

Practice Update

These Items are a Must on Your Title IX “To-Do” List

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By Jamel A.R. Greer

Last week, the Department of Education (DOE) dropped a bombshell in the form of new Title IX regulations (see our [previous alert](#) providing a summary of notable changes to Title IX). As institutions begin planning how to implement the new regulations, here are some action items that we recommend you put on your Title IX “to-do” list.

Assess your Institution’s Resources: Determine your institution’s available resources as well as any deficits that will need to be addressed in order to implement the new regulations by *August 14, 2020*. This may include the technology needed to conduct hearings virtually or appropriate supportive measures that will need to be made available. Additionally, assess whether your institution has the bandwidth to handle implementing the new regulations by the effective deadline or whether certain items should be outsourced.

Conduct a Comprehensive Institutional Policy Review: The new regulations will require institutions to review and update current policies as well as develop new policies in order to maintain compliance. While revising your Title IX policy, do not forget to review and update the following:

- All policies, procedures and related documents that currently *or will* incorporate Title IX by

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reference;

- Student, faculty and staff handbooks/manuals;
- All codes of conduct at your institution;
- Job descriptions of the Title IX coordinator and any key personnel who will be identified as someone with authority to institute corrective measures;
- Record Retention across all campus departments at your institution; and
- Collective bargaining agreements and third-party vendor agreements.

There will also be a need to draft new policies and procedures in response to the new regulations. Here are a few policies and procedures that we recommend your institution develop and adopt:

- Sexual misconduct that is no longer covered by Title IX, but nonetheless amounts to code of conduct violations at your institution;
- Sexual harassment occurring in school programs that take place outside of the U.S. (e.g. study abroad);
- Supportive measures (as defined in the Title IX regulations);
- Informal resolution process and procedures;
- Formal and informal grievance process and procedures (including appeals);
- Process and procedures for conducting live hearings;
- The release of audio/video recordings or hearing transcripts to participants;
- The release of evidence obtained related to an investigation or hearing to participants; and
- The process of designating hearing officers, or members of the hearing panel for live hearings.

In the course of your institutional policy review and/or development, make sure that the following

topics are addressed:

- The conduct that triggers an institution's response under Title IX;
- The deliberate indifference standard that will determine the adequacy of your institution's response;
- Detailed descriptions of conduct that violates Title IX as well as corresponding disciplinary measures and remedies;
- What now constitutes a Formal Complaint (e.g. signed by complainant or Title IX Coordinator and a request for an investigation); and
- In developing supportive measures or revising disciplinary measures, there should be no bias (apparent or otherwise) against one party or the other.

Identify Individuals Responsible for Initiating a Title IX Response: Under the new regulations, an institution's response obligations are triggered when the Title IX Coordinator (and any official who has authority to institute corrective measures) receives *actual knowledge* of sexual harassment. Accordingly, it is vital for institutions to engage with campus departments and stakeholders to develop a plan to identify which officials your institution will designate with authority to institute corrective measures. Institutions should proceed thoughtfully to ensure that such designations provide comprehensive coverage to all aspects of campus life, including student housing and athletics.

**Note – We recommend that institutions consider designating athletic trainers as well as coaches of each sport as officials with authority to institute corrective measures.*

Identify Student Advisors: In response to the requirement for institutions to provide an advisor where a student does not have a representative at a

live hearing, institutions should consider who will be selected to perform this task.

**Note – While institutions are not required to provide an attorney for students, institutions should consider whether principles of fairness require an attorney-advisor where the other party has an attorney-advisor.*

Plan for Public Information Requests (*for public institutions): Determine how your institution will address public information requests that are related to an ongoing Title IX investigation and/or in preparation for a live hearing.

Limit Retaliation: Strategize how your institution will limit retaliation against individuals who exercise their rights under Title IX. This includes protecting individuals who come forward to file a complaint, testify, provide evidence, or otherwise participate in a Title IX investigation and/or adjudication proceeding. Institutions should be cautious that disciplinary action based on an individual's violation of school policy (related to a Title IX matter) may constitute retaliation against that individual.

**Note – Discipline against an individual who provided materially false statements in bad faith during a Title IX proceeding will not constitute retaliation.*

Consider How COVID-19 will Impact

Implementation of New Regulations: Including security measures as well as the need to identify and address digital conduct that rises to the level of a Title IX violation (e.g. forms of cyber-sexual misconduct that may include stalking a fellow classmate's social media or leaking lewd photos of a party or witness involved in a Title IX proceeding).

Engage your Athletic Departments: Now is the time to engage with your athletic departments on how the changes to Title IX will impact your sports programs as well as what trainings your athletic community

needs in order to adapt in a timely fashion. While doing so, make sure to revisit your institution's obligations under the NCAA's Sexual Violence Policy in order to maintain compliance under both Title IX and the NCAA's policy going forward.

Prepare and Execute Required & Recommended Trainings: The new regulations require the following trainings specifically for Title IX Coordinators, investigators, decision-makers, and anyone who will facilitate an informal resolution process:

- Definition of sexual harassment;
- Scope of an institution's programs or activities;
- How to conduct an investigation and grievance process (including appeal process) while avoiding prejudgment, bias or conflicts of interest;
- Technology necessary to conduct live hearings;
- Determine issues of relevance for evidence and questions asked at hearings; and
- Creation of an investigative report that fairly summarizes relevant evidence.

In addition to the required trainings noted above, institutions should also prepare comprehensive trainings for students, faculty and staff on how their Title IX policies have changed in light of the new regulations, including, but not limited to:

- How the institution plans to maintain a safe campus community for all students, faculty and staff while implementing the new regulations;
- The differences, if any, between what the new regulations require as compared to state or local law, or school policy, including potential conflicts;
- The definition of sexual harassment, dating violence, domestic violence, stalking, and any conduct that does not reach this threshold, but nonetheless violates school policy;

- Where a complaint can be filed as well as which employees will be designated as required to report actual knowledge of an allegation;
- The rights that will be afforded to both parties once a complaint is made;
- The evidentiary standard that will apply to all students, faculty and staff;
- What supportive measures are available and how they can be accessed;
- The difference between a formal grievance process and informal resolution, including how live hearings will be conducted and the appeals process;
- The consequences of conduct violating Title IX in contrast to conduct that does not rise to the level of a Title IX violation, but nonetheless violates school policy; and
- How retaliation is defined and the corresponding consequences when such conduct is taken against someone who directly or indirectly participates in a Title IX investigation and/or hearing.

Compliance with the new Title IX regulations by August 14, 2020, will undoubtedly be a challenge for many institutions across the country. Implementing the action items identified above alone will require thoughtful planning, ingenuity, and a cohesive team capable of addressing multiple issues simultaneously.

Our Akerman team is ready and committed to partnering with your institution to meet your new obligations under Title IX, including but not limited to any policy review and update, trainings and day-to-day counseling.

This information is intended to inform firm clients and friends about legal developments, including recent decisions of various courts and

administrative bodies. Nothing in this Practice Update should be construed as legal advice or a legal opinion, and readers should not act upon the information contained in this Practice Update without seeking the advice of legal counsel. Prior results do not guarantee a similar outcome.