

## **EXECUTIVE SUMMARY OF TITLE IX NOTICE OF PROPOSED RULEMAKING**

*July 2022*

On the 50<sup>th</sup> anniversary of the passage of Title IX, the Department of Education released its long-awaited [notice of proposed rulemaking](#) (NPRM) to amend the rules governing how colleges and universities handle sex discrimination on their campuses.

In general, the proposed regulations expand the scope of Title IX while streamlining certain procedural requirements and providing additional protections for victims of sex discrimination. The proposed rules, which differ in numerous ways from both the Obama-era guidance and the [Trump Administration's regulations](#), would remove some requirements that apply to colleges and universities while adding new ones in their place.

The NPRM is subject to a 60-day public comment period that began July 12, 2022 when the proposed rules were [published](#) in the *Federal Register*. Comments must be submitted via the Federal eRulemaking Portal at <http://www.regulations.gov> on or before September 12, 2022. After the comment period closes, the Department will review the comments and draft final regulations, a process that is expected to take at least a year.

Below is an executive summary of the key aspects of the NPRM. NAICU has also produced a detailed [technical summary](#) of the regulations. In addition, the Department has provided a [fact sheet](#) and [summary](#) of the major provisions in the NPRM.

### **COVERAGE**

Perhaps most notably, the Biden NPRM would greatly expand the scope of conduct that is covered by the Title IX regulations. Unlike the Trump Administration's Title IX regulations, which addressed sexual harassment and violence only, the Biden Administration's proposed rules would expand coverage to apply more broadly to all forms of sex discrimination, including retaliation. Specifically, the requirements in the NPRM would now apply to sexual harassment, sexual violence, and discrimination on the basis of parental status and pregnancy and related conditions, including lactation. Likewise, the NPRM would include an express prohibition against discrimination based on sexual orientation and gender identity.

Despite the general prohibition against gender identity discrimination, the Department declined to address how gender identity should be handled in the context of athletics. Instead, the Department stated that it will engage in a separate rulemaking on criteria regarding the eligibility of transgender students to participate on sex-segregated athletic teams.

However, the NPRM would prohibit differential treatment that causes more than de minimis harm in other circumstances in which Title IX permits sex-segregated programs or activities, such as sex-separate shared facilities. According to the NPRM, preventing an individual from participating in an education program or activity consistent with the person's gender identity would subject a person to more than de minimis harm. This provision would not apply in contexts in which particular practices are otherwise permitted by Title IX, such as admissions to single-sex colleges or as permitted by a religious exemption.

The NPRM would expand the scope of Title IX in other ways. For example, institutions would be required to take prompt and effective action to end any sex discrimination that has occurred, prevent its recurrence, and remedy its effects. The NPRM would also broaden the definition of what constitutes sexual harassment and would encompass conduct that occurs outside the institution's educational program or activity or outside the country if such conduct contributed to a hostile environment within the institution's program or activity.

In addition to sex discrimination against students and employees, the NPRM would obligate institutions to address sex discrimination against third parties who participated or attempted to participate in the school's educational program or activity at the time the alleged sex discrimination occurred.

The current regulations governing exemptions for religious institutions would remain in place under the NPRM.

## PROCEDURAL REQUIREMENTS

The NPRM would eliminate some of the most burdensome requirements that the current regulations impose on both institutions and victims of sex discrimination. For example, the NPRM would permit, but not require, institutions to offer a live hearing. During a hearing, institutions would also be required to provide a process to assess the credibility of parties and witnesses but doing so via direct cross-examination would be optional. Supportive measures would still be available under the NPRM, which, unlike current regulations, would permit institutions to offer a voluntary informal resolution process in certain circumstances regardless of whether a complainant files a formal complaint requesting initiation of the grievance procedures.

On the other hand, the NPRM would establish extensive and detailed requirements regarding many aspects of the Title IX process. For example, the rules would establish requirements governing Title IX Coordinators, the establishment and publication of a nondiscrimination policy, training, the informal resolution process, and grievance procedures, including requirements regarding notice, conflicts of interest or bias, evidence, supportive measures, remedies, disciplinary sanctions, and dismissal of complaints. Notable elements would include:

- The option to use a single-investigator model.
- Designation of employees as confidential or non-confidential employees to allow individuals to seek confidential assistance.
- A requirement to use a preponderance of the evidence standard of proof when making such determinations, unless the institution uses a clear and convincing standard in all other comparable proceedings.
- The ability to consolidate complaints.
- A requirement to allow the parties to have an advisor of their choice, who may be an attorney, and to appoint such an advisor if a party does not have one for purposes of cross-examination, if permitted.
- A requirement to offer an appeals process for sexual harassment determinations or dismissals based on procedural irregularities, new evidence, conflict of interest or bias, or other bases established at the discretion of the institution, as long as such bases apply equally to the parties.

## OTHER PROVISIONS OF NOTE

- The NPRM would retain a provision specifying that the Department will not deem an institution to have violated Title IX solely because the agency would have reached a different determination.
- The NPRM would also preempt state or local laws, unless such laws provide greater protections against sex discrimination and do not conflict with the regulations.