
U.S. Department of Education Releases Proposed New Title IX Regulations

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On June 23, 2022, the United States Department of Education (Department) released its long-awaited Notice of Proposed Rulemaking regarding Title IX of the Education Amendments of 1972 for public review. The 701-page document (published [here](#)) outlines the Department's proposed new Title IX regulations. Four of the major changes in the proposed regulations are highlighted below.

While the proposed regulations are currently available for review, they are still subject to change as they continue through the rulemaking process. Once the proposed regulations are published in the Federal Register, the comment period will open to the public for sixty days, during which time the public may submit comments regarding the proposed regulations [here](#). The rulemaking process could take anywhere from a couple of months to over a year. During the rulemaking period, the current regulations remain in effect.

Definition of Sex-Based Harassment

The proposed regulations expand and modify the definition of sexual harassment (referred to in the proposed regulations as "sex-based harassment") by clarifying that protections apply against discrimination based on sex stereotypes, sex characteristics, sexual orientation, and gender identity. Both the proposed and current regulations prohibit sexual/sex-based harassment in the form of *quid pro quo* harassment, sexual assault, dating violence, domestic violence, and stalking. The proposed regulations also prohibit sex-based harassment that creates a hostile environment. A hostile environment is created when "any sex-based conduct that is sufficiently *severe or pervasive* that, based on the totality of the circumstances and evaluated subjectively and objectively, it denies or limits a person's ability to participate in or benefit from the recipient's education program or activity." This is a significant change from the current regulations, which prohibit sexual harassment only if it is "*so severe, pervasive, and objectively offensive* that it effectively denies a person equal access to the recipient's education program or activity."

Title IX Jurisdiction

Similar to the broadened definition of sex-based harassment, the proposed regulations also broaden the jurisdiction of Title IX. Under the proposed regulations, Title IX would require educational agencies to address all sex discrimination in their education programs or activities, including off-campus conduct when the respondent is a representative of the educational agency, or the respondent is otherwise engaged in

conduct for which the educational agency has disciplinary authority. Contrast that with the current regulations, which do not apply to sexual harassment when it occurs outside of the educational agency's education program or activity, or outside of the United States.

Title IX Grievance Procedures

The proposed regulations have established different requirements for Title IX grievance procedures depending on the conduct and age of the parties. The proposed grievance procedure applicable at the K-12 level no longer requires a Title IX complaint to be in writing; no longer requires written notice of allegations to the parties; no longer requires the Decision-Maker to be a different person from the Title IX Coordinator or Investigator; no longer requires written investigation reports; and no longer requires the two separate ten-day periods for exchange of evidence and exchange of written questions. The proposed grievance procedure also allows for the Informal Resolution process to advance without a formal written complaint.

The proposed regulations include additional grievance procedure obligations for postsecondary institutions, such as the opportunity for all parties to have an advisor; requirements for written notices and decisions; and the option for a live hearing or for the Decision-Maker to assess credibility through individual meetings with the parties and witnesses.

Discrimination Based on Pregnancy or Related Conditions

The proposed regulations explicitly clarify that educational agencies must protect students, employees, and employee applicants from discrimination based on pregnancy or related conditions.

Under the proposed regulations, an educational agency cannot discriminate against a student based on the individual's current, potential, or past pregnancy or related conditions. An educational agency may provide reasonable modifications within the education program or activity based on a student's pregnancy or related conditions, which include the offer to participate in a separate program that is comparable to the program offered to students who are not pregnant and do not have related conditions, and a voluntary leave of absence that covers the period of time deemed medically necessary for students who are pregnant or have related conditions or the length of time prescribed in the agency's leave policy, whichever is longer.

Educational agencies would also be required to provide pregnant employees with treatment comparable to that provided to employees with temporary disabilities or conditions, provide a voluntary leave of absence without pay for a reasonable period of time if an educational agency does not have a leave policy or an employee does not have sufficient or accrued leave, and provide reasonable break time and lactation space for employees.

Takeaways

Overall, a number of important changes are likely to come with the proposed regulations, primarily impacting when and how educational agencies are expected to respond to complaints of sex discrimination. While the proposed regulations are not final, it is expected that the final version of the regulations will be substantially different from the current regulations in the highlighted areas above. In the meantime, educational agencies are expected to follow the current Title IX regulations. The Department also stated it will release additional regulations covering other elements of Title IX, such as athletics, in separate guidance.

If you have any questions about the proposed or current Title IX Regulations, the public comment period, Title IX in general, or if you are interested in training opportunities as related to Title IX, please contact the

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