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SUMMARY OF FINAL TITLE IX REGULATION

This summary is based on the Department of Education’s (“ED”) Final Rule dated May 6, 2020, and is specifically targeted at those aspects of the regulation applicable to colleges and universities (often referred to in the regulation as “recipients”).

The final regulation and attendant commentary exceeds 2,000 pages. This document may be revised or supplemented as time permits deeper analysis.

Key Conceptual Elements

- The final regulation is largely consistent with the proposed regulation published in 2018. Core provisions such as the requirement for live hearings and cross-examination remain. The final regulation is heavily focused on elements of due process, including notice of allegations, access to evidence, the right to confront witnesses and accusers, and the right to appeal. It mandates that formal complaints of sexual harassment be resolved pursuant to elaborate processes that will necessitate greater expertise, training, documentation and investments by institutions of higher education. Note: As used throughout this summary, and consistent with the final regulation itself, the term “sexual harassment” includes *quid pro quo* harassment, hostile environment harassment, sexual assault, domestic violence, dating violence and stalking.
- The starting point for the final regulation is the Supreme Court’s “deliberate indifference” framework for Title IX civil liability as explained in the *Gebser* and *Davis* cases. Under the *Gebser/Davis* standard, an institution is liable in a civil suit under Title IX only if: (1) it has actual knowledge of sexual harassment occurring in a setting where the institution exercises substantial control over the alleged harasser and the context in which the alleged harassment occurs; (2) the institution’s response is deliberately indifferent (i.e., clearly unreasonable); and (3) as a result of the institution’s deliberate indifference, it subjects its students to sex discrimination in its education programs and activities. The standards in the regulation for triggering institutional response, assessing the adequacy of an institution’s response, the programmatic reach of Title IX and the definition of sexual harassment are all derived from the civil liability standards articulated in *Gebser/Davis*.
- The final regulation contains numerous provisions designed to incorporate constitutional protections into the Title IX framework, including constitutional protections for Free Speech, Due Process and Religious Liberty, all of which are specifically addressed in the final regulation.
- The regulation permits formal complaints that initiate the grievance process to be filed only by an alleged victim or the Title IX Coordinator. However, it also

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includes the important caveat that, at the time of making a complaint, an alleged victim must be participating in or attempting to participate in the institution's education program or activity. Effectively, this means an institution will have discretion not to initiate the Title IX grievance process for complaints made by former students or employees.

- Unlike the proposed regulation, the final regulation takes pains to prevent institutions from prospectively contracting with their students and employees to waive the regulation's provisions as a condition of admission or employment, as the case may be. However, the regulation does not prohibit parties from *voluntarily* waiving their rights to the elaborate grievance process required by the regulation. As a result, institutions arguably may, in addition to having a fully-compliant grievance process, create an alternative and more streamlined investigation and adjudication process to be used only if the parties voluntarily consent to it and if its use does not amount to deliberate indifference (i.e., is "clearly unreasonable" in light of the "known circumstances").
- The final regulation preserves considerable space for the use of dispute resolution measures, such as mediation or restorative justice, if the parties voluntarily consent to such informal resolution in lieu of a formal investigation and hearing. However, the regulation does not permit the use of informal resolution, or any punitive measures whatsoever, against a respondent until a formal complaint is filed.
- The final regulation, including its detailed investigation and hearing procedures, applies with respect to complaints against students and employees. Those institutions (of which there are many) who presently utilize more streamlined procedures for addressing concerns of sexual harassment by employees will now be required to comply with the processes specified in the regulation. This will likely result in substantially increased burdens for institutions and sets up a conceptual conflict between Title IX and state-law principles of "at will" employment.
- The regulation imposes onerous record preservation requirements that many institutions are likely ill-prepared to handle without significant investment in technology and training. The regulation also requires institutions to publish all training received by all institutional Title IX actors, which could have the potential to expand into a bureaucratic burden of unintended proportions.
- The final regulation contains provisions that explicitly foreclose state and local efforts to force schools to adopt investigation and grievance provisions that are contrary to the Title IX regulation itself. Thus, any state or local efforts to prohibit cross-examination in cases covered by the Title IX regulation, for example, are

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preempted by the Title IX regulation.

