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Federal Regulatory Update for Higher Education Institutions

Higher Learning Commission
Annual Conference
March 2023

Presenters

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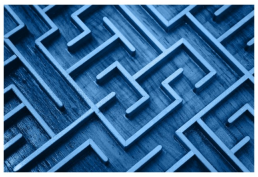
Agenda

- Title IX Regulatory Update
- Third Party Servicers
- Federal Forecast
- Negotiated Rulemaking



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Title IX Regulatory Update

2022 Proposed Rulemaking

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Title IX Regulatory Update

- On June 23, 2022, the Department of Education released its Title IX Notice of Proposed Rulemaking
- 700-plus pages, responds to changes in Title IX regulations imposed in August 2020

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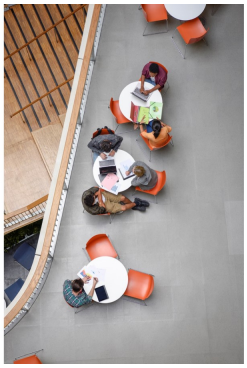
Key Concepts

- Sets the standard for enforcement of Title IX
- Expand protections against sex-based discrimination of all types.
- Restore victim protections.
- Prohibit exclusion from programs on the basis of gender identity.



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Proposed Regulations Objectives –Generally

- Advance Title IX's goal of ensuring that no person experiences sex discrimination in education, that all students receive appropriate support as needed to access equal educational opportunities, and that school procedures for investigating and resolving complaints of sex discrimination, including sex-based harassment and sexual violence, are fair to all involved.
- Restore vital protections for students which were eroded by regulations implemented during the previous Administration, which weakened protections for survivors of sexual assault and diminished the promise of an education free from discrimination.

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Proposed Regulations Objectives - Generally

- Provide clear rules to help schools meet their Title IX obligation to eliminate sex discrimination in their programs and activities.
- Strengthen protections for LGBTQI+ students by clarifying that Title IX's protections against discrimination based on sex apply to discrimination based on sexual orientation and gender identity.

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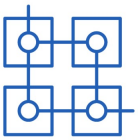
Notable Title IX proposed changes

Scope of Coverage

- Explicitly includes as forms of sex discrimination under Title IX discrimination based on pregnancy, sexual orientation, gender identity, sex stereotypes, or sex characteristics.



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Notable Title IX proposed changes

Hostile Environment

- Modifies the definition of hostile environment sexual harassment to align with Title VII
- Unwelcome sex-based conduct that is sufficiently severe or pervasive, that, based on the totality of the circumstances and evaluated subjectively and objectively, denies or limits a person's ability to participate in or benefit from an education program or activity.

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Notable Title IX proposed changes

Quid Pro Quo

- Applies to conduct by agents or other persons authorized by the institution to provide an aid, benefit, or service under the institution's education program or activity.
- Does not apply to students with leadership positions in extracurricular activities because such students are typically not authorized by an institution to provide aid, benefits, or services under an institution's education program or activity.

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Notable Title IX proposed changes

Jurisdictional Scope

- Harassment occurring outside of an educational program or activity can nevertheless violate Title IX if such harassment contributes to a hostile environment within an educational program or activity.
- Conduct occurring within an institution's education program and activity includes conduct that occurs off-campus when the respondent represents the institution or is otherwise engaged in conduct under the institution's "disciplinary authority."

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Notable Title IX proposed changes

Jurisdictional Scope

- Title IX does not apply to sex-based harassment occurring (1) outside an institution's education program or (2) outside the U.S. where the harassment does not contribute to a hostile environment in the institution's education program or activity in the U.S.

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Notable Title IX proposed changes

Grievance Process

- Expands application of the grievance process requirements to all forms of sex discrimination, not just sexual harassment
- BUT -- includes additional requirements for sexual harassment complaints involving students at postsecondary institutions and generally preserves more of the procedural requirements of the current regulations.

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Notable Title IX proposed changes

Definitions

- Refines definitions of retaliation to include "intimidation, threats, coercion, or discrimination against anyone because the person has reported possible sex discrimination, made a sex-discrimination complaint, or participated in any way in an institution's Title IX process."
- Adds definition of peer retaliation: retaliation by one student against another student.

