

Practice Update

Anticipate These Changes to Your Title IX “To-Do” List

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By LaKeisha C. Marsh, Montoya M. Ho-Sang, and Jamel A.R. Greer

On June 23, 2022, the U.S. Department of Education (the Department) announced that it intends to amend the current Title IX regulations that were instituted under the Trump administration in May of 2020. The Department’s forthcoming Notice of Proposed Rulemaking previews, in part, changes to the procedures an institution must follow when a report of gender-based discrimination or sexual misconduct is reported. An unofficial version of the proposed regulations can be found [here](#). Major highlights of the newly proposed regulations include the following:

- *Live hearings would no longer be required for post-secondary institutions;*
- *Sex-based harassment is redefined to include harassment based on sex stereotypes, sex characteristics, pregnancy, sexual orientation and gender identity;*
- *New definitions of “retaliation” and “peer retaliation”;*
- *Creates a more relaxed standard and a broadened scope for what conduct may contribute to a sex-based hostile environment; and*
- *Expanding which institutional employees are required to report formal and information complaints; and*

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- *New responsibilities applicable to Title IX Coordinators in responding to complaints.*

Below is a detailed overview of the notable changes highlighted above as well as a refresher on key unaffected provisions. As a threshold matter, the proposed amendments would introduce new definitions of key terms and make critical changes to existing concepts.

Re-defining sex-based harassment to include harassment based on sex stereotypes, sex characteristics, pregnancy, sexual orientation and gender identity:

- One of the most consequential proposed provisions would expand the definition of sex-based harassment to include, but not be limited to, sexual harassment. Specifically, proposed § 106.2 would legitimize harassment based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity as forms of sex-based harassment. Accordingly, the proposed amendments would extend Title IX protections to forms of sex-based harassment beyond sexual harassment — the only form of sex-based discrimination regulated by current provisions.
- In particular, the proposed regulations have strengthened the protections afforded to pregnant students or employees. These protections include, but are not limited to, requiring institutions to provide reasonable modifications for students, reasonable break time for employees for lactation and a lactation space for both students and employees.

Noting the new definitions of “retaliation” and “peer retaliation:”

- In contrast to the May 2020 regulations, the proposed regulations would, at last, define “retaliation” as “intimidation, threats, coercion, or discrimination against anyone because the person

has reported possible sex discrimination, made a sex discrimination complaint or participated in any way in a recipient's Title IX process." Proposed §§ 106.2 and 106.71(b) would define peer retaliation as "retaliation by one student against another student."

Adhering to a looser standard and a broadened scope for what conduct may contribute to a sex-based hostile environment:

- To establish a sex-based hostile environment, current regulations require that the unwelcomed sex-based conduct be so "severe, pervasive and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity." Under proposed §106.2 the conduct need only be "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 recipients education program or activity."
- Additionally, proposed § 106.11 would widen the scope of conduct that may contribute to a sex-based hostile environment by recognizing conduct that occurs off-campus but is subject to the recipient's "disciplinary authority."

The proposed regulations also make several material changes to a range of existing procedural requirements—most notably to those that govern (1) the interplay between certain employees and Title IX Coordinators, (2) grievances and, (3) informal resolutions.

Understanding the interplay between certain employees and Title IX Coordinators:

- Under proposed §§ 106.45 and 106.2, institutions would be required to investigate both written and oral complaints of sex discrimination, even if the complaint was lodged by an individual who chose to leave the institution's education program or

activity because of the discrimination or for other reasons.

- From there, any employee at a postsecondary institution or other recipient, who has authority to take corrective action, or for incidents involving students, has responsibility for administrative leadership, teaching, or advising in the recipient's education program or activity, exempting confidential employees, would be obligated, under proposed § 106.44, to notify the Title IX Coordinator (Coordinator) of conduct that may constitute sex discrimination. All other employees, apart from those designated as "confidential," would be afforded the discretion to either notify the Coordinator or provide the individual with the Coordinator's contact information and accompanying materials about reporting. Confidential employees would only be required to provide an individual with the latter, and thus are under no legal obligation to notify the Coordinator.
- In tandem, several requirements have been imposed to regulate how the Title IX Coordinator, once notified about possible sex discrimination, should respond. The new requirements include offering supportive measures — such as counseling, extension of deadlines, restrictions on contact between the parties and leaves of absence — as appropriate to restore or preserve a party's access to the recipient's education program or activity. This imposes a greater duty on Coordinators than current regulations which merely require equitable treatment of complainants and respondents by (1) providing remedies to the complainant once there has been a finding of sexual harassment and (2) adhering to a grievance process before imposing disciplinary sanctions on the respondent.
- Proper compliance with these proposed changes would hinge on revised training requirements — which the Department has anticipated and addressed in proposed § 8(d).

Understanding the Title IX grievance process and informal resolutions:

- Under the proposed provisions, live hearings would no longer be required at the postsecondary level as part of the grievance process for formal complaints of sexual harassment.
- Furthermore, a formal complaint would no longer be a prerequisite for offering an informal resolution process to a complainant and a respondent, when appropriate. *Note – Such an offer would be inappropriate in the case of an employee who is accused of sex discrimination against a student.

When considering the unaffected, already existing, Title IX regulations, it is important to note that institutions may continue to use either evidentiary standard — “preponderance of the evidence” or “clear and convincing” — in discrimination proceedings. Additionally, many of the current regulations that detail the requirements for grievance procedures will remain substantially intact. Lastly, the proposed regulations will recognize and protect against quid pro quo harassment, as is consistent with current practice.

As we continue to dig deeper into the issues presented by these proposed regulations and monitor any new developments, including the Department’s forthcoming Title IX regulations regarding athletics, we invite you to reach out to our Akerman team with any questions or concerns about Title IX or higher education generally.

This article was prepared with the assistance of Pia-Milan Green, Summer Associate.

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