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ATTORNEYS AND COUNSELORS FOR TEXAS PUBLIC SCHOOLS AND LOCAL GOVERNMENT

August 18, 2022

RE: Proposed Updates to Title IX Regulations on Sexual Harassment

Dear Charter School Leaders:

On June 23, 2022, the United States Department of Education’s Office for Civil Rights (“OCR”) issued [proposed updates to the Title IX regulations](#). These proposed updates were long anticipated, as many commentators and school officials had been critical of the current Title IX regulations that took effect in August 2020.

The proposed updates, which include 177 pages of commentary, include plans to significantly change the scope of a school’s responsibilities to prevent and respond to sex-based discrimination while also changing the process for investigating reports of sex-based harassment. While we are continuing to review the commentary and proposed updates, we wanted to share a summary of potential major changes to the Title IX framework.

Included with this letter is a summary table outlining those portions of the proposed updates to the Title IX regulations that would most likely impact K-12 school operations. Some of these changes include:¹

- **Expanded prohibitions on forms of sex discrimination.** The current Title IX regulations include protections against sexual harassment, but do not expressly refer to other forms of sex-based harassment. The proposed regulations define sex-based harassment to include not just sexual harassment, but also other forms of sex-based conduct, including harassment based on sex stereotypes, sex characteristics, sexual orientation and gender identity, and pregnancy or related conditions.
- **Expanded definition of harassment.** The proposed regulations also expand the definition of harassment. The current regulations provide that Title IX prohibits conduct that is “so severe, pervasive, *and* objectively offensive” that it effectively denies an individual equal access to a school’s educational programs or activities. The proposed updates would change Title IX to prohibit unwelcome sex-based conduct that

¹ The proposed updates do not directly address issues related to Title IX’s application to sports or athletic activities. The Department of Education has announced that separate rulemaking on these issues will be forthcoming. For now, schools remain subject to standards under the Texas Education Code and published by the University Interscholastic League when it comes to participation in athletic events.

is sufficiently “severe *or* pervasive” as to create a hostile environment that denies or limits an individual’s ability to benefit from or participate in a school’s programs or activities.

- **Expanded coverage of conduct away from school.** The current Title IX regulations state that schools are responsible for responding to potential sexual harassment that occurs when an individual is participating in an educational program or activity within the United States. The proposed updates would require schools to address sex-based harassment that occurs outside of an educational program or activity or outside the United States *if* the harassment contributes to a hostile environment within the school.

The proposed updates are also open for public comment until *September 12, 2022*, meaning that any school officials who want to share their thoughts with the Department of Education have until that date to do so. Comments must be made via the Federal eRulemaking Portal under a [“Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance”](#) page. School leaders are encouraged to review the proposed updates to the Title IX regulations and submit any comments on provisions that could impact school operations. The Department of Education has expressly requested comment on several topics, including:

- Whether and how any proposed grievance procedures “should apply differently to various subgroups of complainants or respondents, *such as students or employees*, or students at varying educational levels.”
- The interaction between Title IX and FERPA.
- Standard of proof issues, including whether it is appropriate to allow different standards of proof in employee-on-employee discrimination cases.

As noted above, our office is continuing to review the proposed regulations to prepare for policy, handbook, and procedural changes that will become necessary if the Department of Education issues formal notice of final updates to the Title IX regulations. We do not know the timeline of when any final updates would be published; as of August 18, 2022, the Federal Register shows that over 55,000 public comments have been submitted, so it may take some time for the Department of Education to review comments and consider possible revisions to the proposed updates prior to issuing final rules.

Please keep in mind that until the Department of Education publishes final updates, the current Title IX regulations remain in effect and must guide your school’s efforts to respond to possible instances of sexual harassment in the school setting.

Please feel free to contact us should you have questions.

Regards,

**SCHULMAN, LOPEZ,
HOFFER & ADELSTEIN, LLP**

A handwritten signature in black ink, appearing to read "Allen M. Keller". The signature is written in a cursive, slightly stylized font.