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Notable Title IX proposed changes

Less Stringent Procedures

- Relaxes several procedural processes:
  - Complaints may be made orally or in writing
  - Removes the participation requirement for students, employees, & those persons authorized to act on their behalf
  - Mandatory dismissal now permissive
  - Evidence review process

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Notable Title IX proposed changes

Advisors

- The right to an advisor would be preserved in sexual harassment complaints involving postsecondary students, but that is not the case for complaints of sexual harassment that do not involve students or sex discrimination complaints

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Notable Title IX proposed changes

Confidential Employees

- Employees whose communications are privileged under law and are associated with their role or duties for the institution;
- Employees whom the institution has designated as a confidential resource for the purpose of providing services to individuals in connection with sex discrimination; and
- Employees of postsecondary institutions who conduct human subjects research studies that have been approved by the institution's Institutional Review Board and that are designed to gather information about sex discrimination.

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Notable Title IX proposed changes

Live Hearings

- Eliminates the live hearing requirement and allows use of the single-investigator model
- Institutions must develop a process for assessing credibility that could be satisfied by either "advisor-conducted questioning at a live hearing" or having the "decisionmaker ask their questions and the parties' questions of any party and witnesses during individual meetings."

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Notable Title IX proposed changes

Cross-Examination

- In live hearings, the decisionmaker must determine the relevance of advisor-conducted questioning prior to a party answering. The decisionmaker should not permit questions that are "vague or ambiguous, or harassing of the party being questioned."
- If a party does not respond to questions related to their credibility, the decisionmaker must not rely on any statement of that party that supports that party's position.

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Notable Title IX proposed changes

Determinations

- Notice of determination need not be in writing or include any specific details in sex discrimination complaints or sexual harassment complaints that do not involve postsecondary students.
- Must provide written determination of whether sex-based harassment occurred in cases involving postsecondary students.

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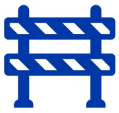
Notable Title IX proposed changes

Title IX Coordinator

Must monitor barriers to reporting conduct that may constitute sex discrimination; and that the institution must take steps reasonably calculated to address identified barriers:

- regular campus climate surveys
- Targeted feedback from students and employees who have reported or made complaints about sex discrimination
- public awareness events for purposes of receiving feedback from student and employee attendees,
- publicizing and monitoring an email address designated for anonymous feedback about reporting barriers.



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H-B

So, everything's settled then?

- *Victim Rights Law Center v. Cardona* (D. Mass. August 2021)
  - Exclusionary rule vacated
  - Arbitrary and capricious
    - ED did not consider likely consequences: "No attorney worth her salt recognizing that – were her client simply not to show up for the hearing – an ironclad bar would descend, suppressing any inculpatory statements her client might have made to the police or third parties, would hesitate to so advise."

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Third-Party Servicers (TPS)

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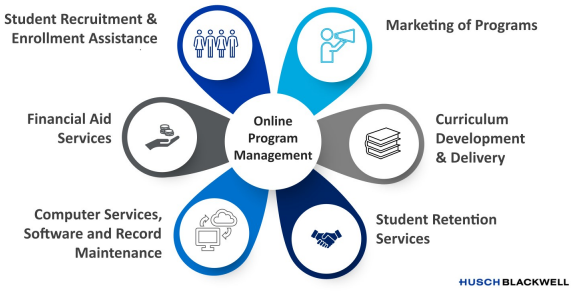
Higher Education Service Providers



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TPS Definition

The Higher Education Act defines "Third-Party Servicer" as:

"any individual, any State, or any private, for-profit or nonprofit organization, which enters into a contract with—

(1) any eligible institution of higher education to **administer**, through either manual or automated processing, **any aspect of such institution's student assistance programs** under this subchapter and part C of subchapter I of chapter 34 of Title 42; or

(2) any guaranty agency, or any eligible lender, to administer, through either manual or automated processing, any aspect of such guaranty agency's or lender's **student loan programs** under part B of this subchapter, including originating, guaranteeing, monitoring, processing, servicing, or collecting loans."

