

Insights

## PROPOSED CHANGES TO TITLE IX UNVEILED ON ITS 50TH ANNIVERSARY

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On June 23, 2022, the 50<sup>th</sup> anniversary of Title IX, the U.S. Department of Education released its proposed amendments to its regulations implementing Title IX. As anticipated, the proposed amendments eliminate many of the new requirements imposed by the 2020 regulations adopted under Betsy DeVos (the “2020 Regulations”). The proposed regulations will reinstate and codify aspects of the Obama-era guidance, and provide significant additional protections against discrimination on the basis of sex, particularly for LGBTQI+ students. Though the proposed regulations remain subject to a 60-day comment period, institutions can begin strategizing on how to approach their policies and processes to address the new requirements.

The proposed regulations expand the scope of issues that institutions must be prepared to address and clarify the standards that will apply to institutions as they work to protect the safety and educational opportunities of their students. Though institutions will need to conduct a thorough review of all campus policies to ensure compliance with the extended breadth of Title IX requirements when the regulations are finalized, institutions can start identifying the policies that will need to be reviewed and updated and begin addressing what changes they will want or need to make to their Title IX policies and procedures.

Key changes to the Title IX regulations that will necessitate institutional review and revision of Title IX policies and procedures, as well as other institutional policies, include:

- **The expanded definition of what constitutes discrimination on the basis of sex.** As anticipated based on the Biden Administration’s January 22, 2021 Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, the proposed Title IX regulations adopt a definition of sex discrimination that includes discrimination on the basis of sexual orientation and gender identity. Institutions must now ensure that their policies and practices do not prevent individuals from participating in institutional programs or activities consistent with their gender identity. The Department will issue a separate notice of proposed rulemaking to address student eligibility to participate in male or female sports teams.

- **The expanded coverage to include not only “sexual harassment” but also all “sex-based harassment.”** The Department has redefined the scope of prohibited activity from “sexual harassment” to a more broadly defined term: “sex-based harassment.” This will cover sexual harassment, quid pro quo harassment, unwelcome-sex-based conduct that is sufficiently severe or pervasive (as opposed to the 2020 Regulations’ “severe and pervasive” and objectively offensive) to deny or limit one’s ability to participate in or benefit from the institution’s program or activity, sexual assault, dating violence, domestic violence, stalking, and discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, or gender identity.
- **The expanded jurisdictional reach of Title IX.** The 2020 Regulations applied only to institutions’ education programs and activities within the United States. The proposed regulations have no such limitation, such that institutions must apply their Title IX policies and procedures to sex-based harassment that occurs outside of the United States, providing coverage for study-abroad programs, for example.
- **Who can assert a Title IX complaint.** Under the 2020 Regulations, a formal complaint can be filed by any complainant who was participating or attempting to participate in the institution’s education program or activity at the time of filing. The new rules require that the student, employee, or third party who files a complaint have been participating or attempting to participate in the institution’s education program or activity at the time when the alleged sexual discrimination occurred. This will permit, for example, a student to assert a Title IX complaint even if he or she has withdrawn or graduated from the institution.
- **Elimination of the live hearing requirement and decision-making process updates.** One of the focal points of the 2020 Regulations was the adoption of a live hearing requirement to address any Title IX complaints not dismissed or resolved through informal resolution. The proposed regulations discard the live hearing requirement, and will permit Title IX grievances to be decided by the Title IX coordinator or investigator. If a live hearing is held, similar limitations on cross-examination by parties will apply, as will the requirement for institutions to provide advisors to the parties for purposes of the hearing. The decision-maker must have the opportunity to question parties and witnesses either at a live hearing (if held) or in individual meetings. If a party refuses to respond to questions relating to their credibility, then the decision-maker will not be entitled to rely on any statement from that party in support of its position. The decision-maker also will not be permitted to draw any inferences as to the merits of the sex-based harassment claim based on a party’s refusal to respond to credibility-related questions.
- **Preponderance of the evidence standard applies.** Whereas the 2020 Regulations permitted institutions to choose between a preponderance of the evidence and clear and convincing evidence standard, the proposed rules mandate application of the preponderance of the

evidence standard unless the institution uses the clear and convincing evidence standard in all other comparable proceedings.

- **Institutional response required for all prohibited sex discrimination.** The 2020 Regulations define institutional responsibility based on an institution's actual knowledge of sexual harassment or allegations of sexual harassment. The proposed rules will require prompt action to end *any* sex discrimination that has occurred in its education program or activity, prevent its recurrence, and remedy its effect. Though institutions may be concerned about the expansive scope of potential liability in the absence of the actual knowledge standard, the Department's notes make clear that an institution will satisfy its response obligations if it complies with the monitoring, reporting, record-keeping, and other obligations outlined in Section 106.44.
- **Updated pregnancy-related protections.** The proposed regulations clarify and expand protection for students and employees from discrimination based on pregnancy or related conditions in admissions, employment, or other education programs or activities. Institutions (including their Title IX Coordinators) will have obligations to provide information on pregnancy –related support measures or modifications that institutions must make available to students once informed of a student's pregnancy.

We will be monitoring the outcome of comment process for the proposed rule, and will provide further updates as the final regulations are published. It would be prudent for all institutions of higher education to review and evaluate all non-discrimination policies and procedures in light of these anticipated changes. Institutions with questions about how the proposed regulations may impact your policies and procedures, or looking for assistance in conducting an internal audit of affected policies and procedures, can contact [sarah.hartley@bclplaw.com](mailto:sarah.hartley@bclplaw.com) or the BCLP Higher Education Team for guidance.

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