What Community College Leaders Need to Know About the New Title IX Regulations

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WEBINAR OUTLINE

- Introductory Comments – Political and Legal Context
- Key Provisions of the New Regulations
- CEO and General Counsels’ Perspectives
- Questions and Answers
- Hugely Controversial
- These ARE Regulations
- More Than 124,000 Comments Filed
- Administration Determined to Implement and Beat Congressional Review Act
- Intense Congressional Focus
- Lawsuits Being Filed
COMPLIANCE WILL BE MAJOR CHALLENGE FOR INSTITUTIONS

- Colleges Must Come into Compliance by August 14, 2020
- Restructuring of Title IX Policies and Practices Will Be Necessary
- New Training Requirements
- New Record Retention and Public Disclosure Requirements
- Procedures Required by Title IX May Create Pressure for Similar Approaches
GENERAL OBSERVATIONS ON NEW REGULATIONS

- Most Important (and Problematic) Feature is Required, Legalistic Grievance Process that Must Include Live Cross – Examination
- Regulations Emphasize Due Process for Accused Students
- Regulations Apply to Faculty/Staff as Well
- Institutional Obligation to Respond is Significantly Scaled Back from Obama Guidance
  - Final regulations clarify separation between Title IX and student conduct codes
  - Colleges may still pursue sexual harassment/violence cases that fall outside the Title IX definition through their disciplinary processes
- No Fundamental Changes from Proposed Regulations
  - Some important differences, but overall structure remains
KEY PROVISIONS OF FINAL REGULATIONS
WHEN AN INSTITUTION IS OBLIGATED TO TAKE ACTION

- **Definition of Sexual Harassment – Three Elements**
  - “Quid pro quo” proposed by a college employee
  - Unwelcome conduct on the basis of sex that is severe, pervasive, and objectively offensive
    - This category narrowed from Obama guidance
  - Sexual violence crimes as defined in the Clery Act and domestic violence, dating violence and stalking as defined in the Violence Against Women Act
    - 3 VAWA crimes added in final regs
Title IX Responsibilities Triggered By Actual Notice

- Occurs only when a report is made to the Title IX coordinator or another employee who has authority to take corrective action on behalf of the institution
- No requirements for “mandatory reporters” or “responsible employees”
- “Constructive notice” – something an institution should have known – not enough
WHEN AN INSTITUTION IS OBLIGATED TO TAKE ACTION

- Conduct Must Occur Within an Institution’s Educational Program or Activity
  - New definition in final regs clarifies that off-campus facilities owned by recognized student groups are included
  - Does not include incidents outside of the U.S.
  - Extends to off-campus locations owned or controlled by institution
  - Claimant must be trying to access educational program or activity
WHEN AN INSTITUTION IS OBLIGATED TO TAKE ACTION

- **Institution Must Dismiss as a Title IX Complaint Cases that Do Not Fall under the Definition of Sexual Harassment**
  - Either because the conduct alleged does not fit the definition or the conduct takes place outside of the institution’s educational program or activity

- **Institutions Are Free To Pursue Non-Title IX Sexual Harassment Cases Through Their Student Codes of Conduct**
  - Off-campus incidents between students, incidents on study abroad programs, etc.
  - Clarified by final regs
HOW AN INSTITUTION MUST RESPOND

- **Colleges Must Respond in a Way that is not “Deliberately Indifferent”**
  - Defined as “clearly unreasonable in light of the known circumstances”
  - Lower bar than under previous guidance
  - Final regs do not contain explicit “safe harbors”

- **College Must Provide Supportive Measures in Response to All Reports of Which it has Actual Notice**
  - Firmer requirement to provide supportive measures than in proposed regs
  - Supportive measures similar in nature to what are now called interim measures – but they must not be punitive to either party
Institutions Must Respond to Formal Complaints Through Required Grievance Process or Informal Resolution

- Informal resolution can only be used if all parties agree
- Any party can withdraw from informal resolution process at any point and pursue the formal grievance process
KEY ELEMENTS OF GRIEVANCE PROCESS

- **Title IX Coordinator, Investigator, and Decision Maker Must Be Different People**
  - “Single investigator” model prohibited
  - All three must receive extensive training

- **College Must Make Broad Swath of the Evidence It Collects During Investigation Available to Both Parties**
  - Evidence provided need not have been relied on by institution in reaching decision
  - Final regs add more protections for medical records
  - Parties permitted to review investigation reports before hearing
KEY ELEMENTS OF GRIEVANCE PROCESS

- **Advisors Must Be Supplied to Parties that Do Not Already Have Them**
  - Institution may choose advisor
  - Advisor may be, but need not be, an attorney

- **Institutions Must Offer An Appeal to Both Parties**
  - New requirement – appeal was optional in proposed regs
  - Person hearing appeal must be different than the other three individuals involved in the first phase of the process
  - Regs lay out three bases for an appeal – irregularity in process, bias or conflict of interest, new evidence – and institutions may offer others
KEY ELEMENTS OF GRIEVANCE PROCESS

- **Grievance Process Must Be Used in All Cases – Including Those Involving Only Employees**
- **Either “Preponderance of Evidence” or “Clear and Convincing Evidence” Standard May Be Used**
  - Same standard must be used for all Title IX cases
  - Final regs remove evidentiary standard link to other student conduct cases
KEY ELEMENTS OF GRIEVANCE PROCESS

- **Grievance Process Must Include Live Hearing with Cross-Examination**
  - Cross would be conducted by advisors – not the parties themselves
  - Cross must be done “directly, orally and in real time” – but may be virtual
  - Decision maker must rule on questions’ relevance and disallow any questions that violate rape shield laws
    - Requires extensive training if not an attorney
COLLEGE CEO AND GENERAL COUNSEL PERSPECTIVES
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