



## A Robinson+Cole Legal Update

June 28, 2022

### Department of Education Proposes Revamping Title IX Sexual Harassment Regulations

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On June 23, 2022, the 50th anniversary of the passage of Title IX, the Department of Education (DOE) released proposed major changes to the current Title IX regulations made effective in August 2020. The proposed revisions would remove barriers to reporting sexual harassment and extend protections based on sexual orientation and gender identity. The proposed rules will not take effect until after the DOE considers what we expect to be tens of thousands of public comments. However, the 701-page notice of rulemaking provides a glimpse into what schools can expect in the final regulations. Here are four highlights from the proposed regulations:

*First*, the proposed regulations significantly expand the definition of sex-based harassment, which now includes harassment based on sexual orientation, gender identity and prenatal and pregnancy status.

*Second*, the proposed regulations eliminate the Trump-era requirement that colleges hold live hearings as part of the formal Title IX investigations with the opportunity for cross-examination of both sides. However, schools may voluntarily choose to include live hearings as part of their grievance procedures.

*Third*, the proposed regulations broaden the definition of “sexual harassment” to cover all forms of sex-based conduct, including harassment based on sex stereotypes and sex characteristics. Whereas the current regulations require sex-based harassment to be “severe **and** pervasive,” the proposed broader definition would require the conduct to be “severe **or** pervasive.” Furthermore, colleges will be required to confront off-campus behavior that “creates or contributes to a hostile environment,” including misconduct that occurs outside of the U.S., such as in study abroad programs. While this broader definition will likely increase the number of reports a school is legally obligated to investigate, the proposed regulations return discretion to schools by allowing for adaptability of the regulations’ grievance policies and procedures.

*Fourth*, the proposed regulations require schools to have a process for a decisionmaker to assess the credibility of parties and witnesses through live questions. Returning to Obama-era rules, the decisionmaker may be the Title IX coordinator. The decisionmaker must not have conflicts of interest or bias for either party. If a party refuses to respond to questions about their credibility, the decisionmaker may not (1) rely on the party’s statements in support of their position or (2) draw an inference about whether sex-based harassment occurred solely based on the party’s refusal to respond.

Although it is likely that the DOE’s final regulations will not be released for quite some time (the current regulations were released 18 months after they were proposed), it would be prudent for schools to begin planning how to implement the new regulations once they are finalized. The DOE’s proposed Title IX regulations are open for public comment for the next 60 days. We will continue to follow these developments closely. Robinson+Cole is well-versed in Title IX issues and is assisting schools in anticipation of the revised regulations.

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