



The New Proposed Title IX Rules: Detailed Analysis & Invitation to Submit Comment

On November 29, 2018, the U.S. Department of Education (DOE) published a Notice of Proposed Rulemaking (NPRM) that proposes amendments to Title IX regulations at 34 CFR 106. ([Docket ID ED-2018-OCR-0064] RIN 1870-AA14).

The public can comment on the harmful Title IX regulations proposed by the U.S. Department of Education (DOE) on educational institutional response to sexual harassment. Comments must be **received** by DOE by January 28, 2019.

Our detailed analysis of the proposed regulations and instructions on how to submit a comment are below.

Overview & Background

Title IX is a federal statute passed in 1972 that prohibits gender discrimination in education programs. Under Title IX, schools receiving federal money must respond to sexual harassment and sexual violence. Title IX has long been interpreted as requiring schools to take prompt and effective steps to eliminate and prevent sexual harassment and remedy its effects while treating student complainants and accused students fairly pursuant to Title IX's equality requirement.

Though discussions of this issue tend to focus on colleges, it is important to remember Title IX applies to all schools that receive federal funding, including K-12.

Note about language: In the context of civil rights law, "sexual harassment" is an umbrella term that includes sexual violence. Using the term "sexual harassment" in the context of analyzing and responding to Title IX rules is not minimizing or erasing the very serious problem of sexual violence.

As discussed in detail below, the proposed regulations would, if adopted, significantly narrow the responsibility of schools to respond to students seeking relief from sexual harassment by:

- Drastically narrowing the kind of behavior considered discriminatory and therefore needing to be addressed;
- Reducing what the school needs to do to address discriminatory behavior;

- Mandating specific procedures favoring the accuseds that exceed the constitutional requirements historically imposed on educational institutions, making it harder for victims to obtain necessary relief.

If adopted, these proposed rules would allow schools and the Department of Education Office for Civil Rights, in its enforcement capacity, to ignore much of the sexual harassment that occurs in schools and deter students from reporting sexual harassment. In other words, the newly proposed Title IX rules would undermine both the spirit and letter of Title IX. This will make schools less safe in violation of Title IX's purpose of protecting student access to education.

These proposed regulations will make it harder for victims of sexual harassment and violence to stop the harassment and violence and continue their education. A significant number of students are victimized by other students. Yet, reporting is already low. Imposing burdensome requirements on student victims, drastically narrowing what behavior schools must respond to and how they must respond, and imposing potentially coercive and harsh procedures on those seeking redress will render Title IX useless to victimized students.

WLP strongly opposes the NPRM because it undermines the purpose of Title IX to protect access to education for students subjected to sexual harassment and elevates the interests of schools and accuseds over those of victims. We urge you to send a strong message to the U.S. Department of Education opposing the NPRM.

The NPRM requires comments to be **received** by DOE by January 28, 2019. Comments may be submitted:

- Electronically through our portal at <http://tny.im/TitleIXComment>, or
- Electronically through the Federal eRulemaking Portal at www.regulations.gov, or
- By postal mail, commercial delivery or hand delivery addressed to Brittany Bull, U.S. Department of Education, 400 Maryland Avenue SW, Room 6E310, Washington, DC 20202. Telephone: (202) 453-7100).

Detailed Analysis: How the Trump Administration’s Proposed Title IX Regulations Harm Victims of Sexual Harassment

Under the proposed rules, far fewer students would be protected by Title IX. Of the pool of students who are not immediately disqualified from filing complaints altogether (such as a student assaulted by another student in off-campus housing), fewer instances of sexual harassment will require school response. Of those, fewer complaints will make it through the new system, which requires onerous steps.