Allen M. Keller

Topic	Current Title IX Regulations	Proposed Updates
Sexual Harassment & Sex-Based Harassment	Sexual harassment means conduct on the basis of sex that satisfies one or more of the following: <ul style="list-style-type: none"> (1) Quid pro quo harassment; (2) Hostile environment harassment; or (3) “Sexual assault,” “dating violence,” “domestic violence,” or “stalking” as defined in federal law. 	Sex-Based harassment is defined as sexual harassment, discrimination on the basis of sex— <u>including on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity</u> —and other conduct on the basis of sex that is: <ul style="list-style-type: none"> (1) Quid pro quo harassment; (2) Hostile environment harassment; (3) Specific offenses (sexual assault, dating violence, domestic violence, or stalking).
“Quid Pro Quo” harassment	A school employee conditioning the provision of an aid, benefit, or service of the school on an individual’s participation in unwelcome sexual conduct.	An employee, <u>agent, or other person authorized by the school</u> to provide an aid, benefit, or service under the school’s education program or activity explicitly or impliedly conditioning the provision of such an aid, benefit, or service on a person’s participation in unwelcome sexual conduct.
“Hostile Environment” harassment	Unwelcome conduct determined by a reasonable person to be <u>so severe, pervasive, and objectively offensive</u> that it effectively denies a person equal access to the school’s education program or activity.	Unwelcome sex-based conduct that is <u>sufficiently severe or pervasive</u> 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 school’s education program or activity. Whether a hostile environment has been created is a fact-specific inquiry that includes consideration of the following: <ul style="list-style-type: none"> (1) The degree to which the conduct affected the complainant’s ability to access the school’s education program or activity; (2) The type, frequency, and duration of the conduct; (3) The parties’ ages, roles within the school’s education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the alleged unwelcome conduct; (4) The location of the conduct, the context in which the conduct occurred, and the control the school has over the respondent; and (5) Other sex-based harassment in the school’s education program or activity.

Topic	Current Title IX Regulations	Proposed Updates
Specific Offenses	<p>“Sexual assault” as defined in 20 U.S.C. 1092(f)(6)(A)(v), “dating violence” as defined in 34 U.S.C. 12291(a)(10), “domestic violence” as defined in 34 U.S.C. 12291(a)(8), or “stalking” as defined in 34 U.S.C. 12291(a)(30).</p>	<p>“Sexual assault,” meaning an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.</p> <p>“Dating violence,” meaning violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim.</p> <p>“Domestic violence,” meaning felony or misdemeanor crimes of violence committed by a person who: (a) is a current or former spouse or intimate partner of the victim under the family or domestic violence laws of the jurisdiction of the school, or a person similarly situated to a spouse of the victim; (b) is cohabitating, or has cohabitated, with the victim as a spouse or intimate partner; (c) shares a child in common with the victim; or (d) commits acts against a youth or adult victim who is protected from those acts under the family or domestic violence laws of the jurisdiction.</p> <p>“Stalking,” meaning engaging in a course of conduct directed at a specific person that would cause a reasonable person to: (a) fear for the person’s safety or the safety of others; or (b) suffer substantial emotional distress.</p>
Title IX Jurisdiction	<p>Sexual harassment in an education program or activity of the school against a person <u>in the United States</u>.</p> <p>Current regulations do not require a school to address claims of sex-based hostile environment in its education program or activity in the United States if the hostile environment results from sex-based harassment that happened outside of the school’s education program or activity, or outside of the United States.</p>	<p>School must address all sex discrimination in education program or activity, which generally means conduct that is subject to the school’s disciplinary authority.</p> <ul style="list-style-type: none"> • <u>Includes conduct that occurs off-campus</u> when the respondent is a representative of the school or otherwise engaged in conduct under the school’s disciplinary authority. <p>Under the proposed regulations, a school would be required to address claims of sex-based hostile environment in its education program or activity, including when sex-based harassment contributing to the hostile environment occurred outside the school’s education program or activity or outside the United States.</p>

