Department of Education Amended Title IX Regulations

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Final regulations from the U.S. Department of Education (DOE) implementing Title IX of the Education Amendments Act of 1972 with respect to sexual harassment will go into effect on August 14, 2020. The final regulations were released on May 19, 2020.

Implementation of the final regulations will present many challenges. This special report discusses some of the more significant changes and challenges in implementation for postsecondary institutions. (There are some distinctions for K-12 schools.)

The DOE has explained the final regulations are intended to bring consistency between the jurisprudence on Title IX and the administrative enforcement of the law. Generally, the final regulations require a higher education institution to "promptly" respond in a manner that is not "deliberately indifferent" when it has "actual knowledge" of "sexual harassment" in its "education program or activity" against a person in the United States. The final regulations limit the range of conduct that requires institutional action under Title IX, impose a number of new procedural requirements, and unequivocally establish that requirements apply equally to employees and students.

Actionable Sexual Harassment Under Title IX

The final regulations apply to students and employees and the required grievance procedures apply regardless of whether either party — complainant or respondent — is a student or employee. This is a significant change from previous DOE guidance, which principally focused on application to students, and the courts were split on whether Title IX was intended to apply to employees or if Title VII of the Civil Rights Act preempted application of Title IX to employees. However, the final regulations make clear that Title IX applies to employees for purposes of administrative enforcement by DOE. Therefore, institutions will need to update not only their Title IX policies, but also their employment-related policies to incorporate the requirements in the final regulations. In addition, institutions must consider whether existing faculty grievance procedures and collective bargaining agreements comport with the final regulations.

Sexual Harassment Defined

Similar to previous DOE guidance, the final regulations set forth three separate types of conduct that would constitute "sexual harassment" under Title IX:

1. Quid pro quo harassment (by an employee);
2. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the institution's education program or activity; and
3. Sexual assault, dating violence, domestic violence, or stalking.

The above "unwelcome conduct" definition of sexual harassment is a departure from the DOE's previous standard, which required a showing that the conduct was so severe, pervasive, or persistent that it impeded access to an education program or activity.

The new, narrower standard had been articulated by the U.S. Supreme Court in *Davis v. Monroe Board of Education*, 526 U.S. 629 (1999).

In rejecting the Title VII standard for sexual harassment (severe *or* pervasive) and, instead, adopting the narrower severe, pervasive, *and* objectively offensive standard, the DOE distinguished educational environments from workplace environments, noting there are First Amendment considerations that must be balanced when regulating speech in educational environments. (The final regulations and preamble repeatedly reference First Amendment considerations, but indicate such considerations apply to both private and public institutions, suggesting the DOE may equate academic freedom with

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The final regulations make clear, however, that an institution may address harassing conduct that does not meet the Title IX definition of "sexual harassment" under other policies, such as a code of conduct.

This dichotomy presents a significant challenge to institutions as they seek to create a sexual harassment policy that meets their obligations under Title IX, Title VII, and state and local laws that may have an even lower threshold for unlawful harassment.

Occurring in an "Education Program or Activity" and "in the United States"

Under the final regulations, institutions must respond when sexual harassment occurs within an "education program or activity" against a person in the United States.

An "education program or activity" is broadly defined to include locations, events, or circumstances over which the institution exercised substantial control as to both the respondent and the context in which the sexual harassment occurred. An "education program or activity" also specifically includes any building owned or controlled by a student organization that is officially recognized by the higher education institution, such as a fraternity or sorority house.

Contrary to previous guidance, the final regulations clarify that, consistent with language in the statute, Title IX applies only to conduct that occurs in the United States, not to any incident that occurs on foreign soil, including during a school-sponsored study abroad program or other activity.

If the alleged conduct does not constitute "sexual harassment," does not occur within an "educational program or activity," or does not occur in the United States, the institution *must* dismiss the complaint for purposes of Title IX. However, an institution is permitted to address such allegations through its code of conduct or other disciplinary code or policy.

Institutions are reminded that their reporting obligations under the Clery Act likely will extend beyond conduct falling within Title IX jurisdiction under the final regulations. Under the Clery Act, institutions are responsible for reporting crimes that occur within "Clery Geography." Clery Geography encompasses on-campus locations that include:

- Student housing;
- Public property within campus bounds;
- Public property immediately adjacent to the campus; and
- Non-campus buildings and property owned or controlled by the institution, or by a student organization officially recognized by the institution.

