations extend Title IX's coverage and institutions' response obligations in meaningful ways, including but not limited to the following:

- The regulations expand Title IX's prohibitions to include discrimination or harassment on the basis of sexual orientation and gender identity, consistent with the Supreme Court's interpretation in *Bostock v. Clayton County*.[1] They also prohibit policies and practices which prevent a student from participating in a program consistent with their gender identity, with a few exceptions.[2]

- The regulations broaden the group of employees who must notify the Title IX coordinator when they have information about conduct **that reasonably may constitute sex discrimination** under Title IX to include all those who are not confidential employees and who have authority to institute corrective measures on behalf of the institution or who have responsibility for administrative leadership, teaching, or advising in the educational program.[3]

- The regulations lower the threshold of hostile environment harassment to include any "unwelcome sex-based conduct that, based on the totality of the circumstances, is subjectively

and objectively offensive and is **so severe or pervasive** that it **limits or denies** a person's ability to participate in or benefit from the recipient's education program or activity."[4]

- The regulations broaden the scope of individuals with the right to make a complaint of sex discrimination other than sex-based harassment to include students (which includes those who have gained admission but not matriculated), employees, and those who "**participat[e] or attempt[] to participate in the [institution's] education program or activity** at the time of the alleged sex discrimination."[5]

- The regulations clarify that **off campus conduct** that contributes to a sex-based hostile environment requires investigation if it is subject to the institution's disciplinary authority.[6]

Coming into compliance with these changes by August 1 will require prompt updates to employee training and resources. Institutions should move quickly to identify (1) who will need to be trained on the updated regulations; and (2) how pre-existing resources for educating campus stakeholders on their obligations will need to be modified to reflect the definitions, scope, and notification requirements under the new regulations. Additionally, because the expanded scope of the new rules may lead to an increased volume of complaints, institutions should contemplate potential changes to staffing and office resources.

2. Modifying Grievance Procedures

The Final Rule modifies existing regulations on grievance procedures in several important respects. For example, the new regulations implement a preponderance of the evidence standard of proof for sex discrimination claims unless the school uses the clear and convincing evidence standard in all other comparable proceedings.[7]

Institutions must adopt, publish, and implement grievance procedures consistent with the new regulations. This will be a familiar exercise for those that needed to move into compliance with the Trump-era regulations. Once the revised procedures have been finalized, Title IX coordinators and personnel—as well as external partners who may assist with investigations and/or adjudications—will need to be trained on them.

The procedural changes contained in the Final Rule generally, although not exclusively, increase the ability of institutions to exercise their discretion in establishing an effective grievance process. For

example, the new rules no longer require, nor do they prohibit, live hearings or the cross-examination of parties.[8] Even without this requirement, however, the Final Rule still includes conditions designed to protect the ability of the decision-maker to question parties and for parties to access a record of that questioning. Institutions should carefully consider the implications of the various paths open to them under the new regulations. Note that where institutions choose to adopt procedures that apply to some but not all complaints of sex discrimination, the rules require the institution to articulate consistent principles for determining how the procedures will apply. Additionally, institutions should ensure all modified procedures and accompanying policy materials comply with other federal and state laws and regulations or any other contractual constraints.

3. Complying with New Protections for Pregnant and Parenting Students and Employees

Title IX has long prohibited discrimination based on pregnancy or related conditions. The new regulations strengthen protections for these classes—namely, safeguarding students, employees, and applicants against discrimination based on pregnancy, childbirth, termination of pregnancy, lactation, related medical conditions, and recovery—by adding affirmative obligations for institutions.

First, in the event a student notifies an employee of the student's pregnancy or related condition(s), the employee must provide the student with the Title IX coordinator's contact information and inform the student that the Title IX coordinator can "coordinate specific actions to prevent sex discrimination and ensure the student's equal access to the recipient's education program or activity."[9] Consistent with other Title IX obligations, institutions will need to ensure that their employees are adequately trained to implement this requirement.

Second, institutions are required to provide students and employees access to a lactation space.[10] While the Final Rule does not provide specific requirements for the size or setup of lactation spaces, it does require such spaces be "clean, shielded from view, [and] free from intrusion from others." It cannot be a bathroom. The regulations are silent on the number of lactation spaces needed. Institutions will need to exercise good judgment in ensuring that there are enough spaces available relative to the size of their workforces and student bodies, and that such spaces are not prohibitively far from where employees and students conduct their activities. Some institutions may not currently have spaces meeting the Rule's requirements readily available. If so, institutions should move quickly and engage necessary stakeholders soon to identify and prepare appropriate spaces by August 1.

Third, the new regulations require that institutions provide employees with "reasonable break time" for lactation.[11] Institutions will need to ensure that employees who are "expressing breast milk or breastfeeding"—the latter of which necessarily implies that institutions must allow, in some fashion, employees to bring nursing children into the institution's education program or activity—have

adequate time and access to a lactation space. To ensure employees have time, institutions may consider adjusting timekeeping policies and practices to not burden or disadvantage lactating employees.

Finally, institutions must make "reasonable modifications" for students who are pregnant or have a related condition.[12] Although somewhat ambiguous, the Final Rule states that reasonable modifications must be based on each student's "individualized needs."[13] Indeed, emphasizing the subjectivity of this standard, the Rule adds that institutions must "consult with the student" to satisfy this requirement.[14] Institutions should prepare resources to facilitate conversations with students seeking modifications. However, while institutions will need to be ready to provide a range of potential modifications, they will not be expected to provide anything that the institution can demonstrate would "fundamentally alter the nature of its education program or activity."

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Jenner & Block has one of the nation's preeminent higher education practice groups. We have counseled and represented institutions in numerous areas of the law, including those related to Title IX compliance and related litigation. If you are interested in learning more about our work in this area, please contact practice group Co-Chairs Ishan Bhabha (ibhabha@jenner.com), Lauren Hartz (lhartz@jenner.com), and Terri Mascherin (tmascherin@jenner.com).

Footnotes

[1] §§ 106.10, 106.2.

[2] § 106.31.

[3] § 106.44. Other employees must either notify the Title IX coordinator or provide contact information of the Title IX coordinator and information about how to make a complaint about sex discrimination.

[4] § 106.2.

[5] § 106.45. The contours of this language may warrant further clarification. The language could be read to include, for example, all spectators of college and university sporting events.

[6] § 106.11.

[7] § 106.45(h).

[8] § 106.46(g); see also, as another example, § 106.45(b)(2), which allows but does not require a "single investigator model."

[9] § 106.40(b)(2).

[10] §§ 106.40(b)(3)(v), 106.57(e)(2).

[11] § 106.57(e)(1).

[12] § 106.40(b)(3)(ii).

[13] *Id.*

[14] *Id.*

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