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**U.S. Department of
Education
Proposed Changes to
Title IX**

Agenda

1. Background of Title IX regulations
2. Overview of proposed Title IX Notice of Proposed Rulemaking (NPRM)
3. Practical effects of proposed changes
4. Overview of the public comment period
5. Next Steps
6. Questions

Background

No 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.

-Title IX, Education Amendments Act of 1972



Background

1975

- First regulations under Title IX are promulgated implementing the nondiscrimination mandate.
- Limited to hiring, admissions, athletics, and other aspects of an institution's education program or activity.
- At that time, Federal courts had not yet addressed an institution's Title IX obligations with respect to sex-based harassment (including sexual harassment), sex stereotyping, or discrimination based on sexual orientation and gender identity.

1990s

- Over the years the understanding of Title IX evolved through judicial interpretation, with relevant case law supporting the broad reach of its nondiscrimination mandate.
- 1997: Guidance is issued for the first time on the rights of gay and lesbian students.

Background

Obama Administration

- 2011: Issues guidance on campus sexual harassment and violence.
- 2014: Issues additional guidance and increases Title IX enforcement efforts.

Trump Administration

- 2017: Repeals Obama Administration guidance and issues new guidance.
- 2017: Announces plans to write Title IX regulations.
- 2020: Publishes final regulations on campus sexual assault which remain in effect.

Biden Administration

- March 2021: President Biden directs Dept. of Education to review all existing Title IX regulations.
- June 2022: Dept. of Education releases Notice of Proposed Rulemaking (NPRM) to rewrite Trump-era Title IX regulations.

Overview

- June 23, 2022 – U.S. Department of Education releases proposed changes to Title IX regulations
- Notice of Proposed Rulemaking (NPRM) published in Federal Register on July 12, 2022



Overview- Coverage

- Covered People
 - Students, Employees, Third Parties attempting to participate in the school's educational program or activities
 - Current religious exemptions would apply
- Covered Conduct
 - Sexual harassment and sexual violence
 - Discrimination based on sex stereotypes or characteristics, pregnancy or related conditions, sexual orientation or gender identity, parental, family, or marital status
 - Retaliation

Overview- Coverage

Expands coverage for sexual orientation and gender identity

- Would prohibit differential treatment that causes “more than de minimis harm” in sex-segregated programs or activities
- References gender identity specifically
- Would not amend the regulations governing athletics, a separate rulemaking is being planned

Overview- Coverage

- Expanded definition of hostile environment harassment
- The current standard is *“Severe, pervasive, and objectively offensive”*

“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 the recipient’s education program or activity”

Overview- Coverage

Parental, Family, or Marital Status

- The NPRM would prohibit any employers from inquiring about a job applicant's marital status.
- Would clarify existing regulatory prohibitions

Overview- Coverage

Expanded Territory of Coverage

- The proposed rule would cover all sex discrimination in the institution's program or activity regardless of if it occurs on campus or not.
- Standard: anywhere if the action contributed to a hostile environment within the program or activity.

Overview - Obligations

- Institutions would be required to take prompt and effective action to end sex discrimination
- Requirement to designate a Title IX Coordinator
- The Title IX Coordinator would be required to provide appropriate supportive measures in response to allegations of sex discrimination.
- Clarifies that an institution may continue to remove students or employees on an emergency basis.

Overview - Obligations

- The proposed rule would prohibit institutions from disclosing the identity of parties
- Would establish a category of “confidential employees” and separate requirements for confidential and non-confidential employees

Overview - Nondiscrimination

- Institutions would be required to adopt and publish a nondiscrimination policy with a number of requirements.
- Policy must be made available to the public

Overview - Training

- Institutions would be required to provide training to the following individuals on their Title IX obligations:
 - All employees
 - Investigators, decisionmakers, facilitators of informal resolution process
 - Title IX Coordinator and designees

Proposed Changes

- Optional live hearing and cross-examination
- Single-investigator model allowed
- Preponderance of the evidence standard
 - Clear and convincing standard is allowed if used in all comparable proceedings



Proposed Changes

- Confidential vs. non-confidential employees
- No mandatory dismissal
- Consolidation of complaints allowed
- General requirements for grievance procedures and separate ones for sexual harassment claims involving students

Practical Effects

What would this rule mean in practice?

Practical Effects

The Department of Education's proposed regulations would include the following procedural obligations:

- All schools must treat complainants and respondents equitably.
- Schools have the option to offer informal resolution for resolving sex discrimination complaints.
- Title IX Coordinators, investigators, decisionmakers, and facilitators of an informal resolution process must not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.
- A school's grievance procedures must give the parties an equal opportunity to present relevant evidence and respond to the relevant evidence of other parties.
- The school's decisionmakers must objectively evaluate each party's evidence.
- The proposed regulations would not require a live hearing for evaluating evidence, meaning that if a school determines that its fair and reliable process will be best accomplished with a single-investigator model, it can use that model.
- A school must have a process for a decisionmaker to assess the credibility of parties and witnesses through live questions by the decisionmaker. The proposed regulations would not require cross-examination by the parties for this purpose but would permit a postsecondary institution to use cross-examination if it so chooses or is required to by law.
- In evaluating the parties' evidence, a school must use the preponderance-of-the-evidence standard of proof unless the school uses the clear-and-convincing-evidence standard in all other comparable proceedings, including other discrimination complaints, in which case the school may use that standard in determining whether sex discrimination occurred.
- A school must not impose disciplinary sanctions under Title IX on any person unless it determines that sex discrimination has occurred.

[Source](#): *U.S. Department of Education Fact Sheet on proposed amendments to its Title IX regulations.*

Practical Effects

More flexibility for institutions

Continued protection for
accused students

Reduced barriers for victims to
file complaints

Submitting Comments

60 day comment period began on July 12, 2022 and **closes on September 12, 2022**

Docket ID: ED-2021-OCR-0166

RIN: 1870-AA16

Comments can be submitted at
www.regulations.gov

Submitting Comments

- Comments take the form of a letter addressed to the Secretary of Education Miguel Cardona
- Comments are public
- Comments do make a difference

Next Steps

- Following public comment the Department of Education will review comments and revise the proposed rule based on the comments they have received.
- The current 2020 regulations remain in place until they are replaced by new regulations.
- This process will last into 2023.

Questions?



Ben Goldeen

Federal Advocacy Manager

(202) 921-6140

BGoldeen@TownsendPA.com