



## News & Updates

### **#METOO, TITLE IX, AND HIGHER EDUCATION: Q&A WITH KRISTIN KLEIN WHEATON**

As the #MeToo Movement sees its first anniversary, the U.S. Department of Education is gearing up to publish drafts of proposed Title IX regulations to address sexual misconduct on college and university campuses. *The New York Times* recently reported on the unofficial drafts of the new regulations, providing insight into what the official drafts may include.

We reached out to Kristin Klein Wheaton, chair of the firm's Higher Education Practice Group and former executive vice president for legal affairs at SUNY Erie, to explore the context of the Title IX revisions as well as to investigate what this means for higher education institutions and their executives.

#### **What is Title IX, and why is it being revised right now?**

Title IX is a federal statute that addresses discrimination on the basis of sex with respect to the provision of educational services. It is a big focus for colleges and universities right now because sexual assault and harassment fall under the umbrella of the law, and the Commissioner of Education is revisiting the prior administration's policies and procedures surrounding assault and harassment.

The guidance issued under the prior administration included very detailed and specific Title IX guidance obliging higher education institutions to provide comprehensive investigations into complaints of sexual assault and harassment, and to take corrective action with a more formalized sense of urgency. For instance, it was recommended that institutions hire chief Title IX officers to effectuate the provisions, and as a result, colleges and universities made significant investments to remain in compliance with the law.

During this time, there were allegations that the guidance did not provide adequate due process for those accused of assault and harassment. While states revised legislation to define updated understandings of consent and assault, higher education institutions were took a hard line because that was what appeared to be required of them. When President Trump took office, his commissioner of education was charged with rolling back some of the prior administration's guidance with the intention of creating, in the administration's view, a fairer process for the accused and a lower administrative cost for institutions. Interim guidance was issued in September 2017 and the final proposed guidance is expected shortly. The Department of Education is estimating that the new guidance will save institutions money because the types of complaints that will need to be investigated are going to be clarified and narrowed. The new guidance will also encourage the use of informal resolutions, which the Department of Education estimates will further reduce the cost.

#### **How has the rise of #MeToo contributed to the focus on revising Title IX?**

Several high-profile cases involve situations in which colleges and universities may have inappropriately reacted to complaints of sexual assault and harassment, including a number of pending investigations involving coaches and players, which particularly foregrounded the #MeToo Movement.

Prior to the recent release of the unofficial Title IX revisions, some state and regional legislatures anticipated that the federal government would formally loosen measures addressing these issues, and reacted by preemptively advancing anti-sexual harassment legislation. New York, in particular, has spent the last year creating new sexual harassment legislation applicable to all employers in New York, and New York City passed the New York City Stop Sexual Harassment Act. California has also recently enacted anti-harassment legislation. The states' legislation offers model policies and training, and includes mandates aimed at preventing harassment. Even though the federal government has not taken any official steps to reduce existing provisions, some states are enacting laws to give victims greater protection than is currently provided under federal law.

#### **How are expectations for higher education institutions' legal counsel changing?**

Following the passing of the Higher Education Opportunity Act in 2008, there has been a substantial increase in regulations and compliance required of higher education institutions, including the Title IX revisions among others. Administrators have sought legal counsel regarding a number of new expectations, ranging from mandates requiring bookstores to post all textbook information on their websites so that students may find their books elsewhere, to financial aid regulations, which are constantly changing both on the federal and state levels. If higher education institutions do not comply with the law, they risk being audited and loss of funding. As a result, many colleges and universities are increasingly hiring in-house counsel or relying on outside counsel for advice with compliance.

#### **What other issues are currently facing higher education institutions and their executives?**

In addition to sexual assault and harassment, Title IX also requires universities to provide reasonable accommodations for students with disabilities. Higher education administrators are expending many resources to work with professors to develop alternative plans for these students so that they may still have the opportunity to obtain their education within the framework of the law. A significant issue arising in this area is website accessibility with respect to the institution's website as well as accessibility of coursework developed by professors and delivered through virtual learning environments and course management systems.

There are also many financial pressures facing colleges and universities that, though not necessarily legal issues, contribute to a difficult balancing act for administrators. In addition to allocating funds for legal counsel, higher education institutions must also allocate funds to stay current with technology, all while grappling with national issues and trends affecting attendance rates such as a declining population of high school graduates, lower higher education enrollments, and rising tuition costs. Institutions are competing more for the same declining pool of potential students than ever before. On top of all of that, many states are developing plans to offer free or reduced tuition programs at public institutions for students with family incomes below a certain amount, causing private institutions to fear that their programs will become financially strained or potentially obsolete.

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