

Gov. Baker Signs Legislation Requiring Massachusetts Colleges and Universities to Adopt Sexual Misconduct Policies and Conduct Climate Surveys

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Under a new law recently signed by Governor Baker, Massachusetts institutions of higher education will be required to implement certain policies, procedures, and other mandates relative to sexual misconduct on campus by the middle of this year. Chapter 337 of the Acts of 2020, “An Act Relative to Sexual Violence on Higher Education Campuses” (“Chapter 337”)^[i] adds two sections to Chapter 6 of the General Laws and takes effect on August 1, 2021.^[ii]

Chapter 337 is a variation of House Bill 4188, discussed in detail in a prior [client alert](#). The Every Voice Coalition, a nonprofit organization created by students to raise awareness about and protect against sexual harassment and violence on college campuses, had been leading the effort to pass this legislation since 2015. In sum, Chapter 337 requires that colleges and universities in the Commonwealth take the following types of action regarding campus sexual misconduct: (1) adopt specified policies, (2) provide training to certain groups, (3) conduct climate surveys, (4) report sexual misconduct data and information about the school’s policies, and (5) enter into written memoranda of understanding with local law enforcement and sexual assault crisis centers. Compliance with these requirements may, at times, implicate Title IX of the Education Amendments of 1972 and the supporting regulations promulgated by the U.S. Department of Education under the Trump administration (“USED Title IX Regulations”). Massachusetts institutions of higher education will need to consider how federal and state law intersect in this context when preparing to implement Chapter 337 this summer.

Required Policies

Once Chapter 337 takes effect, higher education institutions will be obligated to implement policies that comport with best practices and current professional standards regarding sexual misconduct. These policies must be reviewed regularly and made publicly available on the institution’s website. The new law specifies in varying levels of detail the types of policies that must be adopted by an institution. To summarize,^[iii] a school’s sexual misconduct policies must include:

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- procedures for reporting sexual misconduct regardless of the location of the offense and including a method for doing so anonymously;
 - information about the right to report sexual misconduct to campus police and law enforcement, to obtain a protective order or no-contact order against the alleged perpetrator, and the process within the institution and the legal system for handling the complaint;
 - information about sexual misconduct resources, such as where to receive immediate emergency assistance on and off campus, available school-based supportive and protective measures, and how to have such measures reviewed;
 - procedures for resolving complaints of sexual misconduct “promptly and equitably,” including clear statements advising students and employees:
 - that notice to the responding party will include the date, time and location, if known, of the alleged incident of sexual misconduct and will connect the alleged actions with the specific policies violated;
 - that an impartial investigation will be conducted;
 - that there is a presumption of non-responsibility;
 - that both parties can review evidence “directly related” to the allegations or “relevant evidence that shall be used in the determination of a disciplinary action”;
 - that the parties have a right to an advisor;
 - of the standard of evidence;
 - that the parties will receive a copy of the institution’s policies regarding evidence used in a proceeding;
 - of the prohibition on the direct questioning between reporting and responding party;
 - of the requirement that parties will receive results of a proceeding and be informed of the appeal process no later than 7 business days after a final determination unless good cause is shown; and
 - that the institution will not disclose the identity of the parties except as necessary to carry out the disciplinary process or to comply with state or federal law.
 - the range of penalties the institution may impose in the event of a finding of responsibility for sexual misconduct;
 - a prohibition on retaliation against person reporting or participating in the investigation of sexual misconduct;
 - notice to students and employees of the institution’s obligations under state and federal law regarding sexual misconduct; and

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- an amnesty policy for the reporting party or witness who causes an investigation of sexual misconduct.

Schools will also be required to develop a campus security policy that designates at least one “confidential resource provider.” This individual can be an employee at the institution (so long as they are not the Title IX coordinator or someone who is required to report to the Title IX coordinator pursuant to USED Title IX), someone working at a victim support services organization, or, in certain circumstances, another institution in Massachusetts. The purpose of the confidential resource provider is to give students and employees a contact from whom they can gather information about their rights, services and reporting options without triggering an obligation to report the incident of sexual misconduct to the school or law enforcement. Any communications by a reporting party to a confidential resource provider are strictly confidential unless written consent is given by the reporting party. Notably, these communications are subject to the same privileges as set forth in G.L. c. 233 relating to the protection of a patient’s communications with their psychotherapist.

Chapter 337 also requires institutions to adopt memoranda of understanding with local law enforcement, setting forth each organization’s respective roles in sexual misconduct prevention and response. Unless a waiver is provided, schools without a sexual assault crisis service center are also required to enter into a memorandum of understanding with a community-based crisis center to provide services to students and employees. Additionally, schools that do have their own crisis center are also required to enter into a memorandum of understanding with a community-based center, to the extent feasible. Chapter 337 does not define what “feasible” means, but directs the Massachusetts Department of Higher Education (“MA DOHE”), in consultation with the department of public health, to provide guidance on the issue.