What Triggers the Obligation to Respond?

An institution must promptly respond in a manner that is not deliberately indifferent when it has actual knowledge of actionable Title IX sexual harassment in an education program or activity against a person in the United States.

Actual Knowledge

One of the key components triggering an obligation to respond is that the institution must have "actual knowledge" of sexual harassment (including allegations of sexual harassment). For higher education institutions, "actual knowledge" is defined as notice of sexual harassment or allegations thereof provided to an institution's Title IX Coordinator or any official "who has authority to institute corrective measures on behalf of the [institution]." This is a departure from previous guidance that allowed for "constructive notice" and required institutions to respond when a "responsible employee" "knew or reasonably should have known" of the sexual harassment. The concepts of constructive notice and vicarious liability have been rejected in the final regulations.

An "official with authority" is not the same as a "responsible employee" under previous DOE guidance. For a higher education institution, officials with authority include only those employees who have authority to institute corrective measures on behalf of the institution. This likely would include deans and supervisors who have authority to implement discipline. However, this definition probably would not include most professors, administrators, and staff.

The DOE will not assume a person is an "official with authority" solely because the person has received training on how to report sexual harassment, or has the ability or obligation to report sexual harassment; the institution must have granted those individuals the authority to institute corrective measures in order for those individuals to impute "actual knowledge" to the institution.

Significantly, institutions are still subject to the "knew or reasonably should have known" standard for purposes of remedial action under Title VII and most state and local laws.

The final regulations provide institutions the flexibility to expand mandatory reporting for all employees or to designate some employees as confidential resources for students to discuss sexual harassment without automatically triggering a report to the Title IX Coordinator.

Under the final regulations, the "actual knowledge" standard is not met when the only official with actual knowledge of the alleged sexual harassment is the respondent.

Actual knowledge does not necessarily trigger the obligation to investigate, but it does trigger the obligation to provide supportive measures.

Deliberate Indifference

An institution acts with deliberate indifference only if its response to sexual harassment is clearly unreasonable in light of the known circumstances, which is the same standard set forth in *Davis.*

Under the deliberate indifference standard, upon receiving a report of sexual harassment, at a minimum, an institution has an obligation to provide supportive measures. The final regulations require that, after receiving any report of sexual harassment, the institution's Title IX Coordinator must promptly:

- Contact the complainant to discuss the availability of supportive measures;
- Let the complainant know that supportive measures are available regardless of whether a formal complaint is filed;
- Consider the complainant's wishes regarding supportive measures; and
- Explain to the complainant the process for filing a formal complaint.

The final regulations define "supportive measures" as non-disciplinary, non-punitive individualized services that are reasonably available and provided without fee or charge to the complainant or respondent. Supportive measures are intended to ensure equal access to an education program or activity, protect safety, or deter sexual harassment. Supportive measures may include:

- Counseling;
- Extending deadlines;
- Modifying class or work schedules;
- Placing mutual restrictions on contact between the parties;
- Providing campus escort services;
- Changing work or housing locations; and
- Providing leaves of absence.

The preamble to the final regulations elaborates that the supportive measures offered to a complainant must be tailored to each complainant's unique circumstances. The DOE explained that its main focus is to ensure institutions take action to restore and preserve a complainant's equal educational access, while leaving discretion to institutions to make disciplinary decisions only when respondents are found responsible. Supportive measures cannot be punitive, such as prohibiting participation in athletics or other student organizations.

The deliberate indifference standard further obligates an institution to initiate a grievance process when a "formal complaint" of sexual harassment is received by the institution. According to the DOE, requiring a formal complaint before initiating the grievance process ensures the institution considers the wishes of a complainant and only initiates the grievance process against the complainant's wishes if doing so is not clearly unreasonable in light of the known circumstances. Similarly, an institution's decision not to investigate when the complainant does not wish to file a formal complaint will be evaluated by the DOE under the deliberate indifference standard.

Further, the final regulations provide that the institution's response must treat complainants and respondents equitably. An institution is not deliberately indifferent with regard to treating students equitably when it offers complainants supportive measures and follows a grievance process before imposing disciplinary sanctions against respondent. The DOE cautioned institutions that they should not take actions that restrict an individual's rights protected under the U.S. Constitution (including the First Amendment, the Fifth Amendment, and the Fourteenth Amendment) as a means of satisfying the duty not to be deliberately indifferent to Title IX sexual harassment.