Topic	Current Title IX Regulations	Proposed Updates
Responding to Sex Discrimination	<p>Schools must respond to possible sexual harassment when it has <u>actual knowledge</u> of the harassment (i.e., notice of sexual harassment or alleged sexual harassment).</p> <p>The actual knowledge requirement applies to all employees.</p>	<p>Schools would have to take prompt and effective action to <u>end any prohibited sex discrimination that has occurred in its education program or activity, prevent its recurrence, and remedy its effects.</u></p> <p>Proposed regulations require notification to the Title IX Coordinator of conduct that <u>may constitute sex discrimination</u> under Title IX.</p> <p>Any employee at any elementary or secondary school would be obligated to notify the Title IX Coordinator of conduct that may constitute sex discrimination.</p>
Training Requirements	<p>Title IX Coordinators, investigators, decisionmakers, and any person who facilitates an informal resolution process must receive training on Title IX’s definition of sexual harassment, the scope of the school’s education program or activity, how to conduct an investigation and grievance process, informal resolution processes, and how to serve impartially, including by avoiding prejudice of the facts at issue, conflicts of interest, and bias.</p> <p>Decisionmakers and investigators must receive additional training on relevance of questions and evidence.</p>	<p>The following persons must be trained:</p> <ul style="list-style-type: none"> • <u>All employees</u> must be trained on the school’s obligation to address sex discrimination in its education program and activity, the scope of conduct that constitutes sex discrimination, and all applicable notification and information requirements under the Final Rule. • <u>Investigators, decisionmakers, and other persons responsible for implementing grievance procedures or supportive measures</u> must be trained on their responsibilities. • <u>Informal resolution facilitators</u> must be trained on the process and how to serve impartially. • <u>Title IX Coordinator and any designees</u> must be trained on a host of matters.
Who can file a “formal complaint?”	<p>The current regulations provide that the decision to file a complaint of sexual harassment is for the complainant or Title IX Coordinator to make, depending on the circumstances, but they <u>do not permit</u> complaints under Title IX by former students or employees who are not participating or attempting to participate in the school’s education program or activity.</p>	<p>A complainant has a right to file a complaint about sex discrimination they experienced <u>even if they have chosen to leave the school’s education program or activity</u> as a result of that discrimination, or for other reasons.</p>

Topic	Current Title IX Regulations	Proposed Updates
When a school <u>MUST</u> dismiss formal complaints	Conduct alleged in the formal complaint: <ul style="list-style-type: none"> • Would not constitute sexual harassment, even if proved; • Did not occur in the school’s education program or activity; • Did not occur against a person in the United States. 	Dismissals are permitted in certain circumstances, but are not required (see below for circumstances).
When a school <u>MAY</u> dismiss formal complaints	If, at any time during the investigation: <ul style="list-style-type: none"> • Complainant notifies the Title IX Coordinator in writing of a withdrawal of the formal complaint or any allegations therein; • Respondent is no longer enrolled in or employed by the school; • Specific circumstances prevent the school from reaching a determination. 	<ol style="list-style-type: none"> 1. School is unable to identify the respondent after taking reasonable steps to do so. 2. Complainant voluntarily withdraws any or all of the allegations in the complaint, and school determines the remaining allegations do not constitute sex discrimination under Title IX. 3. Respondent is not participating in the school’s education program or activity and is not a school employee. 4. School determines the conduct alleged in the complaint, even if proven, would not constitute sex discrimination under Title IX (school must make reasonable efforts to clarify the allegations).
Investigation	Lengthy investigation process, including sharing with both parties an investigative report and all relevant evidence gathered by the school.	Schools must provide for adequate, reliable, and impartial investigation of complaints; school must: <ul style="list-style-type: none"> • Ensure the burden is on the school to investigate and gather evidence; • Provide equal opportunity for the parties to present relevant fact witnesses and other inculpatory and exculpatory evidence; • Review all relevant evidence and determine what evidence is relevant and/or impermissible; • Provide each party with a <u>description of the relevant evidence</u> and a reasonable opportunity to respond.
Decisionmaker	Decisionmaker <u>cannot</u> be the Title IX Coordinator or investigator.	Decisionmaker <u>may</u> be the same person as the Title IX Coordinator or investigator.

