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New Title IX Regulation Checklist

With the release of the final Title IX regulation by the U.S. Department of Education, Husch Blackwell's higher education practice team appreciates that institutions might be finding it difficult to navigate all of the policy and procedural changes that will be required by August 14, 2020. To assist your Title IX team and institutional leadership as you begin work to update your policies, procedures, and practices, we have carefully analyzed the extensive 2000+ page regulation and guidance to identify the most important decision points for your team to consider in the early stages of your process.

We hope that this complimentary resource is helpful to institutions starting this work, and we stand ready to assist your teams and answer any questions that you might have.

Application to Employees

- Will you have a unitary Title IX policy and eliminate any separate employee-specific policies?
- How will you coordinate your obligations under Title VII and Title IX?
- Do you need to make any changes to existing faculty or staff handbooks or collective bargaining agreements to comply with Title IX?

Standard of Evidence

- Will you change your standard of evidence?
- How will you bring alignment between the standard used for students and employees (including faculty)?
- How will you communicate to your community about why you chose the standard you selected?

Programmatic Scope

- What are all of the physical locations and events over which your institution exercises substantial control, such that they are likely to be considered part of your institution's "education program or activity" subject to Title IX?
- Are there any officially recognized fraternities, sororities, or other student organizations that own or control an off-campus building that would be considered part of your institution's "education program or activity" subject to Title IX? If so, do you intend to continue recognizing these organizations?
- Will you address sexual harassment and sexual assault that does not arise in connection with your institution's "education program or activity" (including conduct that occurs outside of the U.S.) through a separate policy from your Title IX policy? If so, what will the scope of each policy be and how and when will each policy apply?

Temporal Scope

- Will you address complaints only if they are based on events that occurred while the alleged victim was participating or attempting to participate in your institution's education program or activity?
- Or will you also address complaints based on events that occurred at other times? If so, will this be done as part of your Title IX policy or a different policy?
- Will you have the Title IX Coordinator be the complainant if the complaint is based upon events that occurred when the alleged victim was not participating or attempting to participate in one of your education programs or activities?
- When would it be clearly unreasonable for the institution not to move forward with an investigation and resolution?

Notice/Actual Knowledge

- What process will you use for receiving and processing formal complaints?
- Will you modify your current mandatory reporting policies?
- Will you conduct an inventory of institutional officials whose knowledge will constitute "actual knowledge" (i.e., those who have authority to institute corrective measures on behalf of the institution)?"
- Do you have any lab or other K-12 schools on campus? (Note: different rules apply to K-12—any staff member's knowledge is imputed to the institution).

Support Measures/Services

- How will the Title IX Coordinator oversee the offering of "supportive measures"?
- Do you intend to authorize one or more Deputy Title IX Coordinators or other officials to offer and oversee implementation of "supportive measures"?

- Will you combine the information about "supportive measures" with the notice of rights and options required under VAWA/the Clery Act?

Bias and Conflict of Interest

- How will you ensure that your process is free of bias and conflicts of interest?
- What standards will you use to determine if a participant in your process is biased or has a conflict of interest?
- Will you vet participants for bias and conflicts of interest in advance? If so, who will do this and how will it be done?
- How will you evaluate claims of bias and conflict of interest? Who will do this and how will it be done?

Interim Removals

- Will you utilize an existing threat assessment policy for interim removals or address this as part of your Title IX policy?
- What process will you put in place for a suspended student to appeal an interim removal?
- Who will be decision makers for interim removals and appeals?

Informal Resolution

- Do you plan to use an informal resolution option?
- Who will be responsible for overseeing the informal process?
- Who will be responsible for serving as a facilitator or mediator?
- What will the process look like?

Investigation Process

- Who will serve as an investigator?
- What record-keeping system are you going to use to store and share information?
- How will you provide an opportunity to view the written report and evidence?

Hearing Process

- Who will be your decision-maker(s) (e.g., one hearing officer, a hearing panel, etc.)?
- Who will you provide as support persons if a party does not have one?
- What rules of decorum will you have for support persons (who could be attorneys)?
- What technology will you use to conduct the hearing if an in-person hearing is not possible or appropriate?

Appeals

- Will you offer any additional grounds for appeal?
- Who will be your appeal decision maker(s)?

Training

- Who are all of the individuals who need to be trained?
- What training(s) will you use?
- How are you going to retain training records?
- How are you going to make the training materials available?

Records Preservation

- What retention system will you use?
- How will you manage rights of access (e.g., in person, electronic)?
- Who will store the records? (Title IX Coordinator? General Counsel? Other?)

Retaliation

- Do you need to revise your anti-retaliation policies?

Religious Exemption

- Is your institution controlled by a religious organization?
- Do any of the current elements of the regulation conflict with your institution's religious beliefs?
- Do you want to seek confirmation of your exemption?

FERPA

- If you have been using FERPA consent forms before sharing information between and among students involved in a particular matter, do you plan to discontinue that practice?

Constitutional Protections

- If you are subject to the federal or state constitution, how will you ensure compliance with those additional requirements?

Preemption of State Law

- Are you subject to a state law that conflicts, or potentially conflicts, with the final Title IX regulation?
- If so, do you intend to seek an opinion from your Attorney General or other confirmation that there is indeed a conflict and/or that federal law controls?