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## **Department of Education Issues New Regulations Governing How Colleges and Universities Investigate and Adjudicate Sexual Misconduct Cases under Title IX**

On May 6, 2020, the U.S. Department of Education released its long-awaited final regulations governing how colleges and universities must investigate and adjudicate allegations of sexual assault and sexual harassment. The final regulations follow the release of proposed regulations in November 2018, which were subject to a notice-and-comment process that resulted in more than 120,000 public comments.

The new regulations replace the Dear Colleague Letter on Sexual Violence dated April 4, 2011, and the Questions and Answers on Title IX Sexual Violence dated April 29, 2014, which were issued by the Department's Office of Civil Rights under the Obama administration, and which were withdrawn by Education Secretary Betsy DeVos in 2017.

The new regulations represent a sweeping overhaul of the Obama-era guidance, including a new definition of what conduct constitutes "sexual harassment" under Title IX. Under the new regulations, sexual harassment is defined to include any of three types of misconduct: (1) *quid pro quo* harassment by a school's employee; (2) "any unwelcome conduct that a reasonable person would find so severe, pervasive, and objectively offensive that it effectively denies a person equal access to education;" and (3) "any instance of sexual assault (as defined in the Clery Act), dating violence, domestic violence, or stalking as defined in the Violence Against Women Act (VAWA)."

The new regulations further provide that colleges and universities are required to respond to an allegation of sexual harassment only if it occurs "in the school's education program or activity," and "against a person in the United States." An "education program or activity" includes "locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurred, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution (such as a fraternity or sorority house)." With respect to any allegations of sexual harassment that occur outside of a school's "education program or activity," the regulations provide that colleges and universities are free to address those allegations "in any manner the school chooses."

For allegations of sexual harassment that did occur within the school's "education program or activity," the new regulations require colleges and universities to hold live hearings (either in person or virtually) and to allow student advisers to cross-examine the parties and witnesses involved. If a party does not have an advisor present at the live hearing, the school "must provide" one, free of charge. And if a party or witness

does not submit to cross-examination at the live hearing, “the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility.”

The new regulations also specify that “[b]efore a complainant, respondent, or witness answers a cross-examination or other question [at the hearing], the decision-maker must first determine whether the question is relevant and explain to the party’s advisor asking cross-examination questions any decision to exclude a question as not relevant.” Questions and evidence about the complainant’s sexual history are presumptively not relevant “unless offered to prove that someone other than the respondent committed the offense or if the sexual history evidence concerns specific sexual incidents with the respondent and is offered to prove consent.”

The new regulations also permit colleges and universities to modify the “preponderance of evidence” standard or proof provided for under the Obama-era guidance. In particular, the regulations allow colleges and universities to use either the “preponderance of the evidence” standard or a “clear and convincing” standard, so long as the same standard is applied to all complaints of sexual harassment.

Under the new regulations, colleges and universities also must create an audio or audiovisual recording, or transcript, of any live hearing, and make it available to the parties for inspection and review.

Finally, the new regulations allow colleges and universities, “in their discretion, to choose to offer and facilitate informal resolution options, such as mediation or restorative justice, so long as both parties give voluntary, informed, written consent to attempt informal resolution.” Such informal resolution is not available, however, to resolve allegations that an employee of the college or university sexually harassed a student.

All colleges and universities that receive federal funding have until August 14, 2020 to amend their current policies to implement the new regulations.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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