The NPRM would require schools to respond to and investigate sexual harassment allegations *only* for students who:

1. filed a formal complaint;
2. to someone with authority to institute corrective measures on their behalf, specified as a very small group of individuals: (i) a Title IX coordinator, (ii) K-12 teacher, or (iii) higher education official with authority to take corrective action. (Sections 106.30, 106.44(a), 106.45(b)(3));
3. alleging sexual harassment that is so **severe, pervasive, and objectively offensive** that it effectively denies a person equal access to the education program (Section 106.30 (“sexual harassment”));
4. that occurred in a school’s program or activity (106.45(b)(3));
5. against a person in the United States (106.44(a)), and
6. that **already** denied them of equal access to education. (160.30 (Sexual harassment))

By redefining sexual harassment and where it has to occur to be grievable, the NPRM authorizes schools to ignore much of the sexual misconduct occurring in our schools. In fact, the proposed rules also require that schools **must dismiss** a complaint if it does not allege sexual harassment as newly defined by the NPRM and that the harassment occurred within the educational program or activity. (106.45(b)(3)).

- **Reporting (#1 and #2 above)** DOE has long held that schools must respond and investigate sexual harassment when it *knows or reasonably should know* a student was subject to unwelcome conduct of a sexual nature through a variety of sources without the student having to file a formal complaint. The NPRM’s severe limitations on to whom a student must report places students at risk of being unable to identify who that “right” person is. It also eliminates the option for students to report to people they trust, such as known resident assistants, teaching assistants or professors in a university or a school nurse, guidance counselor, or athletics coach in primary or secondary school, individuals identified in many schools as responsible reporters. The consequence will most certainly be fewer reports and increased unaddressed suffering and harm to students.
- **Redefining Sexual Harassment (#3 above):** The proposed rules also depart from Supreme Court rulings and DOE guidance requiring schools to respond to students subjected to “unwelcome conduct of a sexual nature.” Redefining sexual harassment worthy of

response as “severe, pervasive, **and** objectively offensive” significantly raises the threshold of what types of harmful behavior demand response and intervention. For example, does being sexually assaulted once meet the bar of “pervasive”? By requiring that sexual harassment be “severe, pervasive, and objectively offensive,” the proposed regulations will lead schools to ignore a significant amount of sexual harassment harming students in schools and to ignore the impact on the particular student victim. Students would be left to endure repeated and escalating levels of abuse without redress until it was too late.

- **Off-campus/online/out of U.S. (#4 and #5 above):** Eliminating responsibility for sexual harassment outside of the school program or activity will allow ongoing sexual misconduct in the places in which most sexual harassment occurs: unrecognized fraternities, student “clubs” and off-campus housing, even when it occurs between students of the institution and will most certainly have on campus/in school impact on victimized students who must encounter their harasser in school on a daily basis. Harassment that occurs online or in an independent study abroad program will also remain outside of the required scope of a school’s response.
- **Requiring denial of education, rather than preventing denial of education (#6):** Title IX guidance was written to empower schools to address discriminatory barriers to equal education. Requiring the student to prove that they have **already** been denied equal access to education is too little, too late. The goal of Title IX is to *prevent* the harmful consequence that the new rules require to happen.

The NPRM severely narrows how an educational institution must respond to sexual harassment.

1. **Minimum response required:** Under the NPRM, a school must not be *deliberately indifferent* to known harassment. That means, the school’s actions must not be *clearly unreasonable*. (106.44)
 - This standard is an extremely high bar that allows schools to escape liability when they fail to respond and allows them to ignore sexual harassment seriously impacting its students. DOE inappropriately borrowed it from a Supreme Court decision that applies it only to money damages, not remedial action for the complainant to remedy a hostile environment.
2. **Immunity:** Moreover, the proposed regulations **specifically immunize** schools from liability for their response by specifying that a school that made the following minimal responses would *per se* not be deliberately indifferent without regard to the reasonableness of the school’s final decision or actions:
 - The school followed the regulatory procedures in the regulations in response to a formal complaint;
 - The Title IX officer filed a formal complaint and followed procedures when it has actual knowledge of multiple complainants by the same respondent;

