

September 23, 2022

Back to School with Title IX

Sarah Finch, Sandra Musumeci, & Allison Siebeneck

In June, on the 50th anniversary of Title IX of the Education Amendments of 1972, the Department of Education (“DOE”) announced its proposed amendments to the statute’s implementing regulations. Title IX prohibits discrimination on the basis of sex in education programs or activities receiving federal funds. The proposed amendments make sweeping changes to the current definitions of sex-based harassment, expand the scope of Title IX protections applicable to schools receiving federal funds, and materially change the procedural requirements for handling Title IX complaints.

The highly anticipated new regulations reportedly elicited more than 235,000 public comments by the time the notice and comment period ended on September 12; despite the public’s broad interest in the proposed amendments—both supportive and critical of the new regulations—they are expected to be adopted without significant substantive changes. In the meantime, here are a few key issues to consider as you review and revise your institution’s Title IX policies and procedures:

Expanded Definition of Sex Discrimination and Sex-based Harassment

The current DOE regulations define sexual harassment as conduct on the basis of sex that constitutes (1) *quid pro quo* harassment, (2) unwelcome conduct that is “so severe, pervasive, and objectionably offensive that it effectively denies a person equal access to the recipient’s education program or activity,” and (3) sexual assault, dating violence, domestic violence, or stalking.

The proposed new regulations revert back to the standard for sex-based harassment as defined under the Obama administration: “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 (i.e., creates a hostile environment).”

The proposed regulations also clarify that they apply to all forms of sex-based discrimination, which includes not only sexual harassment, but also discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation and gender identity, and other sex-based conduct that meets the requirements defined in the regulations.

The DOE also indicated that it plans to issue a separate notice of proposed rulemaking to address students’ eligibility to participate on athletics teams consistent with their gender identity.

Client Alert

Protections Will Apply to Off-campus Conduct

Current DOE regulations limit Title IX protections to on-campus activity. The proposed regulations expand coverage to some off-campus behavior, including:

- Conduct that occurs in any building owned or controlled by a student organization that is officially recognized by a postsecondary institution; and
- Conduct that occurs off-campus when the respondent is a representative of the recipient or otherwise engaged in conduct under the recipient's disciplinary authority.

The proposed regulations would also govern conduct outside the United States that causes sex discrimination in the United States. This broadened scope of Title IX applicability will have significant implications for colleges and universities that participate in study abroad programs and travel athletics. It may also affect schools' policies with respect to conduct occurring in off-campus housing and online.

Institutional Notice of Misconduct

Under the current DOE regulations, recipient postsecondary institutions are required to respond to allegations of conduct in violation of Title IX only when the institution has "actual knowledge" of the conduct—defined as notice by the Title IX Coordinator or an official with authority to take corrective action. The new proposed regulations expand the definition of "actual knowledge" to include notice by other administrative leaders, teaching staff, or advisors, and they require all other employees (absent certain confidentiality restrictions) who learn of prohibited conduct to notify the Title IX Coordinator or provide the reporting party with information on how to make their own Title IX Notification.

Investigation and Hearing Requirements

The current DOE regulations provide for grievance procedures initiated by filing a formal complaint, followed by an investigation and a mandatory live hearing, with cross-examination permitted by a party's representative. The regulations provide that the hearing decision-maker must be a different person than the Title IX Coordinator or investigator, though the Title IX Coordinator may also serve as the investigator.

The proposed amendments also allow for informal resolution, in the discretion of the Title IX Coordinator, even when a formal complaint has not been filed. Participation in informal resolution must be voluntary, and it is not permitted in situations where an employee is accused of sexual misconduct toward a student. The proposed regulations also permit—but do not require—a live hearing, and they allow the Title IX Coordinator and/or investigator to serve as the decision-maker in the adjudicatory process. The proposed amendments also require that where a live hearing is permitted, the institution must allow the parties, if requested, to participate from separate locations via technology.

The proposed regulations also allow greater flexibility for schools to assess the credibility of parties and witnesses. They will not require institutions to incorporate traditional cross examination into the hearing process;

Client Alert

instead, a school may choose to allow the decisionmaker to ask relevant and not otherwise impermissible questions of witnesses, including questions proposed by the parties.

Standard of Proof

The current regulations allow institutions to choose whether their policies will apply a preponderance or clear and convincing evidence standards when adjudicating Title IX complaints. The proposed regulations require schools to use the preponderance of the evidence standard—meaning that the evidence must show the allegations are more likely to be true than not—unless the recipient uses the clear and convincing evidence standard in all other comparable proceedings, such as other discrimination complaints. The respondent will be presumed not responsible until a determination is made at the conclusion of the grievance procedure.

* * *

In sum, the changes likely to be put into effect are significant, and colleges and universities should take care to carefully evaluate their Title IX policies and procedures to ensure compliance. In many ways, the new regulations provide schools with a greater degree of flexibility than they have under the existing guidelines, but given the greater protections that the new regulations are intended to provide to students and staff, it is critical that schools also pay careful attention to make sure that their policies cover all necessary components of their educational programming, and that those policies are widely disseminated to members of their communities.

Lawyers from RSHC's Education Practice are available to discuss these impending changes to the regulatory framework and counsel colleges and universities concerning their Title IX and related disciplinary policies and processes.

Client **Alert**

For more information, please contact:



Sarah E. Finch
1.312.471.8728
sfinch@rshc-law.com
Chicago



Sandra L. Musumeci
1.212.660.1032
smusumeci@rshc-law.com
New York



Allison N. Siebeneck
1.312.471.8683
asiebeneck@rshc-law.com
Chicago