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Proposed Title IX Regulations Would Necessitate Extensive Changes to Institutional Policies and Practices

On November 16, 2018, more than a year after rescinding Obama administration era Title IX subregulatory guidance on colleges' and universities' obligations under Title IX, the United States Department of Education published its long-awaited proposed Title IX regulations. The proposed regulations will likely be viewed by institutions as a mixed bag. On the one hand, the regulations promise a narrower scope of enforcement and greater deference to institutional decisions. On the other hand, notwithstanding Secretary of Education Betsy DeVos's assertions that the prior administration had inappropriately imposed highly technical and overly-stringent compliance obligations on colleges and universities, the proposed regulations would legislate significantly in this area, mandating detailed new processes, many of which are arguably beyond the Department's discretion to require and some of which may create conflicts with the requirements of state laws such as New York Education Law Article 129-B. The following are some of the most noteworthy provisions.

The Adjudication Process

- The proposed regulations would impose a requirement that colleges and universities use ***a live hearing model*** to adjudicate cases of sexual harassment (including sexual assault), and a corresponding prohibition on the use of investigator models or hybrid investigator/review panel models not involving a full hearing. If adopted, these provisions will necessitate a complete overhaul of disciplinary processes at many institutions.

- One of the most controversial provisions would require institutions to allow ***cross examination on behalf of each party*** during hearings. If a party or witness does not submit to cross-examination, the institution would be precluded from considering his/her statement. Although permitted at some public institutions, "cross-examination" in its traditional sense has not been permitted at most private institutions.

- Although not allowing cross-examination by the party directly, the proposed regulations would require that a party's advisor, who may be an attorney, be permitted to directly question the other party. Even more interestingly, if a party does not have an advisor, ***the institution would be required to provide the party with an advisor to conduct cross examination*** on the party's behalf. This provision is likely to create significant burdens on institutions to train on-campus advisors in cross examination techniques and will require individuals conducting hearings to be trained in permissible and impermissible cross-examination questions. It is also likely to exacerbate imbalances arising under VAWA's existing "advisor of choice" requirements based on socioeconomic disparities (for example, in circumstances where one party retains an attorney who is highly skilled in the art of cross examination, and the other party cannot afford to pay counsel and is required to rely on an on-campus layperson advisor).

- The proposed regulations permit institutions to use the "preponderance of the evidence" standard or the "clear and convincing evidence" standard in adjudicating student cases, but with ***a requirement that the "clear and convincing evidence" standard be used if*** the institution uses that standard (a) in connection with other student disciplinary matters involving the same maximum sanction, or (b) in the adjudication of "complaints" (presumably, but not clearly, limited to sexual harassment complaints) against employees.

- A requirement that every investigation result in the creation of a ***formal written report*** containing certain specified elements. Institutions would be required to ***provide the parties with access to all evidence*** obtained during the case, including even evidence that will not be included in the formal case file to be received by the adjudicator(s). The regulations are silent as to the timing of this access (except as described below), and in particular as to whether an institution may impose reasonable restrictions on the timing of access to maintain the integrity of an ongoing investigation. Upon completion of the investigation, the institution would be required to provide the parties with copies of all such evidence (regardless of whether they have previously asked to review it) in an electronic format that does not allow them to download or copy information, and provide the parties at least 10 days to respond to that evidence prior to completing the investigative report. The institution would then be required to provide the full report to the parties at least 10 days prior to the hearing.

- In contrast to the prior administration's guidance, institutions would be permitted to use ***mediation or other informal resolution processes*** if both parties agree to do so, including in cases of sexual violence.

The Institutional Obligation to Respond

- Prior guidance created ambiguity around the question of whether an institution was required to respond to offensive conduct even if it did not rise to a legally actionable level. The proposed regulations resolve this question clearly in the negative. The proposed regulations ***limit the definition of "sexual harassment"*** to the following: (i) an institutional employee conditioning the provision of an institutional aid, benefit, or service on an individual's participation in unwelcome sexual conduct; (ii) unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the institution's education program or activity; or (iii) sexual assault, as defined in existing regulations implementing the Violence Against Women Act's amendments to the Clery Act.