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Expands Definition of TPS

The new interpretation of TPS includes a "catch-all" provision that captures all vendors that

*"perform **any other aspect** of the administration of the Title IV programs or comply with the statutory and regulatory requirements associated with those programs."*

U.S. Dept. of Education Dear Colleague Letter "Requirements and Responsibilities for Third-Party Servicers and Institutions" Feb. 15, 2023 (Updated Feb. 28, 2023)

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New array of vendors

- Student Recruitment
- Software Products & Services Linked to Title IV
- Educational Content & Instruction

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Recruitment and Application Activities

Third-Party Servicer	Not a Third-Party Servicer
Interacting with prospective students for the purposes of recruiting or securing enrollment.	Conducting, hosting, or assisting with community awareness/public service FASFA completion events
Assisting students with the completion of application and enrollment processes.	Publishing and/or mailing general student financial aid information, policies, procedures, or handbooks
Processing admissions applications.	
Establishing or modifying admissions standards	
Processing Title IV student financial aid application	
Performing individualized and interactive financial aid counseling	

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Computer Services/Software and Record Maintenance

Third-Party Servicer	Not a Third-Party Servicer
Collecting, reviewing, and/or maintaining the information and/or documentation necessary to make or support student eligibility determinations and/or to disburse Title IV funds	Warehousing of records, if such activity involves only storage of records and the entity has no access to or control over the data.
Providing computer services or software in which the provider has access to, or maintains control over, the systems needed to administer any aspect of the Title IV programs … not limited to, systems related to financial aid management, recruitment and enrollment, admissions, registration, billing, and learning management.	Providing computer services or software where the provider has no access to and maintains no control over the systems needed to administer any aspect of the Title IV programs.

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Instructional Content

Third-Party Servicer	Not a Third-Party Servicer
Providing any percentage of a Title IV-eligible program at an institution, including: • Establishing requirements for the completion of a course and/or evaluating whether a student has met those requirements; • Delivering instruction or mandatory tutoring; • Assessing student learning, including through electronic means; or • Developing curricula or course materials, ***unless the institution maintains full control of the curriculum/materials and delivers the instruction itself***.	Providing optional supplementary academic support to students, such as tutoring or other forms of optional academic assistance. This exclusion **does not** apply if the academic assistance is mandatory or a required part of the academic program. Selling or providing course materials, if the institution maintains full control of the curriculum and delivers the instruction itself. This exclusion **does not** apply if the vendor maintains control of the program or materials after selling the materials to the institution or is in any way involved with instruction.

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Impact on Institutions

- Institutions have until **Sept. 1, 2023**, to report any arrangements with Third-Party Servicers that have not previously been reported to the Department.
- Institutions must also:
  - ensure their Third-Party Servicer contracts include specified terms;
  - obtain a signed certification form from each Third-Party Servicer; and
  - ensure their U.S. Dept. of Education E-App is updated to identify each Third-Party Servicer.

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Impact on Vendors

- Vendors covered by the Department's new interpretation of a Third-Party Servicer:
  - are responsible for compliant contracts;
  - must submit to the Department or update a Third-Party Servicer Data Form; and
  - must meet annual audit requirements.

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Incentive Compensation

- Does your institution have a revenue-share agreement with a company that provides recruitment services along with other services?

U.S. Department of Education Launches Review of Prohibition on Incentive Compensation for College Recruiters

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Next Steps

- Take inventory of your institution's arrangements with all outside vendors that provide services in relevant areas (recruitment; computer services, software products and records maintenance; and educational content/instruction)
- Communicate with covered vendors about the Department's Third-Party Servicer Guidance
- Institutions may choose to comment on the Department's new guidance. The deadline to submit comments is **March 30, 2023**.
- Make sure your institution is compliant with the new guidance by no later than **September 1, 2023**.
- Look for additional information from the U.S. Department of Education, especially related to incentive compensation.

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Federal Forecast

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The Clery Act

- Proposed legislation: S. 5047 – Campus Accountability and Safety Act
- Proposed changes to the Clery Act:
  - Increase transparency and reporting requirements
  - Create a campus safety website
  - Establish new campus resources and support services for survivors of campus sexual assault
  - Establish a uniform process to adjudicate sexual assault cases

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Third Party Arrangements

"It has come to our attention that institutions and their accrediting agencies do not always accurately account for the percentage of a program that is provided by an ineligible entity."

- U.S. Dept. of Education

Concern regarding ineligible entities:

- Establishing the requirements for completion of the course;
- Delivering instruction or mandatory tutoring;
- Assessing student learning, including through electronic means;
- Developing curricula or course materials, where the institution and its instructors cannot make changes to the materials; and
- Gap-year experiences.

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Program Participation Agreements

"If a company owns, controls, or profits from a college, it should also be on the hook if the institution fails students."