Formal Complaint

A "formal complaint" is "a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that [the institution] investigate the allegation of sexual harassment."

When filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the institution at which the formal complaint is filed. This suggests that complaints from former students and former employees may not trigger an institution's

obligation to engage in the grievance process under Title IX if they are not attempting to participate in an education program or activity. Depending on the circumstances, however, the institution may still have an obligation to investigate under Title VII and state and local law.

Once a formal complaint has been filed, the institution must offer supportive measures to the complainant and respondent, provide written notice of the allegations to the known parties, and investigate and adjudicate the complaint using a grievance process that complies with the final regulations. An institution may not impose discipline on a respondent without going through its grievance process.

Emergency Removal of Respondents from Campus

The final regulations permit an institution to temporarily remove a student from campus on an interim basis during the pendency of a complaint in limited "emergency" circumstances where there is an immediate threat to physical health or safety. Before it can take this emergency measure, however, the institution must do the following:

1. Undertake an individualized safety and risk analysis to determine whether there is an immediate threat to the physical health or safety of any person arising from the allegations of sexual harassment;
2. Make an affirmative determination that such an immediate threat exists based on its individualized safety and risk analysis; and
3. Provide the respondent with notice and an opportunity to challenge the emergency decision immediately following the respondent's removal.

The final regulations do not limit an institution's ability to place an employee on administrative leave during the pendency of a complaint. Whether such leave is paid or unpaid is at the institution's discretion.

Grievance Process for Formal Complaints

The final regulations provide detailed requirements as to how institutions must investigate and adjudicate formal complaints of sexual harassment. As explained in the preamble, the procedural requirements for investigation and adjudication of formal complaints are intended to provide greater "due process" and fairness to the parties. Institutions cannot discipline individuals accused of sexual harassment in violation of Title IX without complying with the new procedural requirements.

Standard of Evidence

The final regulations give institutions the discretion to determine whether to use a "preponderance" or "clear and convincing" evidentiary standard in adjudicating allegations of sexual harassment.

The chosen evidentiary standard must be clearly set forth in the institution's policy to ensure that all parties are on notice of the applicable standard. The same evidentiary standard must be applied to claims involving employees, as well as those involving students.

Therefore, institutions will need to consider the interplay among existing evidentiary requirements pursuant to state laws, collective bargaining agreements, and institution policies, particularly as to faculty grievance procedures.

Presumption of Non-Responsibility

The final regulations require that the respondent be presumed not responsible until the conclusion of the grievance process. The preamble makes clear that this presumption is not intended to suggest that a respondent must be considered truthful, or that the respondent's statements must be given any more or less credence, based solely on the respondent's status as a respondent. The presumption itself is intended to buttress the requirement that investigators and decision-makers serve impartially without prejudging the facts at issue.

Time Frame for Completion of Grievance Process

Institutions are required to establish "reasonably prompt time frames" for completion of the grievance process, including appeals and any informal resolution processes. Any delays or extensions of the institution's designated time frames must be "temporary," "limited," and "for good cause," and the institution must notify the parties of the reason for any such short-term delay or extension.

Written Notice of Allegations

The final regulations require that an institution provide written notice of the allegations to all known parties upon receipt of a formal complaint of sexual harassment. The requirements for the written notice conform, in large part, with prior DOE guidance.

The written notice must include sufficient detail of the allegations (including the identities of the parties involved, the conduct allegedly constituting sexual harassment, and the date and location of the alleged incident) to permit parties to prepare for an initial interview. It also must inform the parties that they may have an advisor of their choice and inspect and review evidence obtained during the investigation.

The final regulations, however, impose two new requirements for the written notice:

1. It must include a statement "that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process"; and
2. It must include a statement informing the parties of any provision of the institution's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

Many commenters raised concerns that the requirement to include an admonition about making knowingly false statements in the initial written notice of allegations may suggest to complainants there is a presumption that they are not telling the truth or otherwise discourage them from pursuing their complaints. In response to these concerns, the DOE noted that only those institutions whose code of conduct prohibits individuals from knowingly making false statements or submitting false information during a disciplinary proceeding are required to reference the prohibition in the written notice. The DOE further noted that the final regulations prohibit retaliation for exercising Title IX rights generally and that, while it is not retaliatory for an institution to punish a party for making a bad faith, materially false statement in a Title IX proceeding, the institution cannot conclude that the allegation was made in bad faith based solely on a finding that the respondent was not responsible.

Investigation

The final regulations direct the manner in which Title IX complaints must be investigated.