- In an enforcement proceeding by the Department of Education, an institution would not be found to have violated Title IX unless the institution's response was ***deliberately indifferent*** in the face of ***actual knowledge*** of a reported incident, and the proposed regulations provide that an institution is "deliberately indifferent" only if its response to sexual harassment is clearly unreasonable in light of the known circumstances. This is the same standard courts apply when deciding Title IX claims brought in federal court. Additionally, the proposed regulations assure institutions that the Department will not find a violation simply because the Department would have reached a different result in a particular case. All of this is a clear signal that the Department intends to exercise far more restraint than the previous administration in enforcement actions.

- The definition of ***"actual knowledge"*** would be limited to circumstances in which a report has been made to the Title IX Coordinator or another institutional employee who has authority to institute corrective measures. In so doing, the proposed regulation eliminates the broad and amorphous definition of "responsible employees" under the prior guidance, which included an employee who had an obligation to report student misconduct of any kind, or who a student could reasonably believe had this obligation.

- The proposed regulations would ***require institutions to address only those reports involving alleged sexual harassment within an educational program or activity,*** defined as a situation in which an institution owns or exercises oversight, supervision or discipline over the premises at which an incident occurs, or sponsors, promotes or endorses an event or circumstance in which an incident occurs. Although an institution's Title IX obligations would not, therefore, depend entirely on geography, the regulations are likely to have the effect of excluding much off-campus conduct. The proposed regulations clarify that an institution may investigate and discipline misconduct outside the regulatory parameters if the institution chooses to do so; however, the regulations also state that institutions must "dismiss" a complaint that does not fall within the Department's definition of sexual harassment. Presumably, if an institution addresses conduct other than that covered by the Department's narrowed sexual harassment definition, the institution would be required to dismiss the complaint from the Title IX procedure and re-institute proceedings under a general conduct process. This seems unduly cumbersome, particularly given that many institutions will feel obligated to design those processes to mirror their Title IX procedures to adjudicate the same conduct in a different context.

- An institution would be ***required to commence its Title IX process*** in circumstances where a formal complaint is filed by an alleged victim with the Title IX Coordinator, or where the institution has received reports by multiple complainants of sexual harassment by the same respondent. The proposed regulations leave significant ambiguities with respect to the latter scenario, including among other things the time frame within which the multiple reports must have occurred in order to mandate a response. In addition, the regulations do not appear to allow for an individualized assessment of whether the respondent in a multi-complaint situation poses a risk of harm; an investigation simply must ensue. The regulations make clear that an institution will not be found to have violated Title IX if it does not institute a process in the absence of a formal complaint or a multiple-report scenario. Of course, many institutions will choose to investigate in other situations due to potential liability or other considerations, and the regulations do not prohibit this.

- In order to impose an ***interim suspension,*** an institution must conclude, based on an individualized analysis, that an "immediate threat to the health or safety of students or employees" is present, and must provide the suspended student with notice and an opportunity to challenge the decision immediately following the removal. In many respects, these provisions are consistent with many institutions' existing processes. The proposed regulations also provide that an institution may place an employee on administrative leave during the pendency of an investigation, apparently without the same substantive or procedural conditions.

- The proposed regulations would require institutions to create and ***make available to both parties,*** and maintain for a period of three years following conclusion of a case, ***records*** of the investigation, adjudication and appeal of a complaint, as well as copies of all materials used to train coordinators, investigators and decision makers with respect to sexual harassment. Ominously, the preamble to the regulations notes that these requirements are specifically intended to empower parties to "more effectively hold their … institutions accountable for Title IX compliance by ensuring the existence of records that could be used during an investigation by the Department or in private litigation." Institutions will need to be acutely aware that advocates for a complainant or respondent unhappy with the outcome search for any basis to argue that the process was tilted in favor of prevailing party, and this new requirement will enable those advocacy efforts.

Proposed -- Not Final -- Regulations

Formal publication of the proposed regulation in the Federal Register will commence a 60 day period during which members of the public may submit comments. The Department will consider those comments and, at some point in the future, adopt final regulations which will subsequently become effective. Before deciding whether your institution should submit a comment, a conversation with your legal counsel is in order. The anonymity offered by an association representing colleges and universities may be a preferable way to express institutional agreement or disagreement with any of the proposed regulations.

If you have any questions about the matters discussed in this Alert, please contact Philip J. Zaccheo, Laura H. Harshbarger, E. Katherine Hajjar, any of the attorneys in our Higher Education Practice, or the attorney in the firm with whom you are regularly in contact.

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