The Commissioner of Higher Education will appoint a safety advisor from the MA DOHE to manage and oversee statewide campus safety. The safety advisor is in charge of circulating best practices, training opportunities and other resources in an effort to enhance security on campus.

Required Training

Chapter 337 requires that colleges and universities administer sexual misconduct training to certain groups. First, new students and employees must receive training that covers several mandatory topics, including civil rights laws, the role of drugs and alcohol in consent, reporting sexual misconduct, the institution’s disciplinary process and sanctions for sexual misconduct complaints, the confidential resource provider’s contact information, and how witnesses to sexual misconduct can intervene and reduce risk. Second, those serving on disciplinary boards in sexual misconduct cases or otherwise participating in the implementation of the disciplinary process must be trained on or have experience in handling sexual misconduct complaints and the disciplinary process that will apply in such cases. The training must cover eight enumerated topics. Third, the confidential resource provider needs to be trained in sexual misconduct awareness and prevention and “trauma-informed response.” Finally, Chapter 337 mandates sexual misconduct awareness and prevention training for Title IX coordinators, campus safety, and campus police.

Data Collection and Reporting

Another important piece of Chapter 337 is the requirement to conduct an anonymous sexual misconduct climate survey of students and post a summary of the results on the institution’s website at least once every four years. The law calls for a task force of students, educators, lawmakers, law

enforcement, advocacy groups and researchers to develop model questions and recommendations for the surveys. Schools are welcome to draft their own survey so long as it includes certain topics, is designed to prevent and inform the school's response to sexual misconduct, and passes muster with the Commissioner of Higher Education.

In addition to the sexual misconduct climate survey, schools are required to publish the Annual Security Report mandated under the federal Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act on their website, along with the telephone number and website for a 24-hour hotline providing information on sexual misconduct, contact information for the school's Title IX Coordinator and confidential resource advisor, and information about students' options to report sexual misconduct, the investigation and adjudication process, and the process to request interim protective measures.

Relatedly, institutions must report sexual misconduct data to the MA DOHE. The required data includes the number of reports of allegations of sexual misconduct, the number of reports of sexual misconduct reported to and investigated by law enforcement, the number of students and employees found responsible and not responsible for violating the schools policies related to sexual misconduct, and the number of disciplinary actions imposed by the school.

Key Deadlines of the New State Law

There are several important deadlines to keep in mind under Chapter 337:

- Within 120 days after completion and analysis of the climate survey, the institution must post a summary of the results on its website. Since the climate survey task force is not required to submit the model questions and recommendations for the model climate survey until January 1, 2022, schools will have some time to prepare and administer the survey.
- Schools must provide students and employees copies of their policies and procedures related to the reporting and investigation of sexual misconduct each year, and no later than October 15th. This gives schools from now until August to develop policies consistent with the requirements in Chapter 337 and about two months to send copies of those policies out.
- Institutions are required to provide sexual misconduct programming to newly enrolled students and newly hired employees within 45 days of enrollment or hire. It is unclear if this requirement applies to all students and employees after the law takes effect or whether the deadline applies only to students and employees enrolled and hired after the law takes effect. Either way, it is likely that new students or employees will enroll almost immediately after the August 1 effective date and therefore schools will have only 45 days to provide the required programming.
- Annual reports of information related to sexual misconduct at schools must be submitted to the MA DOHE by December 1st every year. Schools should take the opportunity now to focus on data collection in order to ensure they have accurate data assembled for this coming December.

Complexities of Complying with Chapter 337 and USED Title IX Regulations

Chapter 337 imposes obligations on Massachusetts institutions of higher education around sexual

misconduct in addition to existing obligations under the USED Title IX Regulations, which went into effect last year. As discussed in our prior client alert, special attention should be paid to areas where the new law and the USED Title IX Regulations overlap or diverge. For example, the scope of Chapter 337 is much broader than the USED Title IX Regulations. Chapter 337 defines “sexual misconduct,” to include “an incident of sexual violence, dating violence, domestic violence, gender-based violence, violence based on sexual orientation or gender identity or expressions, sexual assault, sexual harassment or stalking.”^[iv] On the other hand, the USED Title IX Regulations cover only incidents of “sexual harassment,” limited to incidents of quid pro quo harassment by an employee against a student, “unwelcome conduct” that is “so severe, pervasive and objectively offensive that it effectively denies” a “reasonable person” “equal access” to education or activities therein, and sexual assault as defined by federal law.^[v] The USED Title IX Regulations further limit the definition of sexual harassment to incidents that occur in a school activity or program where the institution has “substantial control” over the accused and the location or context of the harassment.^[vi] Chapter 337 contains no such limitation.