The parties must have an equal opportunity to present witnesses, including both fact and expert witnesses and other witnesses. Institutions cannot restrict the parties' ability to discuss the allegations or gather and present evidence.

The parties must be allowed to have an advisor of their choosing present at any meeting or grievance proceeding. Institutions are still permitted, however, to establish restrictions regarding the extent to which the advisor may participate in the proceedings, so long as the restrictions apply equally to both parties.

The institution must provide written notice to the parties in advance of any meeting, interview, or hearing conducted as part of the investigation or adjudication in which they are expected or invited to participate.

Institutions cannot access or rely upon any treatment records maintained by a healthcare provider, including the institution's student health center, unless the party provides consent.

Importantly, the final regulations make clear that the burden of gathering evidence sufficient to reach a determination regarding responsibility rests on the institution, not on either party.

Review of Evidence

Before concluding the investigation, an institution must provide the parties and their advisors, if any, equal opportunity to inspect and review any evidence obtained during the investigation that "is directly related to the allegations raised in a formal complaint," even if the institution will not rely on that evidence in reaching a determination. All inculpatory and exculpatory evidence must be included. The evidence must be provided to the parties in an electronic format or a hard copy, and the parties must be given at least 10 days to submit a written response, which the investigator must consider before the completion of the investigative report.

The DOE declined to define what "directly related" means. It said the term should be interpreted using the plain and ordinary meaning. It is clear, however, that "directly related" sometimes may encompass a broader universe of evidence than the evidence that is relevant.

Additionally, the final regulations do not require or recommend a particular means of sharing this information with the parties and their advisors. Use of electronic platforms that prevent the downloading of the materials is permitted. Nondisclosure agreements are permitted to prevent the circulation of the evidence subject to inspection and review.

Investigative Report

At the conclusion of the investigation, the investigator must create an investigative report that fairly summarizes relevant evidence. The investigator must send to the parties and their advisors, if any, the investigative report in an electronic format or a hard copy for their review and written response. The final investigative report must be provided at least 10 days before any hearing so the parties have time to review and provide written responses.

Live Hearing

One of the most significant new requirements in the final regulations is that institutions must hold live hearings for formal complaints of sexual harassment. Institutions will no longer be permitted to use the "single-investigator model" for Title IX sexual harassment claims.

The live hearing must be overseen by a decision-maker, who must be someone other than the Title IX Coordinator or the investigator. The decision-maker must be free from conflict of interest or bias and be trained on such topics as how to serve impartially, issues of relevance (including how to apply the rape shield protections provided for complainants), and any technology to be used at the hearing.

The hearings may be conducted with all parties present physically or virtually, so long as the technology enables the participants to see *and* hear one another in real time. That means parties may not participate solely by telephone. At the request of either party, an institution must permit the parties to be in separate rooms during the live hearing. The final regulations expressly allow the entire proceeding to be held in separate rooms, a change from the proposed regulations, which would have allowed only the cross-examination portion to occur in separate locations.

The final regulations also require institutions to "create an audio or audiovisual recording, or transcript, of any live hearing and make that it available to the parties for inspection and review." According to the DOE, this "recording or transcript will help any party who wishes to file an appeal" and will "reinforce the requirement that a decision-maker not have a bias for or against complainants or respondents generally or an individual complainant or respondent."

Cross-Examination by Advisors

The final regulations require every witness at the hearing be subjected to cross-examination by the parties' advisors. Institutions must allow a party's advisor to directly and in real time present all relevant questions and follow up questions to another party or witness. This expressly includes the ability of an advisor to challenge the credibility of a party. Cross-examination must come from a party's advisor and *may not* come directly from a party.

Respondents rights' advocates have argued that a lack of direct examination of complainants is a fundamental breach of the respondents' due process rights. Some courts have addressed this issue. For example, in 2018, the U.S. Court of Appeals for the Sixth Circuit, in *Doe v. Baum* (903 F.3d 575), ruled that Title IX processes for adjudicating allegations of sexual misconduct did not meet constitutional due process requirements. The Sixth Circuit held that state schools are "arms of the state" and therefore, at state schools at least, an accused was entitled to constitutional due process, including the right to cross-examination of accusers. In August 2019, the U.S. Court of Appeals for the First Circuit ruled differently. In *Haidak v. University of Massachusetts-Amherst* (933 F.3d 56), the First Circuit agreed with the Sixth Circuit that state schools are required to provide due process to the accused, but disagreed that this necessarily guaranteed direct cross-examination. Instead, the First Circuit reasoned that individual circumstances dictate appropriate due process and that interrogation by a neutral, independent factfinder could be enough to satisfy due process. The final regulations seem to resolve the apparent circuit split by fundamentally adopting the Sixth Circuit's construction for both public and private institutions.

