Client Alert: Department of Education Issues Proposed Changes to Title IX Regulations

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On June 23, 2022, the Department of Education issued a Notice of Proposed Rulemaking (NPRM) that would alter obligations to address sex discrimination that affects employees and students, including sexual harassment, pregnancy discrimination, and discrimination based on sexual orientation and/or gender identity. The proposed rules apply to all entities that are subject to Title IX regulation, including all elementary, secondary, and post-secondary educational institutions that receive federal funding.

The proposed rules are not yet final, and there are no immediate changes that schools must or should implement. The Department of Education is currently soliciting comments from the public and may edit the proposed rules based on that feedback. Once the final rules are published, the Department will set a date by which covered institutions must comply. Until the final rules issue and a compliance date is set, institutions should continue to comply with existing law, including the 2020 Title IX regulations applicable to allegations of sexual harassment.

The proposed regulations replace the Trump Administration's 2020 regulations and, while they cover a broader range of conduct, they appear to be significantly less prescriptive, particularly as relates to compliance for employee matters and for matters involving students at post-secondary institutions. Some of the major changes include:

- Unlike the 2020 regulations, which largely applied to a narrowly defined category of sexual harassment, the proposed regulations apply to all forms of sex discrimination. This includes discrimination based on gender identity or sexual orientation; discrimination related to pregnancy; sexual harassment; and other sex-based harassment.
- The proposed regulations also eliminate the jurisdictional limitations of the 2020 regulations: conduct that occurs off-campus or in the context of a study abroad program may now be addressed under Title IX if it has the effect of creating a hostile environment in an education program or activity.
- The proposed regulations broaden the types of employees that must report allegations of sex discrimination to a school's Title IX Coordinator to include all employees at elementary and post-secondary schools, and administrative leaders, teachers, or advisors at post-secondary institutions. Confidential employees remain exempt from reporting requirements.
- Under the proposed regulations, the requirements for grievance processes that apply to claims involving students (as either a complainant or respondent) are distinct from the requirements for grievance processes for claims involving only employees. In general, the requirements for the student-involved process are more substantial. For example, students must be permitted the opportunity to provide the decision-maker with relevant questions to be posed to the other party, and where a violation of policy is found, both students must be informed in writing of disciplinary sanctions and other remedies. In a student-involved matter, the rules also limit a decision-maker's ability to consider information from parties or witnesses who refuse to answer questions related to their own

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credibility.

- Finally, the proposed regulations eliminate the requirement that Title IX adjudications include a live hearing. While the proposed rules allow and provide rules surrounding hearings, they also contemplate a situation where a decision-maker questions parties and witnesses in separate meetings, including by posing relevant follow-up questions provided by the parties, and then issues a written determination.

Institutions must remember that, while their approach to addressing sexual harassment may become more flexible under the new regulations, they must still comply with applicable state law and court decisions. For institutions of higher education in Massachusetts, this includes the Massachusetts Campus Safety Act, M.G.L. c. 6 §§ 168D & 168E; M.G.L. c. 151B & 151C; and non-discrimination obligations related to employees under Title VII. Public institutions must also comply with the First Circuit's decision in *Haidak v. University of Massachusetts*, 933 F.3d 56 (2019).

CLIENT TIP

The new regulations may present an opportunity for educational institutions to consolidate policies. Grievances that were previously addressed under a separate Title IX process may now be combined into a process applicable to all forms of sex discrimination, or all forms of prohibited discrimination. For more information, please contact the author or your Bowditch attorney at 508-791-3511.

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