

OCTOBER 2020

## New Guidance From the Department of Health and Human Services on Title IX in Academic Medical Centers

Joshua W.B. Richards | Zachary Kizitaff

On September 25, 2020, the Office for Civil Rights at the U.S. Department of Health and Human Services (“HHS”) published a document entitled, “Effective Practices for Preventing Sexual Harassment.”

The Department of Education’s recent final rule on Title IX Sexual Harassment left many more questions than answers related to the final rule’s application in the academic medical center context, and institutions seeking further clarification regarding their Title IX obligations in clinical settings had good reason to hope for joint guidance from HHS and the Department of Education. Unfortunately, HHS’s “Effective Practices” document does not provide much in the way of analysis. Nevertheless, the document provides some guidance and suggested practices designed to help academic medical centers reduce or prevent occurrences of sexual harassment.

### **Does Title IX Apply to Academic Medical Centers?**

Before discussing the substance of the guidance, a quick refresher on Title IX in the academic medical center context is helpful. This area of the law has not been addressed with a great amount of clarity by agency guidance or by courts, but there are some fundamental guideposts.

In the preamble to the final rule, the Department of Education wrote: “Congress did not exempt academic medical centers that receive Federal financial assistance from Title IX.” 85 Fed. Reg. 30446 (May 19, 2020). And as a baseline, Title IX provides that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under **any education program or activity receiving Federal financial assistance.**” 20 U.S.C. § 1681(a) (emphasis added). That proscription breaks down as follows:

- **Education:** Neither Title IX nor the implementing regulations define “education” for this purpose. At least one federal appellate court has determined that an academic medical center was subject to Title IX, reasoning that “a ‘program or activity’...is an ‘education program or activity’...if it has ‘features such that one could reasonably consider its mission to be, at least in part, educational.’” *Doe v. Mercy Catholic Med. Ctr.*, 850 F.3d 545, 555 (3d Cir. 2017) (citation omitted).
- **Program or Activity:** A program or activity includes “all operations of...an entire corporation, partnership, or other private organization, or an entire sole proprietorship...principally engaged in the business of providing...health care...” 20 U.S.C. § 1687(1)(A), (3)(A), (3)(A)(ii); see also 34 C.F.R. § 106.2(h)(3)(i)(B).
- **Receiving Federal Financial Assistance:** This includes a grant or federal financial assistance, a grant of federal property, provision of federal personnel, or any federal contract or agreement that has at least one of its provisions designed for assistance to any education program or activity. See 34 C.F.R. § 106.2(g)(1-5).

### **HHS’s Guidance: Reducing and Preventing Sexual Harassment at Academic Medical Centers**

HHS’s “Effective Practices” document proposes a series of specific actions that HHS-funded academic medical centers and programs can take to reduce or prevent occurrences of sexual harassment. HHS cautions that these suggested practices do not represent final agency action or guidance, and failure to implement these suggested practices will not, in itself, result in any enforcement action. However, given the specificity of some of the recommendations, we recommend considering implementing them to take advantage of the implied safe harbor of complying with government recommendations.

The following summarizes HHS’s key suggested best practices:

#### **Prevention**

- Share, post, and distribute a sexual harassment policy that clearly defines sexual harassment, explains the grievance process, and provides contact information for individuals tasked with carrying out the policy.

## HIGHER EDUCATION PRACTICE

- Post conspicuous notices—in person and on the institution’s website—advising visitors, trainees, employees, and others of prohibited conduct and encouraging reporting of such conduct.
- Implement job performance standards for employees responsible for coordinating the institution’s sexual harassment policy and any Title IX compliance efforts.

### **Action**

- Budget adequate resources for fairly investigating complaints of sexual harassment.
- Conduct regular employee and faculty training, hire a sufficient number of staff with experience investigating sexual harassment, and retain specialized consultants to evaluate policies and procedures.
- Provide multiple avenues for filing reports, maintain the confidentiality of all parties involved, and take prompt and appropriate corrective action.

### **Evaluate and Improve**

- Conduct anonymous, program-wide surveys to determine the extent of sexual harassment in academic medical center programs and activities.
- Conduct at least annual reviews of sexual harassment and sexual discrimination policies, procedures, and prevention efforts.
- Devise and offer tailored support measures, even when an alleged victim does not want to participate in the formal Title IX grievance process.

### **Other Practical Considerations**

- Consider encouraging patients to have a support person or chaperone present during examinations who is of the same sex as the patient.
- Provide patients with detailed information before procedures and obtain informed consent.
- Maximize privacy by asking patients to remove the minimum amount of clothing necessary and for the shortest amount of time necessary for the examination.

Many of these suggestions are practices most institutions have already implemented in their academic programs and activities, but may not have extended to their health care training and clinical programs. As institutions continue the process of coming into compliance with the Title IX final rule, these recommendations should provide some helpful guideposts for extending compliance into other contexts.

The authors will continue to closely monitor developments in this area. If you have questions about this alert or the regulations and guidance referenced in it, please contact the authors or your customary Saul Ewing Arnstein & Lehr point of contact.

**This alert was written by Joshua W.B. Richards, Vice Chair of the Firm’s Higher Education Practice, and Zachary Kizitaff, a member of the Practice. Joshua can be reached at (215) 972-7737 or at [Joshua.Richards@saul.com](mailto:Joshua.Richards@saul.com). Zachary can be reached at (215) 972-7714 or at [Zachary.Kizitaff@saul.com](mailto:Zachary.Kizitaff@saul.com). This alert has been prepared for information purposes only.**

**Did you find this information useful? Please provide your feedback [here](#) and also let us know if there are other legal topics of interest to you.**

The provision and receipt of the information in this publication (a) should not be considered legal advice, (b) does not create a lawyer-client relationship, and (c) should not be acted on without seeking professional counsel who have been informed of the specific facts. Under the rules of certain jurisdictions, this communication may constitute “Attorney Advertising.”