



The New Proposed Title IX Rules: Summary & 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.

- 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).

Please note this is only the summary version of our analysis. You can find the complete analysis on our website or request a copy by emailing tmurtha@womenslawproject.org.

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 accuseds 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.

Summary

The proposed regulations would, if adopted, harm student victims of sexual harassment because they:

- Drastically narrow the kind of behavior considered “sexual harassment” under Title IX
- Apply to far fewer students overall
- Reduce obligations of the school to address discriminatory behavior
- Mandate specific procedures that favor accused students
- Force schools to dismiss complaints that are not directly submitted to a small group of specific people through a new gauntlet of procedures
- Disregard sexual harassment or assault that takes place outside the school program or activity
- Disregard sexual harassment or assault that takes place out of country, such as during an independent study abroad program
- Force a student to prove that the sexual harassment or violence already deprived them of education, as opposed to requiring a school to intervene before the student is deprived of education, as is the entire premise of Title IX
- Immunize schools from liability if they follow steps of a response protocol, regardless of whether or not the situation was meaningfully addressed and remedied
- Permit but do not require schools to provide supportive measures for victim-complainants
- Force collegiate complainant-victims to make themselves available for cross-examination by an advisor or attorney, despite long-held court precedent that due process and fairness in school adjudication processes do not require it
- Leave parents and guardians in the dark about the rights of their children, as the rules do not require schools to notify parents about sexual harassment policies and complaint procedures
- Permits and in some cases mandate schools to raise the evidentiary standard for assessing sexual harassment violations from “preponderance of evidence” to “clear and convincing” which, despite misleading media reports to the contrary, is a historic shift in favor of accused students and is out of sync with other civil rights standards
- Mandate a presumption of innocence for the accused, but not a presumption of credibility for the complainant
- Allow schools to offer informal processes such as mediation without requiring school oversight or even the presence of a facilitator
- Ban complainants from appealing sanctions imposed on the accused
- Fail to provide any protection from retaliation for reporting harassment

- Allow extensions and delays without specifying a time period within which procedures must be completed, rendering the protective intention of Title IX precarious and uncertain

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.