- The regulation makes clear that discriminatory treatment of a complainant or respondent as part of a grievance process may itself be a prohibited form of sex discrimination under Title IX.

Programmatic Application

- The regulation clarifies that Title IX applies to an institution’s “education program or activity,” which includes physical locations and events over which the institution exercises “substantial control over both the respondent and the context in which the sexual harassment occurs.” This clarifies that an institution’s Title IX obligations are not limited to activities on campus but also to activities occurring off campus that are part of an institution’s “education program or activity.”
- The regulation explicitly clarifies that the phrase “education program or activity” includes “any building owned or controlled by a student organization that is officially recognized” by a college or university. Although the regulation does not explain what the term “officially recognized” means, this section presumably means that fraternity and sorority houses will be covered by Title IX at many institutions.
- The regulation and comments clarify that Title IX does not apply to sexual harassment that occurs off-campus, in a private setting, and that is not part of the institution’s education program or activity. For example, if a student were subject to an isolated act of sexual harassment by a fellow student, during the summer, in their hometown away from campus, the regulation clarifies that Title IX does not apply and an institution may not process the claim under its Title IX policy. Whether the institution chooses to address such off-campus, non-programmatic conduct through another policy, such as a student code of conduct, is up to the institution.
- The final regulation makes one important limitation to the programmatic application of Title IX: The regulation sets a bright line rule that Title IX does not apply to sexual harassment that occurs outside the geographic boundaries of the United States. See below for a further discussion of this point.

Definition of Sexual Harassment

- The regulation explains that sexual harassment consists of *quid pro quo* harassment, hostile environment harassment, sexual assault, dating violence, domestic violence and stalking.

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- In defining hostile environment harassment, the regulation adopts the following definition: “conduct on the basis of sex” that is “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 recipient’s education program or activity.” By using the conjunctive “and”, this definition requires the hostile environment to be severe, pervasive and objectively offensive, rather than the Title VII definition of hostile environment, which uses the disjunctive “or.” This could create a significant conflict where an employee files a complaint under a Title IX grievance process, and the employee also requests action by a human resources department under Title VII.
- Related to the definition of sexual harassment, the regulation clarifies that it does not impose a mandatory definition of “consent” for purposes of sexual assault. This means schools retain discretion to set their own definitions, which may be influenced by state and/or local law.

Notice of Sexual Harassment

- An institution must respond promptly and in a manner that is not “deliberately indifferent” when it has “actual knowledge” of sexual harassment. For colleges and universities, “actual knowledge” essentially tracks the Supreme Court’s definition from the *Gebser* and *Davis* cases as being when an institutional official with authority to institute corrective measures on behalf of the institution (which includes Title IX Coordinators) has notice of sexual harassment. The final regulation, unlike the proposed regulation and *Gebser/Davis*, however, extends the “actual knowledge” test to also include the situation where “any employee of an elementary or secondary school” has actual knowledge of sexual harassment. Colleges and universities that operate laboratory K-12 schools will need to be aware of this distinction.
- The regulation also clarifies that “knowledge” refers both to “notice of sexual harassment or allegations of sexual harassment.” This means an official with corrective authority cannot claim they lacked “actual knowledge” of conduct or allegations reported to them on the basis that they did not directly observe the conduct at issue.
- The definition of “actual knowledge” effectively means all employees of K-12 institutions must report sexual harassment to a Title IX Coordinator but that—unless state or local law sets a broader reporting requirement—colleges and universities have discretion to relax mandatory reporting policies such that only certain officials who have authority to take corrective action (such as human resources, student life, campus safety and residence life officials) must report sexual harassment to the Title IX Coordinator.

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- Upon receiving actual knowledge of sexual harassment, the Title IX Coordinator must promptly contact the alleged victim (defined as a “complainant”) to discuss the availability of supportive measures, consider the alleged victim’s wishes with respect to supportive measures, inform the alleged victim that supportive measures are available irrespective of whether the alleged victim files a formal complaint, and explain the process for filing a formal complaint.

