

Update on New Proposed Title IX Regulations

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Notice of Proposed Rulemaking Process

- Department review of May 2020 Title IX regulations began in March 2021, as directed by an executive order
- Department sought public input from stakeholders and convened a nationwide virtual public hearing in June 2021
- NPRM was published officially in the Federal Register on July 12th, and public will have until Monday, September 12th to submit comments to the Department
- Department will then have to summarize and respond to comments received and issue the resulting final regulations, which will include an effective date
- Department took 15 months to respond to approximately 125,000 comments to May 2020 regulations
- It will likely be many months before proposed regs become effective
- Until they are, May 2020 regulations remain in effect

Scope and Definition Changes

- May 2020 regulations:
 - narrowed definition of "hostile environment sexual harassment" and
 - required schools to focus their Title IX procedures on on-campus or program-related conduct that fit within that definition
- Proposed regulations in NPRM roll back that narrowing and essentially restore the definition to that used during the Obama Administration, which is more likely to require investigations of a broader category of unwelcome conduct of a sexual nature

Scope and Definition Changes

- Consistent with June 2021 Notice of Interpretation, proposed regulations make clear that sex-based discrimination covered by Title IX includes discrimination on the basis of:
 - sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation and gender identity
 - For the most part, these protections are already provided in essence by a combination of case law and other statutes

Scope and Definition Changes

- Proposed regulations explicitly define discrimination on the basis of gender identity as including:
 - "different treatment or separation on the basis of sex in a way that would cause more than de minimis harm, including by adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with their gender identity"

Scope and Definition Changes

- Although there is no definition of “de minimis harm,” Preamble (at p. 41536) cites several court decisions which appear to suggest that the Department would view the refusal of an institution to allow students to use:
 - restrooms
 - locker rooms or
 - shower facilities
- consistent with their gender identity to constitute more than de minimis harm, and therefore, be prohibited by Title IX
- Guidance on housing issues is less clear

Scope and Definition Changes

- Proposed regulations emphasize, in contrast to on-campus/program-related focus of the May 2020 regulations, that Title IX obligates a school "to respond to sex discrimination within the [school's] education program or activity in the United States, even if it occurs off-campus," and
- to "respond to a hostile environment based on sex within its education program or activity in the United States, even if sex-based conduct contributing to the hostile environment occurred outside the recipient's education program or activity or outside the United States."
- This "schools must address the on-campus effects of off-campus harassment" concept is similar to guidance included in the 2011 Dear Colleague Letter.

Scope and Definition Changes

- NPRM provides that the “conduct that occurs under a recipient’s education program or activity includes but is not limited to:
 - conduct that occurs in a building owned or controlled by a student organization that is officially recognized by a postsecondary institution
 - (similar to current regulations) and
- conduct that is subject to the school’s disciplinary authority
 - (this is a new and significant change)

K-12 Students with Disabilities

- If a complainant or respondent is a K-12 student with a disability, the Title IX Coordinator must consult with:
 - the student’s Individualized Education Program (IEP) team, if any, or
 - the group of persons responsible for the student’s placement decision under 34 CFR 104.35(c) (Section 504 team), if any
 - to help ensure that the school complies with the IDEA and Section 504 throughout the school’s implementation of grievance procedures

K-12 Employee Notification Requirements

- K-12 schools must require all of their employees who are not confidential employees to notify the Title IX Coordinator when the employee has information about conduct that may constitute sex discrimination under Title IX
- Similar in application to May 2020 regulations' rule that K-12 schools are deemed to have “actual knowledge” of sexual harassment once any employee learns of it

“Confidential Employees”

- “Confidential employee” means:
 - An employee of a school whose communications are privileged under Federal or State law associated with their role or duties for the institution;
 - An employee of a school whom the recipient has designated as a confidential resource for the purpose of providing services to persons in connection with sex discrimination—
 - but if the employee also has a role or duty not associated with providing these services, the employee’s status as confidential is limited to information received about sex discrimination in connection with providing these services; or
 - An employee of a postsecondary institution who is conducting an Institutional Review Board-approved human-subjects research study designed to gather information about sex discrimination—but the employee’s confidential status is limited to information received while conducting the study.

Confidential Employee Requirements

- Confidential employee requirements:
 - Schools must notify all participants in their education program or activity of the identity of any confidential employee
 - Schools:
 - Must require a confidential employee to explain their confidential status to any person who informs the confidential employee of conduct that may constitute sex discrimination under Title IX and
 - Must provide that person with contact information for the recipient's Title IX Coordinator and explain how to report information about conduct that may constitute sex discrimination under Title IX

Employee Notification Requirements - Postsecondary

- For postsecondary institutions, May 2020 regulations scrapped the "responsible employees must report sexual harassment" standard that Department had used for many years
- Replaced it with easier-to-administer approach that only requires colleges to initiate an investigation based on a signed, formal written complaint provided to a narrow group of college officials

Postsecondary Employee Notification Requirements

- Proposed regulations would impose a more precise but ultimately broader version of the previous standard, in that they would mandate policies that require any employee who is not a confidential employee:
 - And who has authority to institute corrective measures on behalf of the school to notify the Title IX Coordinator when the employee has information about conduct that may constitute sex discrimination
 - And who has responsibility for administrative leadership, teaching, or advising in the school's education program or activity to notify the Title IX Coordinator when the employee has information about a student being subjected to conduct that may constitute sex discrimination

