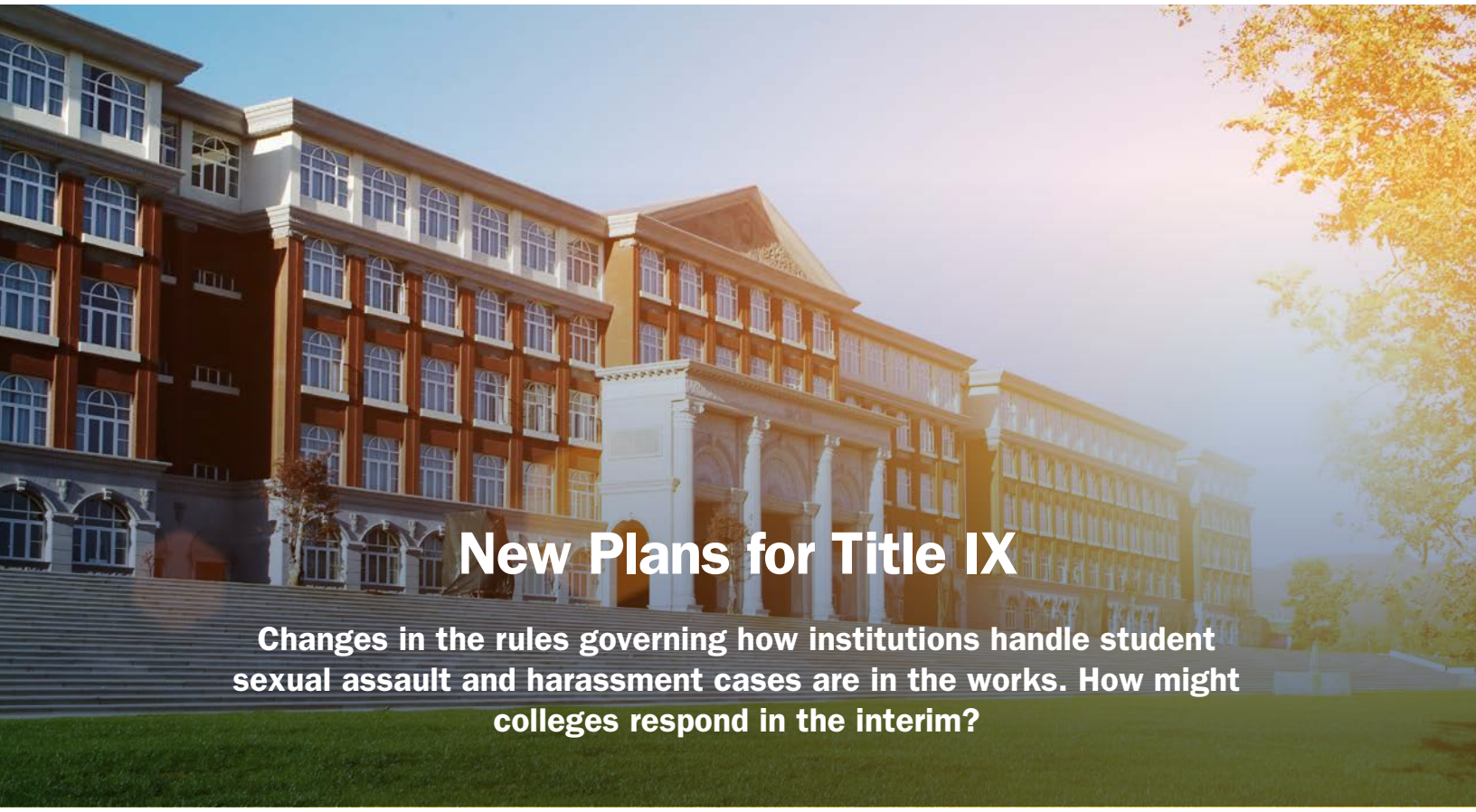

New Plans for Title IX

Changes in the rules governing how institutions handle student sexual assault and harassment cases are in the works. How might colleges respond in the interim?

In March, the Biden Administration issued an executive order signaling changes in rules governing how colleges deal with sexual misconduct, discrimination, and harassment on campus. The order calls on the Department of Education and the Office for Civil Rights to "review all existing regulations" within Title IX, the federal civil rights law that protects college students from sex-based discrimination at any institution that receives federal dollars, and then offer "new guidance" on how the law should be reworked.

Though Title IX officers across many institutions have applauded the prospect of emerging new rules that aim to be fairer to those who allege sexual misconduct by other students, some have also let out the equivalent of a sigh. Coming just eight months after colleges had worked to re-engineer their Title IX policies and hearings structures to comply with rules created by Betsy DeVos, the Secretary of Education under former President Donald Trump, Biden's plans to re-work Title IX yet again have left many administrators reeling. Once again, they'll likely have to change how they proceed with on-campus hearings.