Supportive Measures

- The regulation explains that, upon receiving actual knowledge of sexual harassment, an institution must promptly contact the alleged victim and offer “supportive measures.” In the event a formal complaint is filed and an investigation is commenced, the supportive measures must also be offered to the respondent. The regulation is ambiguous as to whether an institution must offer and provide supportive measures to a respondent before a formal complaint is filed.
- Supportive measures are “non-disciplinary” in nature, as are those that are “reasonably available” “without fee or charge” and are “designed to restore or preserve equal access” to the institution’s education programs and activities “without unreasonably burdening the other party.”
- The regulation gives various examples of supportive measures including “mutual restrictions on contact between parties,” which implies the regulation either does not permit or disfavors no contact orders that apply only to one party.
- The Title IX Coordinator is responsible for coordinating “effective implementation” of supportive measures. However, commentary clarifies that institutions may continue to designate individuals as deputy Title IX Coordinators to assist in these responsibilities.

Interim Removal

- The regulation clarifies that an institution still has the ability to remove a respondent “on an emergency basis” provided that the institution makes an “individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately after the removal.”

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- Effectively, this sets a high bar for interim suspensions and precludes them as routine matters of course. The reference to “*physical* health or safety” also implies that interim removal may not be appropriate in cases involving non-physical misconduct, such as verbal harassment, and will instead be reserved for more serious cases involving actual or threatened physical contact (i.e., sexual assault, dating violence or domestic violence) or post-report threats or acts of physical violence.
- The regulation clarifies that, in the case of a non-student employee respondent, an institution retains broad discretion to place the respondent on administrative leave pending the outcome of the grievance process.

Grievance Process (generally)

- Whereas the proposed regulation created a “safe harbor” grievance process, compliance with which would have ensured an institution that it would *not* be deemed deliberately indifferent by ED, the final regulation does not include a safe harbor. Instead, it contains mandatory elements to a grievance process that each institution must follow. These elements are conceptualized in three phases: investigation, hearing and appeal.
- All three phases of the grievance process must meet certain qualitative elements, including:
 - Complainants (i.e., alleged victims) and respondents (i.e., alleged perpetrators) must be treated equitably.
 - There must be an objective evaluation of all relevant evidence, including both inculpatory and exculpatory evidence.
 - There can be no presumptions of credibility based on a party’s status as complainant, respondent or witness.
 - All institutional participants (e.g., Title IX Coordinator, investigator(s) and decision-maker(s)) in the process must be free of a conflict of interest or bias.
 - There must be a presumption that the respondent is “not responsible for the alleged conduct” until a determination is made at the conclusion of the process. This presumption must be stated in the initial written notice provided after a formal complaint is made.

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- There must be reasonably prompt timeframes for completion of various phases of the process, including delays (after written notice to the parties) only based on “good cause.” However, the regulation does not specify a total number of days by which the grievance process must be completed.
- The procedures must specify the range of, or articulate a specific list of, potential disciplinary sanctions and remedies.
- The procedures must specify the standard of evidence to be used (either preponderance of the evidence or clear and convincing) and use the same standard for cases against students as well as cases against employees, including faculty. In other words, an institution cannot use a preponderance of the evidence standard for students, while using a clear and convincing standard for tenured faculty.
- The institution must not utilize procedures that invade legally recognized privileges (e.g., attorney-client, priest-penitent, patient-counselor, etc.) unless the party holding the privilege has waived it.

Investigation

- The regulation clarifies that an institution’s formal obligation to investigate a report of sexual harassment under its grievance procedures is triggered by the filing of a “formal complaint.” A formal complaint is a physical or electronic document signed by an alleged victim of sexual harassment or the Title IX Coordinator specifically requesting an investigation. There is an important caveat, however. “[A]t the time of filing a formal complaint,” the alleged victim “must be participating in or attempt to participate in the school’s education program or activity.” Thus, for example, an alleged victim who graduated a year prior, has moved away and is not seeking to be readmitted cannot initiate a Title IX investigation through a formal complaint.
- A parent, friend or other third-party could not file a formal complaint on behalf of an alleged victim at a college or university and cause a Title IX investigation to be initiated. Instead, the alleged victim would have to sign or otherwise ascribe to a physical or electronic written document requesting an investigation. A Title IX Coordinator could file a formal complaint based on a report made by a parent, friend or third-party only after consulting with the alleged victim and only if filing an institution complaint is not clearly unreasonable under the facts and circumstances.
- Whereas the proposed regulation provided a number of factors to be considered by the Title IX Coordinator in determining whether to file a formal complaint if the