Topic	Current Title IX Regulations	Proposed Updates
Standard of Proof (Preponderance of the evidence vs. clear and convincing evidence)	Schools can choose whether to use the preponderance of the evidence or clear and convincing evidence standard; standard must be the same for all investigations, whether respondent is employee or student.	Preponderance of the evidence standard is the “default,” <u>unless</u> the school uses the clear and convincing evidence standard in comparable proceedings (e.g., other discrimination complaints).
Sexual Orientation, Gender Identity, Sex Characteristics	None.	<p>Schools would be prohibited from separating or treating any person differently based on sex in a manner that subjects that person to more than minimal harm.</p> <ul style="list-style-type: none"> • This includes policies and practices that prevent a student from participating in a school's education program or activity consistent with their gender identity. • The Department of Education will engage in separate rulemaking to address Title IX’s application to the context of athletics and criteria that can be used to establish students’ eligibility to play on a particular male or female athletic team.
Pregnancy or Related Conditions	The current regulations prohibit discrimination against students, employees, and applicants based on pregnancy, childbirth, and recovery. The current regulations also prohibit schools from adopting rules that treat parents differently on the basis of sex.	<p>Schools must protect students and employees from discrimination based on “<u>pregnancy or related conditions.</u>” Related conditions defined as “pregnancy, childbirth, termination of pregnancy, or lactation.</p> <p>When a student (or a student’s parent, guardian, or other authorized legal representative) tells a school employee of the student’s pregnancy or related conditions, the employee <u>must</u> provide information on how to contact the Title IX Coordinator. The Title IX Coordinator then must:</p> <ul style="list-style-type: none"> • Provide the student with the option of individualized, reasonable modifications as needed to prevent discrimination and ensure equal access to the school's education program or activity • Allow the student a voluntary leave of absence for medical reasons and reinstatement upon return • Provide the student a clean, private space for lactation.

Topic	Current Title IX Regulations	Proposed Updates
Pregnancy Leave	<p>Schools that do not maintain a leave policy for its employees, or in the case of an employee with insufficient leave or accrued employment time to qualify for leave under such a policy:</p> <ul style="list-style-type: none"> • shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom as a justification for a leave of absence without pay for a reasonable period of time, • At the conclusion of which the employee shall be reinstated to the status which she held when the leave began or to a comparable position, without decrease in rate of compensation or loss of promotional opportunities, or any other right or privilege of employment. 	<p>Schools that do not maintain a leave policy for its employees, or if an employee has insufficient leave or accrued employment time to qualify for leave under school policy:</p> <ul style="list-style-type: none"> • <u>shall treat pregnancy or related conditions</u> as a justification for a <u>voluntary leave of absence</u> without pay for a reasonable period of time, • At conclusion of leave, employee <u>shall be reinstated to the status held</u> when the leave began or to a comparable position, without decrease in rate of compensation or loss of promotional opportunities, or any other right or privilege of employment.
Lactation time and space	None.	Provide reasonable break time for an employee to express breast milk or breastfeed as needed and ensure the availability of a lactation space, which must be a space other than a bathroom that is clean, shielded from view, free from intrusion from others, and may be used by an employee as needed.
Pre-employment inquiries	Prohibits pre-employment inquiries regarding marital status and limits permissible inquiries as to sex.	<p>Schools must not make pre-employment inquiry as to the marital status of an applicant for employment, including whether such applicant is “Miss” or “Mrs.”</p> <p>Schools may ask an applicant to self-identify their sex, but only if this question is asked of all applicants and the response is not used as a basis for discrimination.</p>