

insights

TYPES NOT MAPPED YET June 23, 2022 | TTR not mapped yet | Scott Z. Goldschmidt, Aaron D. Lacey

U.S. Department of Education unveils proposed revisions to Title IX regulations

On June 23, 2022, the U.S. Department of Education (the “Department”) released its long anticipated proposed rule under Title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of sex in education programs or activities receiving federal financial assistance. The unofficial version of the proposed rule is available [here](#), and a fact sheet published by the Department is available [here](#).

Changes proposed to Title IX’s regulations

As expected, the Biden administration proposed significant changes to the [current Title IX regulations](#). In particular, the proposed rule would:

- Clarify that Title IX’s prohibition of discrimination based on sex includes protections against discrimination based on sex stereotypes and pregnancy and applies to sexual orientation and gender identity;
- Expand the definition of sexual harassment;
- Expand protections for students and employees who are pregnant or have pregnancy-related conditions;
- Permit, but not require, live-hearings and cross examination to adjudicate sex discrimination complaints; and
- Establish clear requirements for schools to conduct a reliable and impartial investigation of all sex discrimination complaints, as Title IX requires as opposed to only formal complaints of sexual harassment

Notably, the Department explained that it endeavored to keep as much as the current regulation as possible to ensure consistency for schools. The Department also announced that it will engage in a separate rulemaking to address Title IX’s application to athletics.

Webinar and Redline

Thompson Coburn attorneys are in the process of comprehensively examining the proposed rule. **We invite you to join us for a webinar on July 7, 2022, during which we will discuss the rule in detail, highlight significant changes, and suggest opportunities for comment (see below for additional information regarding the comment process and period).** [Click here to register for the webinar.](#)

Further, to assist institutions with their review of the proposed rule, we have created a redline that shows the revisions to the current regulations. The redline can be [downloaded here](#).

Timeline for a final rule

In accordance with the Administrative Procedure Act, the Department must undergo a specific process to issue a final rule. Generally, the first step is for the Department to publish a proposed rule. The proposed rule provides the public an opportunity to review and comment on the proposed changes. After the comment period closes, the Department reviews the comments received. The Department must then decide whether to proceed with the rulemaking it proposed, issue a new or modified proposal, or withdraw the proposal. A final rule, if issued, will include responses to the comments received.

While the timeline of the federal rulemaking process varies based on a number of factors, we expect this proposed Title IX rule to generate significant interest and thousands of comments. For context, the previous Title IX

rulemaking process, which occurred during the Trump administration, took almost 18 months to complete, with the [NPRM](#) being issued on November 29, 2018 and the [final rule](#) being published on May 19, 2020. Over 124,000 comments were submitted during the 60-day comment period. While it is not possible to predict whether this rule will follow a similar timeline as the Trump administration's rule, it is safe to say it will take a number of month before a final rule is published.

The current Title IX regulations remain in effect until a final rule is issued and effective. This means that institutions must continue to comply with the Trump administration's rule throughout the rulemaking process. To assist institutions comply with current Title IX rule, Thompson Coburn has made the following resources free and available to the higher education community:

1. A six-part [online lecture series](#) that provides foundational training for those individuals who will be administering the Title IX process, including Title IX coordinators, investigators, advisors, hearing officers and appeal officers; and
2. A [compliance checklist](#) that is designed to assist institutions as they review their policies for compliance with the new rule's most significant requirements, and includes select quotations from the commentary that accompanied the new rule.

Comments

The Department's proposed Title IX rule will be open for public comment for 60 days from the date of publication in the Federal Register. We strongly encourage the higher education community to seriously consider submitting comments, both in support and opposition of its proposed changes. It is important for the Department to hear from the regulated community and comments will help to shape the Department's decision-making and the final rule. Institutions interested in posting comments may do so online via the [Federal eRulemaking Portal](#).

Extra Credit. The Department is not the only branch of the federal government that has recently addressed Title IX. On April 28, 2022, the U.S. Supreme Court decided [Cumplings v. Premier Rehab Keller, P.L.L.C.](#). In that case, the Court held that emotional distress damages are not recoverable in a private action brought under Title IX, Title VI of the Civil Rights Act of 1964, the Rehabilitation Act of 1973 or the Patient Protection and Affordable Care Act.



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