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alleged victim did not wish to do so, the new regulation provides no guidance other than requiring that the Title IX Coordinator's decision must not be "clearly unreasonable." Presumably, Title IX Coordinators will continue to rely on factors articulated in prior guidance and caselaw, such as the severity of the conduct at issue, the risk the conduct may be repeated, the availability of evidence, etc. For example, where a Title IX Coordinator has received multiple reports of serious misconduct against the same respondent, it is likely not clearly unreasonable for the Title IX Coordinator to sign a formal complaint even though no particular alleged victim wishes to do so.

- Once a formal complaint is made, the institution must provide written notice to the parties of the investigation, describe the process to be utilized and disclose "sufficient details" regarding the complaint, including, if known, the identities of the parties, the conduct at issue and the date and location of the alleged incident. This written notice must include a statement that the respondent is presumed not responsible and that a determination will not be made until the conclusion of the grievance process. The notice must also advise the parties of their right to an advisor of their choice, who may be an attorney. The institution must also apprise them of any prohibitions on making false statements.
- If the scope of the investigation expands, the institution must issue a supplemental written notice providing additional details that also meet this standard.
- At any point in the investigation, if the institution determines that the conduct alleged in the formal complaint, if assumed true:
 - Does not constitute sexual harassment;
 - Did not occur in the institution's education program or activity; or
 - Did not occur against a person in the United States

then the institution *must* dismiss the complaint for purposes of its Title IX grievance procedure. The institution has discretion to address such conduct under another policy, such as a student code of conduct, if it wishes to.

- Apart from these mandatory dismissal provisions, the regulation states that an institution *may* dismiss a formal complaint at any time if:
 - The complainant would like to withdraw the complaint;
 - The respondent is no longer enrolled or employed by the institution; or
 - Specific circumstances prevent the institution from gathering evidence sufficient to reach a determination.

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These voluntary dismissal provisions appear to permit an institution to close an investigation in a case, for example, where a respondent withdraws from the institution under an agreement never to return or in a case where an employee subject to a report of sexual harassment enters into a voluntary separation agreement or is terminated for reasons other than the reported sexual harassment itself.

- The regulation clarifies that an institution may consolidate multiple complaints involving different persons when they arise from the same facts or circumstances. This is an important clarification that resolves ambiguity in prior guidance.
- During the investigation, the burden of proof and burden of gathering evidence rests on the institution. Notably, the institution is prohibited from accessing a party's health, psychiatric or counseling records without written consent.
- During the investigation, the parties must have equal opportunity to present witnesses, including both fact and expert witnesses, together with other inculpatory and exculpatory evidence. The inclusion of expert witnesses is a significant change from existing practice and raises the possibility that complainants or respondents with the financial ability to pay an expert could be at a significant advantage.
- During the investigation, the institution may not restrict the ability of either party to discuss the allegations or to gather and present relevant evidence. This directive means it is likely impermissible to prohibit the parties from communicating with witnesses or the media during the investigation or grievance process.
- The regulation clarifies that parties have the equal right to be accompanied by an advisor of their choice to interviews and meetings and that the advisor may, but does not have to be, an attorney. The institution retains the ability to limit the role of the advisor in interviews and meetings as long as it does so equally for both parties. It cannot, however, limit the advisor's role in cross-examining the other party and witnesses at the hearing (discussed further below).
- The regulation requires the institution to provide written notice to the parties and witnesses of any interview, meeting or hearing that the individual is expected to attend, with sufficient time for the party to prepare to participate, to include: the date, time and location; the participants; and the purpose. The guidance does not further clarify what "sufficient time" means; presumably, that is a qualitative standard that will vary depending on the complexity of the allegations at issue and other circumstances.