Postsecondary Employee Notification Requirements

- Proposed regulations would impose a more precise but ultimately broader version of the previous standard, in that they would require policies that require any employee who is not a confidential employee:
 - And who has responsibility for administrative leadership, teaching, or advising in the recipient’s education program or activity and has information about an employee being subjected to conduct that may constitute sex discrimination under Title IX to either:
 - (A) notify the Title IX Coordinator when the employee has information about conduct that may constitute sex discrimination against employees under Title IX; or
 - (B) provide the contact information of the Title IX Coordinator and information about how to report sex discrimination to any person who provides the information

Public Awareness Events

- When a postsecondary institution's Title IX Coordinator is notified of information about conduct that may constitute sex-based harassment under Title IX that was provided by a person during a public event held on the postsecondary institution's campus or through an online platform sponsored by a postsecondary institution to raise awareness about sex-based harassment associated with a postsecondary institution's education program or activity, the postsecondary institution is not obligated to act in response to this information
 - unless the information reveals an immediate and serious threat to the health or safety of students or other persons in the postsecondary institution's community
- Institution must however use this information to inform its efforts to prevent sex-based harassment
 - including by providing tailored training to address alleged sex-based harassment in a particular part of its education program or activity or at a specific location when information indicates there may be multiple incidents of sex-based harassment

Training Requirements

- Proposed regulations would require schools to do some training for all employees so that they understand their notification obligations
- More specific training would be required for Title IX Coordinators, investigators, and others involved in formal or informal resolution proceedings
- Proposed regulations would require retention and posting of training materials

Procedural Changes

- Proposed regulations:
 - all complaints of sex-based discrimination at all schools would be addressed through procedures that include certain elements (see proposed section 106.45)
 - historically and currently, general sex-based discrimination procedures that do not involve sexual harassment are only required to be "prompt and equitable"
 - sex-based harassment cases at postsecondary institutions that involve a student complainant or student respondent would include certain additional elements (see proposed section 106.46)

Procedural Changes

- In contrast to May 2020 regulations, the proposed regulations would, for example:
 - Allow complaints to be based on both oral and written complaints
 - Allow schools to temporarily separate respondents from the institution to the extent necessary to "protect the safety of the complainant or the [school's] environment"
 - This is in addition to current “emergency removal” or “administrative leave” separation rules, which would be retained

Procedural Changes

- In contrast to May 2020 regulations, the proposed regulations would, for example:
 - Not require complaints to be "dismissed for Title IX purposes"
 - This would eliminate provision of May 2020 regulations that caused many schools to adopt relatively cumbersome dual-track procedures to address forms of sexual misconduct both within and outside the narrow definition of sexual harassment stated in the current regulations
 - See "Here's How Title IX Could Change Under Biden's Proposed Rule," Chronicle of Higher Education (June 23, 2020)

Procedural Changes - Postsecondary

- In contrast to May 2020 regulations, the proposed college student complainant/respondent sex-based harassment regulations would, for example:
 - Allow schools to provide the parties with either access to evidence gathered in investigation or a written investigation report (with evidence provided upon request)
 - but they do not have to provide both
 - Allow, but not require, live hearings
 - Current “live hearing” procedures could be replaced by a process that involves live questioning of parties and witnesses at individual meetings with an investigator or investigators

Procedural Changes - Postsecondary

- In contrast to May 2020 regulations, the proposed sex-based harassment regulations for college student complainant/respondents would, for example:
 - Allow investigators to make decisions regarding responsibility
 - that is, a "single investigator" model would again be permitted
 - Previously invalidated exclusionary rule would be replaced by a rule providing that:
 - if a party does not respond to questions related to their credibility, the decision-maker must not rely on any statement of that party that supports that party's position
 - but could rely upon statements, such as inculpatory or exculpatory text messages, that do not support that party's position

Procedural Changes

- These changes will, of course, require an overhaul of policies rewritten in 2020 to comply with the current regulations
- While the notice and comment period is running its course, schools should
 - reflect on their experiences under the current regulations and
 - start to think through how they would like to change their policies within the more flexible parameters that would be established by the proposed regulations

Informal Resolution

- In 1997, 2001 and 2011 guidance, Department stated:
 - "in cases involving allegations of sexual assault, mediation is not appropriate even on a voluntary basis."
- While some schools used non-mediation informal resolution processes notwithstanding this guidance, many schools read this language broadly and did not use any form of informal resolution practices in sexual assault cases
- Trump Administration's Department rescinded this guidance in 2017 and declared that informal resolution could be used in sexual assault cases if certain safeguards were implemented, and incorporated that position into the May 2020 regulations

Informal Resolution

- Fortunately, proposed regulations do not revert to a pre-Trump Administration position on this point
 - proposed regulations would permit the use of informal resolution processes in sexual assault and other sex-based discrimination cases
- As with the current regulations, certain safeguards must be followed
- Helpfully, the proposed regulations explicitly state a safety-related caveat that was implied in the current regulations, specifically:
 - "[c]ircumstances when a recipient may decline to allow informal resolution include but are not limited to when the recipient determines that the alleged conduct would present a future risk of harm to others."

Employee-Related Issues

- Proposed regulations back away from substantial incursion on the school-employee relationship that was made by the May 2020 regulations
- For example:
 - The most detailed procedural requirements that apply in college student complainant/respondent sex-based harassment cases discussed previously would not apply in employee-employee sex-based discrimination or harassment cases
 - Again, though, the NPRM standard would require the most detailed procedures in student complainant/employee respondent cases
 - Schools can provide a different standard of proof in employee-employee cases than they do in student cases

Questions?



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