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Client Alert

Five Considerations as You Prepare for the Release of the Final Title IX Regulations

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Amidst the COVID-19 pandemic and increased uncertainty on campuses across the country over enrollment, instructional modes, and revenue planning, the United States Department of Education (DoE) is poised to issue the final rule implementing Title IX. The regulations have been in the "Final Rule Stage" since November 2019, and the Office of Management and Budget (OMB) review concluded March 27, 2020.

In late March, attorneys general in 17 states and the District of Columbia, several senators, and the American Council on Education (ACE) all requested that DoE suspend the rulemaking process while schools are responding to the COVID-19 crisis. Others, however, have urged DoE to move forward, noting that institutions are continuing to adjudicate sexual misconduct complaints even as they have moved to remote operations. DoE's response has been cryptic at best, with Secretary DeVos stating "We are sensitive to the situation, but we also have to acknowledge that Title IX investigations continue to happen."

Regardless of when the final rule is published, institutions should be considering now how they will implement the new rule. The proposed regulations, which were released in November 2018 and elicited nearly 130,000 public comments, will require most institutions to significantly modify their policies and procedures. While DoE is obligated to address, in the aggregate, all the comments it received during the public comment period, it is unclear how different the final regulations will look. Here are five aspects of the proposed regulations, which, if they remain in the final rule, likely will require significant changes to institutions' policies and procedures:

1. **The scope of what an institution may adjudicate under a Title IX process is narrowed.** The proposed rule would require an institution to "dismiss" a complaint that falls outside of DoE's definition of "sexual harassment," even if that conduct would violate campus codes of conduct. *See* proposed § 106.45(b)(3). The regulations also appear to prevent an institution from taking disciplinary action without a "formal" Title IX complaint, even if the alleged conduct would violate Title IX and campus codes of conduct. This means that institutions likely will need to revise non-Title IX policies and procedures as well, to make sure they are able to appropriately investigate and adjudicate complaints that don't meet these thresholds but otherwise violate the school's policies or ethos in order to maintain a safe and inclusive environment.
2. **Institutions may choose a standard of evidence, but it must be uniform.** The proposed rule would allow institutions to use either the "clear and convincing" or the "preponderance-of-the-evidence" standard for internal Title IX disciplinary proceedings. *See* proposed § 106.45(b)(4)(i). However, institutions may use the "preponderance" standard *only* if they also use that standard for other conduct violations *(i.e.*, those that do not involve sexual misconduct) that carry the same maximum disciplinary sanction. Additionally, the evidentiary standard used to determine student violations must be the same as that used for determining violations by employees (including faculty). Thus, institutions will need to look at

their disciplinary policies and procedures holistically and thoughtfully determine which standard of evidence is most suitable under the current policies and the institution's culture. And, again, institutions will need to make appropriate revisions to non-Title IX policies and procedures as well, to fully comply with the new regulations.

3. **The parties have broad evidentiary review rights.** In cases where a "formal" complaint is filed, the proposed regulations require that the school provide both parties with the right to inspect and review *any* evidence directly related to the allegations and obtained as part of the investigation, including evidence on which the school does not intend to rely. *See* proposed § 106.45(b)(3)(viii). The public comments raised concerns regarding how institutions will be able to simultaneously comply with this requirement and applicable federal and state privacy obligations. If DoE does not provide clarification, institutions will need to navigate these competing obligations carefully, including by potentially implementing processes for obtaining advance written consent from students and employees.
4. **Live hearings are required, with direct cross-examination permitted.** The most controversial aspects of the proposed regulations are the requirements that institutions hold live hearings that allow for cross-examination of parties and witnesses by parties' advisors of choice.*See* proposed § 106.45(b)(3)(vii). Where a party does not have an advisor, the institution must provide the party with an advisor "aligned with that party" to conduct the cross-examination. Despite the large number of comments DoE received regarding the live hearing and cross-examination requirements, these provisions are expected to remain in the final rule in some form. This will be a significant change for most institutions, especially those that currently use a single-investigator model to adjudicate sexual misconduct cases. Institutions, therefore, should begin discussions with campus stakeholders regarding how they might implement live hearings, who would serve as advisors when parties do not have their own advisor, how to ensure proper "alignment" and address potential "lack of parity" between parties' advisors when one is provided by the school, and who may be able to preside over the live hearings and make, among other things, evidentiary decisions.
5. **Mediation or informal resolution of misconduct claims, without regard to level of seriousness, is permissible.** Under the proposed regulations, an institution may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, for *any* claim of sexual misconduct, prior to reaching a determination regarding responsibility. *See* proposed § 106.45(b)(6). This is a departure from prior DoE guidance in which there was essentially a ban on mediation of sexual violence claims. To facilitate informal resolution, the proposed regulations require written notice of (a) the allegations, (b) the informal resolution process, and (c) any consequences from participating in informal resolution, in addition to the parties' voluntary, written consent to the process. If this remains in the final rule, it will be important to establish policies and procedures regarding informal resolution options that make sure the parties are participating voluntarily and that skilled and well-trained mediators are being used.

Once the final rule is released, there will be an implementation grace period to allow schools time to make necessary changes for compliance, but it is unclear how much time DoE will provide. While there likely will be litigation challenging various aspects of the final rule and the rulemaking process, absent a court-ordered injunction or other agreement by the Secretary to forestall implementation and enforcement, schools will need

to adapt their procedures to reflect the new Title IX reality. Further, institutions should strive to come into compliance quickly to deter restraining orders or other litigation by respondents or complainants challenging the school's handling of their cases.

In short, institutions should use this time to get themselves into a position to comply with the final rule quickly once it is released. This includes forming committees or task forces so that administrators can be positioned to review the final rule and DoE's responses to the public comments as soon as they are published, and making action plans for how to revise policies and procedures expediently with input from various stakeholders.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Amanda Shafer Berman
Partner – Washington, D.C.
Phone: +1.202.688.3451
Email: aberman@crowell.com

Laurel Pyke Malson
Partner – Washington, D.C.
Phone: +1.202.624.2576
Email: lmalson@crowell.com

Aryeh S. Portnoy
Partner – Washington, D.C.
Phone: +1.202.624.2806
Email: aportnoy@crowell.com

Rebecca L. Springer
Partner – Washington, D.C.
Phone: +1.202.624.2569
Email: rspringer@crowell.com

Eli Berns-Zieve
Associate – Washington, D.C.
Phone: +1.202.688.3436
Email: eberns-zieve@crowell.com