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- The institution must give the parties equal opportunity to inspect and review any evidence gathered during the investigation directly related to the allegations raised in the formal complaint, including inculpatory and exculpatory evidence and evidence the institution does not intend to rely upon in the hearing. Access must be given so that each party “can meaningfully respond to the evidence prior to the conclusion of the investigation.” At a minimum, the institution must send the evidence to the party and the party’s advisor in electronic form and give them at least 10 days to submit a written response, which the investigator must consider before finalizing the investigation. The institution must make the evidence available again at any hearing, including for use in cross-examination.
- The investigation must result in an investigation report that “fairly summarizes” the investigation that must be completed at least 10 days prior to the hearing and sent to each party and their advisor.

Hearing

- For all colleges and universities, the investigation must be followed by a live hearing during which a “decision-maker” must permit each party’s advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those bearing on credibility.
- Cross-examination must be conducted “directly, orally and in real time” by the party’s advisor of choice and “never by a party personally.” This precludes institutions from requiring that cross-examination be conducted by pre-submitted written questions or that questions be posed by a hearing panel chair.
- If a party is unable to obtain an advisor, the institution must provide one free of charge for the purpose of conducting cross-examination for the party. The advisor provided does not have to be, but may be, an attorney.
- While the hearing must be “live,” the regulation states that, at either party’s request, the institution must provide the parties with separate rooms and use technology so the decision-maker and parties may simultaneously see and hear the questions.
- At the hearing, the decision-maker has the responsibility to determine the relevancy of questions and explain in real time any decision not to permit a question.
- The final regulation formalizes prior guidance that questioning concerning a complainant’s sexual history is generally not permitted, subject to narrow

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exceptions similar to those utilized under the rape shield provisions of the Federal Rules of Evidence.

- If a party or witness refuses to submit to cross-examination, then the institution is required to ignore that person’s statement and reach a decision based on the remaining body of relevant evidence. The institution is not, however, permitted to draw an adverse inference based on the mere fact that an individual refused to submit to cross-examination.
- The institution must make an audio or video recording of the hearing, or a transcript, and make it available to the parties for inspection and review.
- The regulation does not specify the nature of the “decision-maker(s)” who conducts the hearing, except to specify that it cannot be the same person as the Title IX Coordinator or the investigator. Presumably, the regulation’s use of both the singular or plural indicates the decision-maker could be a single person—similar to a judge—or a hearing panel—similar to a jury. The inability of the Title IX Coordinator or investigator to serve as the decision-maker effectively forecloses the use of any “single-investigator” or “civil rights” model of adjudication.
- After the hearing, the decision-maker must issue a written determination of responsibility applying the institution’s chosen standard of evidence. The written determination must have several required elements, including:
 - Identification of the allegations at issue;
 - Description of the procedural steps taken throughout the case;
 - Findings of fact supporting the determination;
 - Conclusions regarding application of the Title IX policy;
 - A statement and rationale as to the determination for each allegation;
 - A statement of any disciplinary sanctions and whether any remedies will be provided to the complainant; and
 - A description of the procedures and permissible grounds for appeal.
- The institution must provide the written determination to the parties at the same time. Under the regulation, the written determination becomes final upon the earlier of when: (i) the parties are notified of the determination on appeal; or (ii) the time to file an appeal has passed with neither party appealing.

Appeal

- Unlike the proposed regulation, which merely permitted appeals and specified the elements of any appeal, the final regulation mandates that either party be

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allowed to appeal the determination, or any dismissal of the complaint, on the following grounds:

- Procedural irregularity that affected the outcome (this effectively incorporates the concept of “prejudicial error” versus “harmless error”);
- New evidence not reasonably available “that could affect the outcome”; and
- Conflict of interest or bias by the institutional participants that affected the outcome.

Although the regulation does not specify that an appeal may be based on a challenge to the weight of the evidence, the regulation does not foreclose other permitted grounds for appeal as long as they are equally available to both parties. So, presumably, an institution could choose to add this or other grounds in addition to the three mandatory grounds for appeal.

