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Department of Education Releases Proposed Changes to Title IX Regulations

Announcing it as a commemoration of the 50th Anniversary of the enactment of Title IX (though anticipated for the past 18 months), the U.S. Department of Education (DOE) announced sweeping proposed amendments to the Title IX regulatory scheme that went into effect less than two years ago.

It is important to stress that these amendments are only proposed and still have to go through the rulemaking process, which could take many months. It would be very surprising to see any of these proposed changes go into effect before 2023. That said, the 700-page Notice of Proposed Rulemaking appears to be something close to a final product and is unlikely to undergo significant changes prior to implementation.

Bond will be releasing comprehensive guidance on these proposed changes in the coming weeks; however, the following is a brief summary of some of the most notable proposed amendments.

Definitions

The definitions have been consolidated into a single section, rather than spread throughout the various subparts as they are in the current regulations. Substantively, the proposed amendments also contain several additional and extended definitions that will expand the application of the regulations. These include:

- A new provision defining "pregnancy or related conditions" to explicitly include pregnancy, childbirth, termination of pregnancy or lactation;
- A new definition of hostile environment harassment that includes severe or pervasive conduct that "denies or limits a person's ability to participate in or benefit from" a college or university's program or activity [emphasis added];
- A new definition of supportive measures that specifically includes "temporary measures that burden a respondent imposed for non-punitive and non-disciplinary reasons";
- Eliminating the current distinction between "directly related" evidence and relevant evidence, the proposed regulations define relevant evidence as that which is "related to the allegations of sex discrimination under investigation" and go on to state that "[q]uestions are relevant when they seek evidence that may aid in showing whether the alleged sex discrimination occurred, and evidence is relevant when it may aid a decisionmaker in determining whether the alleged sex discrimination occurred."

Protections Based on Sexual Orientation and Gender Identity

The proposed amendments codify the DOE's June 16, 2021 Notice of Interpretation—itself based on a U.S. Supreme Court ruling—which effectively extended Title IX's definition of sex discrimination to include discrimination on the basis of sexual orientation and gender identity.

Scope

The proposed rules expand the application of the Title IX regulations generally. Under the proposed rules, in addition to territorial jurisdiction covered under the current regulations, Title IX would apply to any conduct that is subject to the institution's disciplinary authority. Furthermore, the proposed rules specifically obligate an institution to address a sex-based hostile environment even if the sex-based harassment contributing to the hostile environment occurred outside the institution's education program or activity or outside the United States.

Protections Based on Pregnancy, Parenting and Family Status

While they add little to existing guidance, the proposed regulations layer that guidance into more specific regulatory prescriptions surrounding the treatment of students based on "current, potential, or past parental, family, or marital status." Provisions that are new to the regulatory framework include:

- A requirement that any employee who becomes aware of a student's pregnancy inform the student that the student may contact the Title IX Coordinator for assistance;
- A requirement that the Title IX Coordinator, upon becoming aware of a student's pregnancy or related condition, inform the student of their rights;
- A requirement that the Title IX Coordinator affirmatively:
  - provide reasonable accommodations;
  - allow a leave of absence after which the student will be reinstated to the same academic and extracurricular status; and
  - ensure the availability of clean, private lactation space that is not a bathroom;
- A requirement that the college or university make modifications to policies, practices and procedures that are individualized, documented and consider an array of specific actions outlined in the amendments.

Provisions that require colleges and universities to treat pregnancy-related conditions in the same manner as temporary disabilities remain, as do requirements that pregnant students be allowed, but not required to, participate in alternative programming.

Perhaps most instructive is a new subsection on healthcare provider certifications. The proposed regulations make clear that provider certification may only be required if necessary and required of all students engaged in the specific course, program or activity.

Taken as a whole, and in combination with recent OCR actions, it is safe to assume that the expanded breadth of the proposed regulations addressing pregnancy or related conditions demonstrate a renewed focus on ensuring pregnant students are not disadvantaged in their education.

Mandatory Reporting

The proposed regulations would greatly expand mandatory reporting and related obligations of most personnel on college and university campuses, arguably implementing a mandatory reporting scheme even broader than the "responsible employee" system that existed under pre-2016 sub-regulatory guidance. As is the case under the current regulations, employees who are not confidential

resources and who have authority to institute corrective measures would be required to notify the Title IX Coordinator when they receive information about conduct that may constitute sex discrimination under Title IX. In addition, however, any institutional employee who is not a confidential resource and who has responsibility for "administrative leadership, teaching or advising" would similarly become a mandatory reporter of such conduct impacting students—this would appear to include most faculty. All other employees who are not confidential resources would be obligated to either report such information to the Title IX Coordinator or, alternatively, provide the Title IX Coordinator's contact information and information about reporting options to the reporting party (i.e., these employees would apparently have discretion to determine whether to honor requests for confidentiality by simply informing reporting parties of their rights in a manner similar to the "first disclosure statement" required under New York State Education Law Article 129-B and other similar state legislation). Institutions would continue to be permitted to designate as confidential resources employees not subject to a legally recognized healthcare practitioner or other privilege.

