



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

May 13, 2020

David Baime, Senior VP for Government Relations & Policy Analysis

Jim Hermes, Associate VP for Government Relations

Thuy Thi Nguyen, President, Foothill College, CA

Bill Mallowney, Vice President for Policy and General Counsel,
Valencia College, FL

Joseph Storch, Associate Counsel, The State University of New York

WEBINAR OUTLINE

- **Introductory Comments – Political and Legal Context**
- **Key Provisions of the New Regulations**
- **CEO and General Counsels' Perspectives**
- **Questions and Answers**

POLITICAL AND LEGAL CONTEXT

- **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

WHEN AN INSTITUTION IS OBLIGATED TO TAKE ACTION

- **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

HOW AN INSTITUTION MUST RESPOND

- **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



STAY ENGAGED WITH AACC'S FEDERAL ADVOCACY EFFORTS!

David Baime: dbaime@aacc.nche.edu

Jim Hermes: jhermes@aacc.nche.edu

www.aacc.nche.edu/advocacy