- The non-appealing party must be notified of the appeal and allowed to submit a written statement in response.
- The appeal decision-maker(s) cannot be the same as the hearing decision-maker(s). Nor can the appeal decision-maker(s) be the Title IX Coordinator or the investigator who worked on the case.
- The appeal must conclude with a written decision describing the appeal and the rationale for the result that is provided to the parties simultaneously.

Informal Resolution

- Only after a formal complaint is filed, the regulation permits the voluntary use of an informal resolution process at any time prior to a final determination. The parties must provide their voluntary consent in writing to participate in such a process.
- Prior to commencing an informal resolution process, the institution must have provided the parties with the required written notice of the allegations and also describing the parameters of the informal resolution process. The notice must include a statement that a party is permitted to withdraw from the informal resolution process and resume the formal process at any time prior to a resolution being reached. This implies that the institution may explicitly foreclose a party’s ability to re-initiate the formal process after he or she has agreed to an informal resolution of the formal complaint.

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- The regulation prohibits informal resolution in any case where an employee is accused of sexually harassing a student.
- The regulation specifically prohibits an institution from requiring parties to waive their right to a formal process and agree to informal resolution, as a condition to enrollment or employment. In other words, institutions cannot circumvent the Title IX rule by requiring students to waive their rights prospectively in order to be admitted.

Retaliation

- The regulation includes considerable additional detail on Title IX's prohibition against retaliation, including that persons protected from retaliation include persons who "made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing."
- The regulation also clarifies that retaliation includes intimidations, threats, coercion, discrimination and bringing code of conduct charges for actions that do not involve sexual harassment but arise from the same facts or circumstances as a formal grievance complaint, if the conduct charges are brought "for the purpose of interfering" with a person's Title IX rights. This interpretation of retaliation creates considerable risk for some religious institutions that may seek to enforce provisions of their student conduct codes prohibiting consensual sexual conduct, if such consensual sexual conduct was reported in the context of reporting an act of sexual harassment.
- The regulation requires an institution to maintain the confidentiality of complainants, respondents and witnesses except as permitted by FERPA, as required by law or as necessary to comply with the directives of the Title IX regulation itself.
- The regulation specifies that complaints of retaliation may be subject to the same grievance procedures as complaints of sexual harassment.
- The regulation explicitly states that the exercise of rights under the First Amendment (free speech) is not retaliation.
- The regulation clarifies that bringing conduct charges against someone for making a materially false statement in bad faith, even if made during the course of a Title IX investigation, is not retaliation.

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Title IX Coordinator

- The person designated by an institution to serve as Title IX Coordinator must carry the actual title “Title IX Coordinator.”
- The regulation expands an institution’s notification obligations, such that the institution must notify applicants for admission and employment, students, parents, legal guardians, employees and unions of the Title IX Coordinator’s name and contact information.
- Any person may make a report to the Title IX Coordinator by person, by mail, by telephone, by email or by other specified means. A complaint “may be made at any time” by email or telephone. To comply with this requirement, Title IX Coordinators will need to either carry cell phones or ensure their phone systems have voicemail capability to capture reports made after hours.

Training

- The regulation requires that all Title IX Coordinators, investigators, decision-makers and informal resolution facilitators receive training on various relevant aspects of the institution’s Title IX policy and grievance process, including definitions of sexual harassment; the scope of the institution’s education programs and activities; how to conduct investigations, hearings, appeals and informal resolutions (as applicable); and how to serve “impartially, including by avoiding prejudice of the facts at issue, conflicts of interest and bias.”
- The training for decision-makers must include training on relevant technology to be used at any live hearing, relevance and the permissible use of sexual history.
- The training provided to various institutional actors must be free of “sex stereotypes” and must promote “impartial investigations.”

FERPA

- The regulation clarifies that an institution’s obligations under FERPA do not “obviate[]” or “alleviate[]” any of the obligations in the Title IX regulation.
- Effectively, this means that to the extent there is a conflict between FERPA and the Title IX regulation, an institution must comply with the Title IX regulation.