A concern consistently raised against direct cross-examination and noted repeatedly in the comments to the proposed regulations is that direct cross-examination may retraumatize victims and prevent many from coming forward with a complaint. The DOE attempted to address these concerns by insisting that advisors, rather than parties, must do the questioning.

While parties still have the right to have an advisor of their choosing present throughout the entirety of the Title IX process, the final regulations require all parties to have an advisor at the live hearing for the purpose of conducting cross examination. An institution's policy may permit advisors to participate in a greater capacity at the live hearing, but, under the final regulations, the only requirement is that advisors be permitted to cross examine the other party and witnesses.

If a party does not have an advisor, the institution must provide that party with an advisor at no cost. Advisors provided by the institution can be, but are not required to be, attorneys or experienced advocates.

The final regulations do not impose any expectation of skill, qualifications, or competence on individuals serving as advisors. There is also no requirement that an advisor provided by an institution

have equal competency as the other party's advisor. For example, an institution is not required to provide an attorney advisor to a party simply because the other party has an attorney advisor.

If a party or witness does not submit to live cross-examination, the decision-maker cannot rely on *any* statement made by that party or witness when making the decision about the respondent's responsibility. Only statements that have been tested for credibility through cross-examination at the live hearing may be considered by the decision-maker in reaching a responsibility determination. This includes statements against interest. Thus, if a party makes a statement against interest to the investigator during the investigation, but subsequently declines to participate in the live hearing or otherwise be subject to cross-examination, the statement made to the investigator must not be relied upon in making a determination regarding responsibility. Importantly, however, while this "untested" evidence cannot be relied upon in making a determination for Title IX purposes, the institution will be held accountable for knowledge of this same evidence when liability is assessed under Title VII and state and local law.

The preamble provides several other examples of incidents when statements may not be used because the party or witness did not submit to cross-examination. For example, police reports, sexual assault nurse examiner (SANE) reports, medical reports, and other documents and records may not be relied on to the extent they contain the statements of a party or witness who has not submitted for cross-examination. Similarly, where the evidence is a text exchange or an email thread and one party refused to submit to cross-examination, but the other does not, the decision-maker may rely only upon the statements made by the party who was cross-examined. According to the DOE, this prohibition does not prevent an institution from relying on a description of the words allegedly used by a respondent if they constitute part of the alleged sexual harassment at issue because the verbal conduct does not constitute the making of a factual assertion to prove or disprove the allegations of sexual harassment.

While the individual's statements may not be relied upon, the decision-maker cannot draw any inference regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.

Questions Must be Relevant

Questions posed to parties and witnesses at the live hearing must be relevant. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker must determine whether the question being asked is relevant and provide an explanation as to any decision to exclude a question as not relevant. Submission of written questions for the purpose of ascertaining the relevance of the question in advance does not comply with the final regulations.

The final regulations expressly provide that questions relating to a complainant's prior sexual behavior are deemed not relevant, unless the questions are offered to prove someone else was responsible for the alleged conduct or offered to prove consent.

Written Determination

The final regulations require the decision-maker to issue a written determination. The written determination must include a determination of responsibility, as well as a written finding of facts.

The determination must clearly state its conclusion regarding whether the alleged conduct occurred as alleged or at all and support each conclusion with the rationale relied upon.

The written determination also must indicate the sanctions imposed on the respondent and delineate the remedies provided to the parties.

The determination must be sent simultaneously to the parties, along with information to both parties regarding the process of filing an appeal.

Appeals

The final regulations require institutions to offer appeals equally to both parties from determinations regarding responsibility or from an institution's dismissal of a formal complaint or any allegation contained in a formal complaint.

Parties must be permitted to appeal on the following grounds:

1. Procedural irregularity that affected the outcome;
2. New evidence that was not reasonably available when the determination of responsibility was made that could affect the outcome; and
3. The Title IX Coordinator, investigator, or decision-maker had a general or specific conflict of interest or bias against the complainant or respondent that affected the outcome.