Another complex area of overlap is the disciplinary process for sexual misconduct. The USED Title IX Regulations require that any complaint reporting an incident that does not fall within the narrow definition of sexual harassment under such regulations must be dismissed. To the extent that institutions had developed a separate disciplinary process for sexual harassment falling under the definition in the USED Title IX Regulations, they will now need to ensure that the disciplinary process applied to the broader charge of sexual misconduct complies with the new requirements of Chapter 337. Examples of these include specific notice requirements, such as providing notice of the policies that were allegedly violated and by what conduct, the presumption of non-responsibility, the prohibition on the direct questioning between the reporting and responding party, and Chapter 337’s inconsistent language around what type of evidence the parties must be allowed to review. For non-USED Title IX sexual misconduct, institutions will still have freedom to determine standards for the admissibility of evidence and to decide whether to require a live hearing. This is in contrast to the USED Title IX Regulations, which set forth detailed evidentiary requirements.

In addition, separate but parallel disciplinary processes for what is, in many cases, similar conduct, can be confusing for students and employees to understand and difficult to enforce. This may, in turn, deter reports of incidents of sexual misconduct, contrary to the objective of Chapter 337. It is, therefore, critical that schools take care to provide clear messaging of these policies to the community in an effort to avoid such issues.

Yet another point of intersection between the USED Title IX Regulations and the new state law arises with respect to a school’s sexual misconduct response obligation. Chapter 337 explains that a formal complaint under the USED Title IX Regulations is not required by a reporting party in order for the confidential resource provider to request interim protective school-based supportive measures. However, a confidential resource provider must still inform the Title IX coordinator of an allegation in order to obtain interim protective supportive measures, which constitutes actual knowledge under USED Title IX Regulations. Therefore, if the conduct amounts to “sexual harassment” under the USED Title IX Regulations, the school will still be required to respond generally, pursuant to such regulations, by providing supportive measures and information about filing a complaint and the grievance process.

These are only some examples of areas where Chapter 337 and the USED Title IX Regulations are intertwined and require a comprehensive understanding to ensure compliance and limit liability. This task is particularly onerous under current circumstances: Schools are still becoming familiar with their new policies as a result of the recent change in federal regulations and are now required to make

further changes to their policies within the next few months – all while continuing to respond to an ongoing pandemic.

Potential Changes to the USED Title IX Regulations Under the Biden Administration

Adding an extra layer of uncertainty, the Biden administration is likely to repeal the current USED Title IX Regulations in order to restore and build upon the Obama administration's policies.^[vii] President Obama's approach differed from the current regulations in that it bolstered the rights of the reporting party and afforded institutions more leeway to handle complaints of sexual misconduct. It is unclear, however, when a repeal might occur, given that the USED Title IX Regulations were put into place under a formal rule-making process, which gives them more staying power than mere guidance.

There are a few different paths that the Biden administration could take to undo these regulations: engage in another rule-making process (but this can take up to two years); pass legislation superseding the regulations; prevail in litigation challenging their legality; and decline to enforce the current regulations and issue interim guidance more in line with an Obama-era approach to Title IX. Given the overlap between the USED Title IX Regulations and Chapter 337, colleges and universities in Massachusetts would be well-advised to monitor the legislative process for potential changes under the new administration.

Over the past year, institutions of higher education have been put to the challenging task of revising their sexual misconduct protocols to comply with the change in federal Title IX policy while responding to a global pandemic. This new state law will require Massachusetts colleges and universities to implement additional changes. Schools are encouraged to consult with experienced attorneys to ensure they comply with both state and federal law.

^[i] The new law was signed by Governor Baker on January 12, 2021, but since it was passed by the Legislature during the 2020 legislative session, it is considered a 2020 Act.

^[ii] Once in effect, Chapter 337 will appear as sections 168D and 168E of Chapter 6 of the General Laws.

^[iii] See Chapter 337's insertion of G.L. c. 6, § 168E(b), (i), (j), (k), & (l).

^[iv] Chapter 337's insertion of G.L. c. 6, §§ 168D(a) & 168E(a).

^[v] 34 CFR §106.30(a).

^[vi] 34 CFR § 106.44(a).

^[vii] Tyler Kingkade, "Biden wants to scrap Betsy DeVos' rules on sexual assault in schools. It won't be easy," NBC News, November 12, 2020, available at <https://www.nbcnews.com/politics/2020-election/biden-wants-scrap-betsy-devos-rules-sexual-assault-schools-it-n1247472>.

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