The New Title IX Regulations: Understanding the Changes and Requirements for Compliance

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Today’s Agenda

1. Brief Background
2. New Definitions
3. General Requirements
4. Notifications
5. Investigations
6. Hearings
7. Subsequent OCR Clarifications
8. Implementation Strategies

*This presentation is for general informational purposes only; it is not intended to be legal advice. Institutions should consult with their general counsel before implementing any changes
1. Brief Background

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5 P’s of Title IX Compliance
2. New Definitions

1. Actual Knowledge
2. Formal Complaint
3. Complainant/Respondent
4. Sexual Harassment
5. Consent
6. Supportive Measures

3. General Requirements

A. Equitable treatment of parties
B. Objective evaluation of all evidence
C. Train Coordinators, Investigators & Adjudicators
D. Presumption of innocence
E. Reasonably prompt grievance process timeframes
3. General Requirements (cont’d)

F. Describe or list possible sanctions or remedies—post finding of responsibility

G. Standard of evidence; process and permissible bases for parties to appeal

H. Range of supportive measures available to both parties

J. Emergency removal; “Immediate threat” assessment

K. Recordkeeping

4. Notifications

A. Written notification of institution’s grievance process and informal processes

B. Notice of allegations of potential sexual harassment; sufficient details of the incident and involved parties (if known)

C. Mandatory disclosure statements

D. Parties’ ability to have an advisor present (may be a lawyer)
4. Notifications (cont’d)

E. Ongoing notice (with sufficient information) if new allegations will be investigated

F. Notice of dismissal, if applicable
   - Mandatory dismissal; “must” dismiss
   - Permissive dismissal; “may” dismiss
   - If dismissal, institution must promptly send written notice of the dismissal and reasons simultaneously to parties

5. Investigations

A. Responsibility for burden of proof and burden of gathering evidence; respect privileged info

B. Equal opportunity to present witnesses and evidence (inculpatory & exculpatory)

A. Restricts use of “gag orders” so parties can gather and present relevant evidence

D. Provide parties with the same opportunities to have advisors present for any meetings

POLICY  PROCESS
5. Investigations (cont’d)

E. Provide expected advisors information and sufficient time to prepare for meeting dates, times and purpose

F. Opportunities for parties to inspect and review ALL evidence gathered relating to the formal complaint

G. Create an investigative report that fairly summarizes relevant evidence; provide the report 10 days prior to any hearing

6. Hearings

A. Postsecondary institutions
   - Must provide for a live hearing
   - Decision Maker (DM) must permit advisors (never the parties) to ask the other party and witnesses relevant follow up questions, including those that challenges the credibility of a witness [aka "cross examination"]
   - If a party does not have an advisor, the institution must provide one who can engage in cross examination appropriately
   - Cross examination must be conducted at the hearing orally, and in real time
   - DM must make a determination regarding relevancy; if question will not be allowed, the DM must explain why on the record
6. Hearings/Appeals (cont’d)

B. K-12 institutions
- MAY provide for a live hearing (permissive)
- Must send the investigative report to both parties and allow each party to submit written relevant questions of any party or witness
- Must provide each of the parties/witnesses sufficient time to respond to the questions and provide each party with the responses
- If DM excludes any questions, the DM must explain to the party who asked the question why the question will not be sent to the party/witness

C. Written determination regarding responsibility must include:
- identification of allegations of potential of sexual harassment; and
- description of the procedural steps taken; and
- findings of fact supporting the determination; and
- conclusion regarding the application of the institution’s code of conduct (policy) to the facts; and
- statement of (and rationale for) the result as to each allegation, including regarding responsibility and disciplinary sanctions imposed on the respondent; and
6. Hearings/Appeals (cont’d)

C. Written determination regarding responsibility must include:
   - whether remedies designed to restore or preserve equal access to the institution’s education program or activity will be provided to the complainant; and
   - procedures and permissible bases for complainant and respondent to appeal

D. Written determination must be delivered to both parties simultaneously; information as to when the determination becomes finalized (after appeals or when date for appeal has lapsed)

6. Hearings/Appeals (cont’d)

A. Both parties can appeal a finding of responsibility or a dismissal of a formal complaint

B. Appeals must be for the following reasons:
   - Procedural irregularity; or
   - New information; or
   - Conflict of interest or bias
7. Subsequent OCR Clarifications

✓ OCR’s Outreach, Prevention, Education and Nondiscrimination (OPEN) Center
✓ Information & clarification regarding final regs
✓ Blog also addresses technical issues submitted to the OPEN center by institutions
✓ Training and informational videos
✓ 4 specific blogs have been posted since May 6th, 2020

7. Subsequent OCR Clarifications (cont’d)

✓ Posting of important info on websites [20200518]
✓ Requirement to continue investigations during the pandemic [20200521]
✓ Use of information when a party does not submit to cross-examination [20200522]
✓ Final regs are not retroactive [20200805]
8. Implementation Strategies

✓ Ensure policy & process is in compliance with new federal reg
✓ Check your Title IX webpage often for updates
✓ Be aware of how other federal reg requirements are affected (or not) by the new regs
✓ Redefine and identify new roles, structures and personnel. Get creative!
✓ Now that the institution is back in session (even if fully online), find ways to re-engage with your campus community
✓ Be able to show a good faith effort to comply.
✓ Always refer questions to your campus Title IX Coordinator.

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THANK YOU

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