- In the absence of a formal complaint, the college or university offered supportive services.
(106.44(b))
 - Under the former guidance, schools had to take prompt and effective actions *reasonably calculated* to end the sexual harassment, eliminate the hostile environment, prevent its recurrence, and remedy its effects. DOE intended the school to respond immediately and not wait until students were deprived of education. The proposed rule elevates process over meaningful and remedial action. Lowering the response required while specifically immunizing schools that follow regulatory protocol offers a roadmap to avoiding liability without concern for addressing sexual harassment and preventing the harmful consequence of denying a student equal access to education.
3. **Supportive measures:** (106.30) While acknowledging the importance of supportive measures to assist students to stay in school, the NPRM does not actually *require* supportive measures. Instead it defines supportive services as non-disciplinary, non-punitive and free measures that “may” include “counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures.” Notably, they do not include one-way restrictions on contact but only include mutual no-contact orders that suggest the victim is somehow equally responsible for the assault and in need of restraint, a very harmful action. Whereas prior guidance required the supportive measures to not burden the victim, **the NPRM expresses concern only for not burdening the accused.** Supportive measures would neither be guaranteed nor enforceable under the NPRM, leaving victims vulnerable. Supportive measures are critical to allowing a student victim to remain in school, free of harmful contact with the accused and retaliation by the accused and the accused’s friends. Such services must be required and enforceable, and should benefit and not burden a victim.

The NPRM mandates specific procedures favoring the accuseds that exceed the constitutional requirements historically imposed on educational institutions. These procedures harm victims, deter victim reporting and make it harder for victims to obtain necessary relief.

1. **Live hearings and cross-examination:** The NPRM requires higher education students to be available for and subject to direct cross-examination by an advisor of a party in a live hearing. Advisors may include an attorney, and schools must provide an advisor to a party without an advisor at the hearing for the purpose of cross-examination. For K-12 schools, a school may require a live hearing but is not required to have face-to-face questioning; instead, students can submit written questions for answer by the other party. (106.45(b)(3 (vi)- (vii))).

- Courts have long held that due process (a constitutional requirement imposed on public schools) and fairness (with respect to private schools) in a school setting **does not** include the right to cross-examine in education proceedings. Courts have historically defined due process in school settings as requiring only notice of the wrongful conduct, an opportunity to be heard and respond to the allegations against them, and a fair decision-maker.
 - Historically, in sexual assault cases in criminal court, cross-examining the victim has been used by the defense to try to highlight or manufacture inconsistency in the victim’s description of the alleged incident, a technique which relies on and seeks to exploit a jury’s lack of knowledge about (a) the neurobiology of trauma which can result in fractured memories, and (b) that delayed and incremental reporting of sexual assault is common and does not inform the likelihood of veracity. Cross-examination can be tremendously traumatic for a victim of sexual assault. A former guidance protected university-level survivors from the trauma of potential intimidation from hostile and abusive cross-examination by having students submit questions for each other to the adjudicator who would then ask the questions, buffering the harshness of cross-examination in these cases. DOE should continue this past practice.
 - In K-12 schools, it is difficult to conceive of a student, particularly a younger student, participating in an actual hearing. Yet, the regulation completely disregards and fails to address age differences, developmental disparities, and cognitive disabilities.
 - While applicable to K-12 students, most of whom are minors, the NPRM does not require notification of its sexual harassment policy and Title IX Coordinator to parents and guardians. (106.8)
2. **The NPRM proposes an evidentiary standard for assessing violations and other procedural changes that are unbalanced in favor of the accused.** (106. 45(b)(4)(1)).
- **Evidentiary Standard:** DOE’s proposed regulation allows school grievance procedures to use either a preponderance of evidence standard or a clear and convincing standard, but requires schools to use the same standard for sexual harassment that it applies in other disciplinary actions and in faculty discipline. Notably, the NPRM does not require the converse, i.e., that the use of the preponderance standard in other spheres requires its application in sexual harassment proceedings. Many schools will use a clear and convincing standard for non-sexual harassment misconduct and/or for faculty discipline, resulting in the elimination of the preponderance of evidence standard in many schools.
 - While many media reports focused on the evidentiary standard of school-based disciplinary processes adjudicating sexual harassment under Title IX, most falsely asserted that the evidentiary standard was lowered in recent

years. In reality, evidence suggests most schools historically used a preponderance of evidence standard, as is appropriate.

