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**Title IX:  
Here We Go Again**

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## **Title IX: Here We Go Again**

On June 13, 2022, the U.S. Department of Education (“USDOE”) issued a Notice of Proposed Rulemaking that included proposals to amend the regulations implementing Title IX of the Education Amendments of 1972 (“Title IX”). Publication of the proposed updates corresponded with the 50th anniversary of Title IX, a seminal civil rights law that protects individuals from discrimination based on sex in education programs or activities that receive federal financial assistance:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance[.]<sup>1</sup>

Shortly after publication of the Notice of Proposed Rulemaking, the USDOE issued a press release stating that the proposed updates would:

- Clearly protect students and employees from all forms of sex discrimination.
- Provide full protection from sex-based harassment.
- Protect the right of parents and guardians to support their elementary and secondary school children.
- Require schools to take prompt and effective action to end any sex discrimination in their education programs or activities – and to prevent its recurrence and remedy its effects.
- Protect students and employees who are pregnant or have pregnancy-related conditions.
- Require schools to respond promptly to all complaints of sex discrimination with a fair and reliable process that includes trained, unbiased decisionmakers to evaluate the evidence.
- Require schools to provide supportive measures to students and employees affected by conduct that may constitute sex discrimination, including students who have brought complaints or been accused of sex-based harassment.
- Protect LGBTQI+ students from discrimination based on sexual orientation, gender identity, and sex characteristics.
- Clarify and confirm protection from retaliation for students, employees, and others who exercise their Title IX rights.
- Improve the adaptability of the regulations' grievance procedure requirements so that all recipients can implement Title IX's promise of nondiscrimination fully and fairly in their educational environments.
- Ensure that schools share their nondiscrimination policies with all students, employees, and other participants in their education programs or activities.<sup>2</sup>

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<sup>1</sup> 20 U.S.C. § 1981(a).

<sup>2</sup> U.S. Department of Education, *The U.S. Department of Education Released Proposed Changes to Title IX Regulations, Invites Public Comment*, <https://www.ed.gov/news/press-releases/us-department-education-releases-proposed-changes-title-ix-regulations-invites-public-comment#:~:text=The%20Department's%20comprehensive%20review%20of,Sexual%20Orientation%20or%20Gender%20Identity> (published June 23, 2022).

If enacted, the proposed updates to the Title IX regulations would result in significant changes to the scope of Title IX and a district's responsibilities for recognizing and responding to reports of possible sex-based discrimination and sexual harassment.

Following is a summary of the USDOE's thought process in enacting the current Title IX regulations, along with a comparison of how the proposed updates would impact the current regulations.

#### **A. Where Are We Now?**

The current Title IX regulations took effect on August 14, 2020, found in 34 C.F.R. Part 106, were developed through the USDOE's analysis of Supreme Court precedent dealing with Title IX enforcement.

In 1979, seven years after Title IX's enactment, the Supreme Court in *Cannon v. University of Chicago*<sup>3</sup> recognized the existence of a judicially-implied private right of action under Title IX. More than a decade later, in *Franklin v. Gwinnett County Public Schools*,<sup>4</sup> the Supreme Court held that money damages were an available remedy in private actions alleging a school's intentional discrimination under Title IX.

In 1988, the Supreme Court continued refining the circumstances under which a school could be held financially liable for conduct in violation of Title IX. In *Gebser v. Lago Vista Independent School District*,<sup>5</sup> the Court held that districts are liable for money damages in private lawsuits under Title IX in circumstances in which a district has actual knowledge of an employee sexually harassing a student and the district responds with "deliberate indifference to such knowledge."<sup>6</sup> The following year, in *Davis v. Monroe County Board of Education*,<sup>7</sup> the Supreme Court held that the same standards of actual knowledge and deliberate indifference apply in scenarios when sexual harassment is committed by a peer rather than an

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<sup>3</sup> *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979) ("Title IX . . . sought to accomplish two related, but nevertheless somewhat different, objectives. First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices.").

<sup>4</sup> *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 74-75 (1992) (holding intentional discrimination by a school is alleged when a school's employee sexually harassed a student).

<sup>5</sup> *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998).

<sup>6</sup> *Id.* at 290.

<sup>7</sup> *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999).

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