- Under Secretary of Education, James Kvaal

Updated PPA Signature Requirements impact:

- Sole Member of Institution
- Entity or Person with Substantial Direct or Indirect Control of the Institution
- Entity that provides audited financial statements for Institution's annual financial submissions to the U.S. Department of Education

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Personal Liability for Title IV Compliance Failures

"Congress gave the Department the authority to make college owners and operators personally responsible … to protect taxpayer dollars, and deter future risky behavior."

- March 2, 2023 announcement
- ED may require individuals at schools demonstrating financial risk to assume personal responsibility by signing a school's Title IV program participation agreement
- Risk factors:
  - Significant audit findings
  - Failure to meet financial responsibility requirements
  - Legal actions related to fraud, misrepresentation, consumer harm, or financial malfeasance
  - Significant compliance issues
  - Executive compensation or a bonus structure that could significantly affect the financial health of the institution

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Changing Accrediting Agencies

"The goal is to prevent a race to the bottom in quality standards among accrediting agencies and ensure that institutions cannot switch to an accrediting agency with less rigorous standards simply to evade accountability…"

-Antoinette Flores, Senior Advisor, Office of Postsecondary Education

Institutions must apply to switch accrediting agencies:

- Institutions must receive approval from the Dept. of Education to switch accrediting agencies.
- The Department will determine whether an institution has "reasonable cause" to change its accrediting agency.
- Requests to change accrediting agencies will be rejected if due to bad standing or an attempt to lessen oversight of the institution.
- Approval **only if** able to demonstrate that a change in accreditor will improve institutional quality.

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Negotiated Rulemaking

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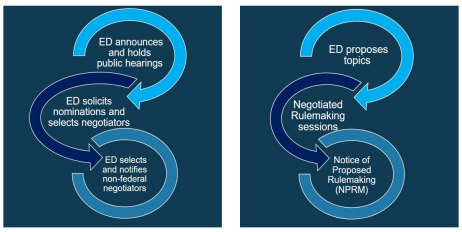
Negotiated Rulemaking



Source: U.S. Department of Education 2020 FSA Training Conference

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Final Rules

- Borrower Defense
- Closed School Discharges
- Interest Capitalization
- Total and Permanent Disability Discharges
- False Certification
- Public Student Loan Forgiveness
- 90/10
- Prison Education Programs
- Change in Ownership

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Borrower Defense to Repayment (BDR)

- Effective July 1, 2023
- Establishes a single federal standard for BDR
- New definition of aggressive and deceptive recruitment
- Reinstates a ban on pre-dispute arbitration and class action waivers

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BDR (continued)

- The Final Rule provides five grounds under which a claim could be filed:
  - Substantial misrepresentation
  - Substantial Omission of fact
  - Breach of Contract
  - Aggressive and Deceptive Recruitment
  - A federal or state judgment or department adverse action against the institution that could give rise to a borrower defense claim

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Extending Pell Grants to Incarcerated Students

- Individuals expected to become eligible next summer to apply for Pell Grants to pay for college
- New Prison Education Program (PEP) rules become effective July 2023
- Ban on Pell for prisoners dates back to 1994
- Incarcerated individuals will be able to use Pell to pay for public or nonprofit postsecondary educational programs, up to the cost of attendance.

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Change in Ownership

- New rule updates the definition of nonprofit institution to prevent improper financial benefits to a former owner or other affiliate of a college.
- Tightens ownership and control provisions when a for-profit institution converts to a nonprofit institution.
- Unlikely for a nonprofit status to be approved if the institution owes debts to a former owner or if it holds a revenue-sharing or other agreement with a former owner, current or former employee, or board member that is inconsistent with the market value for the services provided.

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Other Final Rules

- Total and Permanent Disability Discharge: streamline and ensure uniformity of the TPD discharge across all the loan programs
- False Certification: established a uniform standard for false certification
- Public Service Loan Forgiveness (PSLF): Definitions were added, modified, and restructured to clarify the definitions of qualifying employer and full-time for PSLF purposes
- Closed School Loan Discharge: Expanded qualifications
- Pre-Dispute Arbitration: Added limitations to the use of pre-dispute arbitration agreements.

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Potential New Rules...

Rules In Negotiated Rulemaking Progress	Proposed Negotiated Rulemaking Topics
Gainful Employment	Accreditation
Factors for Financial Responsibility	State Authorization
Standards of Administrative Capability	Distance Education
Certification Procedures	Third-Party Servicers
Improving Income-Driven Repayment	Return of Title IV Funds
Ability to Benefit	Deferments and Forbearances

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Questions

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