- The clear and convincing standard is too high for a right arising out of a civil rights law that stands for equal treatment and which is assessed in a civil (as opposed to criminal) setting. Instead of treating the parties equally in terms of truthfulness and risk, this standard tilts investigations in favor of harassers and rapists and against survivors.
- The clear and convincing standard treats the risk faced by a complainant as less important than the risk faced by the respondent even though both parties face the same ultimate risk of being unable to remain at their chosen school. The risk that a complainant faces of having to leave their school if the school does not respond in a way that protects their safety in the school is very real. If they are forced to leave, victims experience a sense of betrayal, long-lasting personal suffering, and loss of educational opportunity.
- **Presumption of Non-Responsibility:** The NPRM proposes requiring a presumption that the accused is not responsible for misconduct with no comparable presumption for the complainant. 106.45)(b)(1)(iv).
 - Such a presumption suggests that the reported harassment did not occur, which schools may interpret to presume survivors are lying. A presumption favoring one party is not equitable.
- **Reverse Discrimination:** The NPRM provides for reverse discrimination by stating that unfair process for a respondent/accused student is a violation of Title IX's prohibition on sex discrimination. (106.45(a))
 - While an unfair process, or a process perceived to be unfair, may be a failure of school administrators, it is not discrimination on the basis of sex. Some courts may have found an accused student to have stated a due process or contract claim for an allegedly unfair process but they have generally rejected claims of sex discrimination asserted by accused students. A respondent's claim of unfair process is not the same as a victim's claim of the school's failure to respond to sexual harassment resulting in a lack of equal access to education. Raising it to the level of sex discrimination pressures a school to focus its concern on respondents instead of victims.
- **False statements:** The NPRM requires schools to inform parties of their code of conduct prohibition on false statements during the grievance process 106.45)(b)(2)((i)(B).

- This requirement feeds into a myth that women falsely charge rape and sends victims the message that they will be disciplined for filing a complaint of sexual harassment. In fact, research demonstrates that false reporting is minimal. Given that schools already retaliate by filing unmerited charges of false complaints against victims, and the NPRM is silent about retaliation, this requirement will perpetuate the disbelief of women.
 - **Mediation:** The NPRM proposes schools be allowed to offer an informal process to resolve sexual harassment, such as mediation, if all parties give written consent; it also proposes that complainants may be prevented from ending the informal process and starting a formal process. It requires neither school oversight of the process nor the presence of a facilitator. (106.45(b)(6))
 - Previous guidance prohibited mediation for sexual violence and cautioned against requiring students complaining of sexual harassment to work it out directly by themselves without involving school. It also required the school to notify students of the opportunity to end mediation at any time and begin the formal process. Mediation in matters relating to violence against women always raises concerns of unequal bargaining power and risk of coercion and should not be permitted without *informed* consent, a full assessment of its appropriateness, and a facilitator to prevent coercion. It is totally inappropriate for younger students in the K-12 age groups.
 - **Appeals:** The NPRM provides no right to appeal. To the extent it allows schools to offer appeals, it requires they be provided to both parties but in an equal manner. Yet, the NPRM prohibits complainants from appealing the sanctions imposed on the accused. (106.45(b)(5)). This is not equality.
3. **Retaliation:** The NPRM provides no protection from retaliation. Students who complain of sexual harassment are often subjected to retaliation by the accused and other students in the form of bullying and threats that prevent complainants from attending class, taking exams, and otherwise participating in campus life. Sometimes the university itself will retaliate against the complainant by charging the complainant with violations of the code of conduct and even suspending or expelling the complainant. Protection against retaliation is essential.
 4. **Time Limits:** While the NPRM calls for a prompt response, it allows extensions and delays without providing a time period within which procedures must be completed. This will allow procedures to drag on for unlimited time periods and exacerbate the harm to the complainant, who in the absence of a remedy may be forced to leave his or her school of choice.

Beyond the procedural and legal analysis, it's important to highlight who will be most harmed by the proposed Title IX rules. Girls of color, students with disabilities, and LGBTQ students

disproportionately experience sexual harassment in schools. Therefore the new rules will disproportionately harm them.