Emergency Removal & Supportive Measures

The proposed regulations would modify the standard for emergency removal of students from campus pending the outcome of a process. Under current regulations, emergency removal may occur only where the continued presence of a student poses an "immediate threat to the physical health or safety" of the reporting party or others. Under the proposed regulations, emergency removal would be authorized in cases involving an "immediate and serious threat to the health or safety" of such individuals, thereby permitting emergency removal based on threats of emotional harm.

The proposed regulations would modify the standards for implementation of supportive measures that impact a respondent prior to a determination of responsibility. Current regulations limit an institution's ability to impose such measures if (among other things) they are similar to consequences considered sanctions following a process. The proposed regulations would permit the implementation of supportive measures, provided that they are no more restrictive on the respondent than is necessary to restore or preserve a complainant's access to educational programs or activities and are not imposed for punitive or disciplinary reasons. As is the case under current regulations, institutions would be required to provide each party an opportunity to contest the need for, and details of, supportive measures impacting the party, either before they are implemented or as soon as possible after they have taken effect.

Grievance Procedures

The proposed regulations would permit the filing of complaints verbally, as compared to current regulations which require complaints to be in writing and signed.

The proposed regulations eliminate all the strict timelines in the current regulations and instead require that institutions complete the major steps of their processes (e.g., intake, investigation, adjudication and appeal) in "prompt time frames" articulated in their policies, with reasonable extensions permissible based only on good cause that is fully disclosed and explained to the parties.

The proposed regulations would eliminate the current mandate that institutions conduct live hearings at which each party's advisor may cross examine the other party and any witnesses. Institutions would be permitted to continue live hearing systems (and many may need to do so in light of federal court decisions during the past several years), but would also have the option to return to "single investigator" or hybrid models not involving a live hearing. If these alternative models are

implemented, institutions would be obligated to ensure that they incorporate processes to evaluate credibility (including permitting the parties to propose to the decision maker or investigator relevant permissible questions and follow up questions for the other party and any witnesses), and an opportunity for the parties to review an investigative report and/or relevant evidence gathered during the process.

If an institution chooses to use a live hearing model, the institution would be required to either: (a) allow each party's advisor to cross examine the other party and any witnesses; or (b) allow the parties to propose to the decision maker questions for the decision maker to ask the other party and any witnesses (again, in light of federal court precedent, some institutions would still need to allow advisor questioning).

In contrast to current regulations (which greatly restricted institutions' ability to require parties to maintain the confidentiality of ongoing processes), the proposed regulations would obligate institutions to take steps to preserve confidentiality/privacy of the parties and others involved in the process. However, institutions would need to ensure that such privacy measures do not restrict the ability of the parties to obtain and present evidence, consult with family members, confidential resources or advisors, prepare for a hearing if one is offered or otherwise advocate on their own behalf.

Retaliation

Like the current regulations, the proposed regulations require institutions to address retaliation against parties or witnesses relating to a sex-discrimination complaint. Unlike the current regulations, however, the proposed rules obligate an institution to use the specified Title IX grievance process to resolve the allegations of retaliation. The proposed rules also specifically require an institution to address "peer retaliation" such as student-on-student conduct.

Employment

The proposed regulations would specifically extend lactation protections and accommodations to employees, requiring colleges and universities to allow lactation-related break time and provide a clean, private lactation space that is not a bathroom.

Miscellaneous

The proposed regulations would retain a number of provisions under current regulations, including among other things the parties' right to utilize an advisor of their choice (as is required under the Violence Against Women Act amendments to the Clery Act), the presumption that a respondent is not responsible unless a finding of responsibility is made through the process, an obligation to post training materials on institutional websites, broad authorization for the use of informal resolution processes and standards for appeals of determinations and dismissals of complaints.

While none of the changes are likely to go into effect for at least several months (perhaps longer), it is prudent for colleges and universities to begin planning now in order to avoid scrambling later. Institutions should consider what changes to their policies and procedures would be required if the proposed regulations are adopted substantially in their current form, as well as opportunities to modify grievance procedures and other existing processes in light of flexibility afforded by the proposed regulations in certain areas.

Taking these steps now will ensure that your institution is prepared for implementation and staff training whenever the new regulations go into effect. Bond's team of higher education attorneys is ready to help.

If you have any questions, please consult any attorney in Bond's Higher Education practice or the Bond attorney with whom you are regularly in contact.

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