Title IX officers are now confronted with a pressing question: As a lengthy review process continues, what rules should colleges follow in order to handle sensitive cases that often involve allegations of rape and sexual assault?

> **"The law is the law, and right now the law is the DeVos regulations," says Ignazio Ruvolo, a former California Court of Appeal justice who now serves as a hearing officer, mediator, and arbitrator--or "neutral"--for JAMS, the largest private provider of alternative dispute resolution services worldwide.**

JAMS currently has on its panel over 60 legal professionals with extensive experience who have been trained to hear Title IX cases, along with experienced associates who support their work.

The Biden review, which will eventually include public hearings and the release of a "Q-and-A"-formatted document covering which current Title IX rules the federal government will enforce and which it will change, will likely take 18 months or longer—meaning institutions will have to wait a good while for fresh guidance. "Colleges don't have the luxury of putting their Title IX cases on hold until they receive such guidance, or of ignoring the DeVos regs. The timeline is too long," Ruvolo says.

So, what can administrators do in the interim to make sure their cases are

handled fairly? For one thing, Ruvolo says, colleges can create policies on their own, with an eye toward making hearings fairer to both sides, even as they stay within the DeVos rules. For example, under the current regulations, colleges are more limited as to which cases they can hear, including ones that originate off-campus. Some institutions have managed to expand their purview, while awaiting potential new rules that could grant colleges wider jurisdiction over such cases.

Also, under the current rules, both sides in sexual misconduct cases have the right to avail themselves of an advisor, often an attorney, to cross-examine those accused of sexual misconduct (the "respondents") and those alleging sexual misconduct ("complainants"). Many administrators and activists worry that complainants will be traumatized while giving testimony.

The DeVos rules purported to even the playing field for respondents. All cases must now include hearings at which both complainants and respondents are present—making impartial and solid hearings even more imperative for colleges.

> **"Most of the colleges I've worked with have new policies that require advisors not to intimidate or harass witnesses," Ruvolo says. "The DeVos regulations do not speak to the quality of the tone of the hearings," leaving it up to institutions to create rules that protect parties and witnesses.**

Besides being required to serve the cause of justice for complainants, colleges need to adjudicate Title IX cases fairly while ensuring that respondents are also granted due process of law. Young lives are frequently upended by Title IX cases and the circumstances that have led to them. It is critical that colleges keep in mind the extremely high stakes students face.

Colleges face their own risks. Legal and financial threats exist that compel colleges to act responsibly. Many respondents who believe they have been denied due process have filed civil lawsuits against colleges. Nearly 60 civil lawsuits regarding Title IX case outcomes were filed against institutions in 2020. Such legal battles can become very expensive for colleges, which have contended with more and more litigation in recent years.

The number of reported forcible sex crimes on campus has more than doubled in the past decade, according to the National Center on Education Statistics. During the same period, lawsuits made by students against institutions for what they consider to be unfair Title IX proceedings, and the numbers of institutions that are being investigated by the federal government for possibly mishandling their Title IX cases, have followed similar upward trajectories. (Civil lawsuits related to Title IX declined last year, possibly due to the locking down of many campuses.)

Precisely because they could face investigations or lawsuits, institutions might

refrain from any guesswork about the Biden regulations-to-come, or about when they might become law.

> **"Your guess is as good as mine about what changes the new administration will make," says Eileen Brewer, a JAMS neutral and a retired state judge from Illinois. "But any rule change will have to take into account recent federal appellate decisions, including cases from the 9th circuit, 7th Circuit and the 6th Circuit, which address the due process rights of the accused."**

To navigate this barbed thicket of concerns, more colleges are turning to firms such as JAMS that provide third-party hearing officers. The firm has handled hundreds of cases for American colleges and universities during the past decade, including many Title IX cases, earning a reputation for fairness and independence that has become the industry standard.

"We at JAMS believe an institution of higher learning can benefit from utilizing a hearing officer or decision-maker who is independent, whether the regulations end up changing significantly or not," says Jennifer Sambito, Client Solutions Manager at JAMS. "The current rules require adjudicators who are free of bias and without conflict. Having an experienced hearing officer from outside of the institution adds a higher degree of impartiality."

Hiring an external hearing officer has other advantages, Sambito adds. Many Title IX cases are overseen by hearing panels made up of an institution's administrators and faculty. Using an independent resource instead frees campus personnel from such obligations, allowing them to spend their time educating and helping students in ways that are more consistent with their roles. Also, third-party hearing officers instill tangible, objective fairness into campus processes, especially when such firms serve only in neutral capacities and not as advocates, consultants, or advisors.

With a roster made up of retired attorneys, judges, and justices, JAMS neutrals are particularly valuable to institutions, Sambito adds, "because they intricately understand the law and know how to conduct hearings."