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Religious Exemption

- The new regulation makes clear that the statutory exemption for religious institutions contained in 20 U.S.C. § 1681(a)(3) is self-executing and a school need not notify OCR in advance of its claimed exemption, although it may do so in order to seek assurance of its exemption. The proposed regulation would permit an institution to assert a religious objection during the pendency of an OCR investigation.
- The existing Title IX regulation contained at 34 C.F.R. § 106.12(a) states that “this part does not apply to an educational institution which is controlled by a religious organization to the extent application of this part would not be consistent with the religious tenets of such organization.” This religious exemption’s reference to “this part” refers to the entirety of 34 C.F.R. § 106, which includes all the directives and mandates issued by ED in the new final regulation.

Constitutional Protections

- The regulation explicitly states that nothing in the regulation requires a private or public college to restrict any rights that would be protected from government action under the First Amendment (Freedom of Speech), the Due Process Clauses of the Fifth and Fourteenth Amendments or “any other rights guaranteed against government action by the U.S. Constitution.”
- Effectively, this means that, for public institutions, Title IX policies and processes must be applied in a manner consistent with constitutional rights.
- For private institutions, this means that institutions cannot claim that Title IX requires them to adopt policies and procedures that, if adopted at a public institution, would be unconstitutional. However, as private actors, such institutions could adopt policies limiting speech, due process, etc. on the basis of other rationales, provided, however, that such private institutions must meet the minimal due process requirements imbedded in the Title IX regulation itself.

Application to Employees

- The regulation explicitly states that it does not limit any of the rights of an employee under Title VII of the Civil Rights Act of 1964.
- Otherwise, the regulation applies with equal force to sexual harassment complaints brought by employees or filed against employees, effectively mandating an elaborate grievance process for any employee accused of sexual

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misconduct. It is not immediately clear how this regulation will impact an institution's ability to immediately terminate an at-will employee.

- While the regulation purports to prohibit an institution from conditioning employment on a waiver by an employee of their rights under the regulation, it is unclear whether the regulation would prohibit an institution from requiring employees to arbitrate their claims pursuant to the Federal Arbitration Act. Litigation on this point seems likely.

Recordkeeping

- The regulation requires an institution to maintain the complete records of each phase relating to the resolution of a formal complaint for a period of seven years, including any records of informal resolution.
- The institution must also retain "all" materials used to train institutional participants in the various phases of the resolution process, including the Title IX Coordinator, investigators and decision-makers.
- Institutions must make all such training materials available on their website or, if they do not maintain a website, must make them available subject to inspection. It is not clear whether this requirement applies to training that occurs after the effective date of the regulation (August 14, 2020), or whether it encompasses prior trainings.
- For each instance where an institution receives a report of sexual harassment but where a formal complaint is not filed, the institution must maintain, for a period of seven years, a record of all actions taken, including all supportive measures provided.
- For each such case, the institution must include documentation of its rationale for why the actions it took were not deliberately indifferent. This means that, if an alleged victim decides not to file a formal complaint, and the Title IX Coordinator decides not to file a formal complaint, the documentation must explain why the Title IX Coordinator's decision was not clearly unreasonable.

Preemption of State Law

- The regulation specifies that to the extent of a conflict between state or local law and Title IX, "the obligation to comply with §§ 106.30, 106.44, and 106.45 is not obviated or alleviated by state or local law."

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- Sections 106.30, 106.44 and 106.45 are the provisions of the final Title IX regulation that define “sexual harassment”, dictate the institution’s required response to reports, and specify required procedures for the grievance process, including live hearings with cross-examination.
- Effectively, these provisions mean that the Title IX regulation preempts any state or local laws that conflict with its core provisions, including but not limited to any attempt by state or local government to prohibit cross-examination in Title IX hearings.

Extraterritorial Application Limited

- The regulation clarifies that the obligation to adopt and utilize Title IX grievance procedures applies only with respect to sex discrimination “occurring against a person in the United States.”
- Consistent with the language in the proposed regulation, this would appear to limit application of the Title IX regulation only to sexual harassment occurring in the geographic boundaries of the United States.

Severability

- The final regulation includes a severability clause such that if a court strikes down any particular part of the regulation, the remaining portions remain in effect.
- This provision is ED’s attempt to preserve as much of the regulation as possible should litigants be successful at challenging the enforceability of particular provisions, such as the cross-examination requirement.

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