Institutions are permitted to allow additional grounds for appeal but must do so equally for

complainant and respondent. The preamble specifically notes that institutions have the discretion to decide whether the severity or proportionality of sanctions is an appropriate basis for an appeal, but any such appeal must be offered equally to both parties.

Dismissal of Formal Complaints

The final regulations require institutions to dismiss a formal complaint in certain circumstances.

An institution must dismiss a complaint if the conduct alleged in the formal complaint:

1. Would not constitute sexual harassment even if proven;
2. Did not occur in the institution's education program or activity; or
3. Did not occur against a person in the United States.

Additionally, an institution may dismiss a complaint where:

1. The complainant notifies the Title IX Coordinator in writing that the complainant wishes to withdraw the formal complaint or allegations;
2. The respondent is no longer enrolled or employed by the institution; or
3. Specific circumstances prevent an institution from gathering evidence sufficient to reach a determination regarding responsibility.

Institutions must provide the parties with written notice of a dismissal, whether mandatory or discretionary, and the reason for the dismissal.

Dismissal of the formal complaint under Title IX does not preclude action under another policy or code of conduct.

Informal Resolution

The final regulations make clear that institutions may still utilize informal resolution processes, but only after a formal complaint has been filed.

Institutions generally have discretion as to when informal resolution may be offered; however, an institution is prohibited from offering or facilitating an informal resolution process where the allegations in the formal complaint allege that an employee sexually harassed a student.

Before proceeding with an informal resolution process, both parties must give voluntary, informed, written consent. Additionally, the institution must provide written notice to the parties disclosing the allegation, the requirements of the informal resolution process, and any consequences of participating in the informal resolution process (for example, what information, if any, will be considered confidential).

Any party may withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint at any point.

Retaliation

The final regulations expressly prohibit retaliation against any individual for exercising rights under Title IX, including the participating in or refusing to participate in the filing of a complaint, the investigation, or any proceeding or hearing.

Examples of prohibited retaliation include intimidation, threats, coercion, or discrimination, and specifically include bringing charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same fact or circumstances as a report or complaint of sex discrimination or sexual harassment.

Exercising rights protected under the First Amendment does not constitute retaliation. Similarly, charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding does not constitute retaliation. However, punishing a party for making false statements in the course of the grievance process would constitute retaliation where the conclusion that false statements were made is based solely on the determination regarding responsibility.

Recordkeeping

The final regulations impose broad recordkeeping requirements and require that institutions maintain certain documents relating to Title IX activities for seven years.

Institutions must maintain records of:

- Sexual harassment investigations, including any determination regarding responsibility and any audio or audiovisual recording or transcript, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal

access to the institution's education program or activity;
- Any appeal and the result therefrom;
- Any informal resolution; and
- All materials used to train Title IX coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process.

Furthermore, institutions must create, and maintain for seven years, records of any actions (including any supportive measures) taken in response to a report or formal complaint of sexual harassment. In each instance, the institution must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the institution's education program or activity.

If an institution does not provide a complainant with supportive measures, the institution must document the reasons why such a response was not clearly unreasonable in light of the known circumstances.

Institutions will need to revise applicable record retention policies, if necessary, and establish procedures for completing and retaining required documentation.

Training

The final regulations provide that training of Title IX personnel must include training on:

- The definition of sexual harassment;
- The scope of the institution's education program or activity;
- How to conduct an investigation and grievance process, including hearings, appeals, and informal resolution process, as applicable; and
- How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.

While the DOE declined to specify that training must include implicit bias training, the nature of the training is left to the institution's discretion, as long as it achieves the provision's directive that such training provide instruction on how to serve impartially and avoid prejudgment of the facts at issue, conflicts of interest, and bias, and that materials used in such training avoid sex stereotypes. Trauma-informed training is permitted, insofar as it does not create a bias in favor of complainants.

Additionally, the final regulations require that an institution's investigators and decision-makers receive training on issues of relevance, including how to apply the rape shield protections provided only for complainants. Decision-makers also must receive training on any technology used at a live hearing.

Institutions are required to publish all training materials on their websites. If the institution does not have a website, it must make the materials available for inspection and review by members of the public.

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If you have questions or need assistance, please reach out to the Jackson Lewis attorney with whom you regularly work.

(Amanda Brody, Janea Hawkins, Jason Ross, and Jessica Vizvary contributed significantly to this Special Report.)

*The National Operations Center serves as the firm's central administration hub and houses the firm's Facilities, Finance, Human Resources and Technology departments.