

Title IX's Anniversary Gift – Proposed Changes

By David Hirt & Adrienne Kirshner

On Title IX's 50th Anniversary, the Department of Education announced its proposed changes to Title IX's implementing regulations concerning sexual misconduct to better align them to Title IX's nondiscrimination mandate. The proposal keeps some of the Trump administration changes while eliminating others. The proposal would amend the regulatory requirements on how schools must respond to sex discrimination complaints and creates a new term "sex-based harassment." The new term will clarify that Title IX covers sexual harassment, harassment based on stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.

The proposed new term "sex-based harassment" returns the scope of Title IX to a broader definition of harassment by returning the or: "unwelcome sex-based conduct that is sufficiently severe or pervasive, that, based on the totality of the circumstances and evaluated subjectively and objectively, denies or limits a person's ability to participate in or benefit from the recipient's education program or activity (i.e., creates a hostile environment)."

The proposed rules keep the requirement of an accused's presumption of innocence and will still allow schools to use either a preponderance of the evidence or a clear and convincing standard. However, the clear and convincing standard will only be permitted if the same standard is used by the school in other discrimination matters such as accusations of racial discrimination.

The proposal will allow the investigator to also be the decision-maker. The requirement that the Title IX coordinator, investigator, and decision-maker be free of conflicts of interest or bias for or against complainants or respondents will remain.

For higher education institutions, the proposed rules will no longer require live hearings, and cross-examination by the parties will no longer be required. However, a post-secondary school must have a process that allows the decision-maker to assess the credibility of parties and witnesses through live questioning by the decision-maker. However, these changes may not affect Ohio because the Sixth Circuit in *Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018) held that cross-examination is a constitutional requirement of due process in the Title IX context involving a university. The Department of Education has opined that the case law, including *Baum*, does not require a live-hearing with cross-examination as long as another live method of determining credibility is provided.

The proposed rules also expand what a school may investigate and punish by allowing schools to take actions for activity that takes place off campus.

The Department of Education will issue a separate proposal concerning how Title IX should apply to athletics, including how schools should determine a student's eligibility to participate on a male or female athletic team.

For the next 60 days, the public may submit comments on the proposal. The Department of Education will then need to address each point in writing before the regulations may be finalized. This process is likely to take at least several months. However, even if elements of the proposal make it into the final regulations,

the Congressional Review Act will allow Congress to vote within 60 legislative days to overturn the regulations.

If you would like more information regarding the proposed changes to Title IX or assistance in preparing a public comments, please contact any of the listed Roetzel attorneys.

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