

Education

Key Takeaways from the New Proposed Title IX Regulations

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The Department of Education marked the fiftieth anniversary of Title IX, the landmark civil rights law prohibiting sex discrimination in federally funded education programs and activities, by releasing its highly anticipated [Title IX Notice of Proposed Rulemaking](#) on June 23. The proposed regulations would expand protections against sex-based discrimination of all types and restore some of the flexibility that colleges and universities were afforded to address and resolve complaints of sex-based discrimination prior to the regulations promulgated by the Trump Administration in 2020. At the same time, the proposed regulations would expand the legal obligations of colleges and universities to identify, address, and prevent sex-based discrimination on their campuses and beyond. Once these proposed regulations are published in the Federal Register, stakeholders will have 60 days to submit comments for the Department's consideration as it formulates a final set of regulations.

There is a lot to analyze in these new regulations, and institutions of higher education would do well to think carefully about how the proposed regulations would impact their operations when crafting comments. Below we summarize five key takeaways we urge institutions to think about as they chart a course forward.

1. The regulations would target a much broader range of sex-based discrimination.

The proposed regulations would expand prohibited sex-based discrimination in several important respects. For example, the regulations would clarify that sex-based discrimination includes discrimination based on sex stereotypes, sexual orientation, gender identity, and pregnancy. In addition, the regulations would proscribe unwelcome conduct that is either severe *or* pervasive, loosening the much-criticized definition in the existing regulations requiring both severe *and* pervasive conduct for actionable harassment.

2. The regulations would give colleges and universities more discretion in devising grievance procedures.

The proposed regulations would restore some flexibility and discretion for institutions to develop grievance procedures that align with their institutional goals and respect student choice. At the same time, however, the proposed regulations would place greater burdens on institutions to take action in response to sex-based discrimination. Key provisions would include:

- Investigating all complaints. The existing regulations require institutions to investigate only *formal* complaints of sex discrimination, meaning those that will proceed through the formal grievance process. The proposed regulations would require investigation of all complaints, but institutions would be required to honor a complainant's request not to proceed with the grievance process following an investigation.
- Eliminating the actual knowledge requirement. The proposed regulations would eliminate the requirement that schools have actual knowledge of alleged misconduct to trigger their duty to investigate.
- Permitting, but not requiring, live hearings. The proposed regulations would eliminate the requirement under the existing regulations that all colleges and universities adjudicate sex-based harassment complaints through a live hearing. The proposed regulations do not prohibit live

hearings, but give institutions the option to use live hearings or to revert to the single-investigator model commonly used under Obama-era guidance.

- Permitting, but not requiring, cross-examination by a party's advisor. The proposed regulations would make cross-examination by a party's advisor permissible but not required. Live hearings must provide the opportunity to assess credibility, but an institution can choose whether to allow the decision-maker or a party's advisor to ask parties and witnesses questions that test their credibility.
- Replacing the "suppression clause" with a requirement that witnesses answer credibility-testing questions. The existing regulations include a provision termed the "suppression clause" that prohibited the decision-maker from relying on any statement of a party or witness who did not submit to cross-examination at the live hearing. That provision was struck down in a court decision and the proposed regulations replace it with a prohibition against considering any statement of a party that supports that party's position "if the party does not respond to questions related to their credibility."
- Lowering the presumptive burden of proof to a preponderance of the evidence standard. The proposed regulations would alter the burden of proof requirement under the existing regulations such that the preponderance of the evidence standard would be applied unless the clear and convincing evidence standard is used in all other comparable proceedings at the institution.
- Allowing informal resolution procedures. The proposed regulations would permit informal resolutions even where a formal complaint has not been filed, except where an employee is accused of sex-based discrimination against a student.

3. The regulations would require additional training and supportive measures.

Under the proposed regulations, institutions would be required to train:

- All employees about the school's obligations to address sex-based discrimination and the scope of conduct that constitutes sex-based discrimination.
- Investigators and/or decision-makers on their obligations under the grievance procedures, how to serve impartially and without bias, the meaning of the term "relevant" in relation to questions presented to parties, and the types of evidence that are impermissible in the grievance process, regardless of relevance.
- Informal resolution facilitators on the rules and practices associated with the institution's informal resolution process and how to serve impartially and without bias.

Unlike the Obama-era guidance, the proposed regulations would not require schools to develop specific training and educational programming for the general student body. The decision to develop such programming is left to each individual institution.

The proposed regulations would require institutions to provide supportive measures to students regardless of whether a formal complaint is filed. The proposed regulations do not specifically prescribe the supportive measures that are necessary, but require that such measures be effective at restoring or preserving access to the education programs and activities.

Finally, the Department chose to retain a controversial provision in the existing regulations that prohibits any sanctions on the respondent during the pendency of the investigation. That said, there is an exception allowing an institution to remove a respondent from the institution on an emergency basis if the institution determines that "an immediate and serious threat to the health and safety of students or other persons justifies the removal."

4. The regulations would require colleges and universities to address off-campus conduct that contributes to a hostile environment.

The proposed regulations would revive the Obama-era guidance requiring institutions to investigate misconduct that takes place off-campus. Specifically, institutions would have an obligation to address sex-based harassment even if the harassment occurred outside the institution’s program or activity, meaning at off-campus locations not under institutional control. The proposed regulations go further than the Obama-era guidance in imposing an obligation to investigate when harassment occurs outside of the United States.

5. The regulations would prohibit exclusion from programs on the basis of gender identity—but leave open questions about sports.

The regulations would prohibit institutions from excluding students from clubs, activities, facilities, or the like on the basis of gender identity. At the same time, however, the regulations would continue to recognize limited circumstances in which differential treatment is permissible, such as separate toilets, locker rooms, shower facilities, living facilities, and human sexuality classes. Critically, the Department chose not to address athletic activities in this proposed regulation. Instead, the Department stated that it would issue a separate notice of proposed rulemaking to address whether and how the regulations apply to participation on male or female athletics teams.

Jenner & Block’s Education Practice is one of the most sophisticated in the country, regularly representing institutions of higher education in their highest-stakes regulatory and litigation matters. We have extensive experience in submitting comments in response to Notices of Proposed Rulemakings and likewise have litigated numerous Title IX cases. We have deep knowledge of this subject matter and look forward to the opportunity to assist our clients in submitting comments in response to these proposed regulations and developing compliant Title IX procedures once final regulations take effect.



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