



## Analysis: The New Title IX Rules

May, 2020

Title IX is a federal statute adopted in 1972 that prohibits sex 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.

The U.S. Department of Education issued new rules in May 2020 after strong opposition. The rules subvert the intent of Title IX and will harm students who are subjected to sexual harassment and deter reporting. The new regulations narrow schools' obligation to respond to sexual harassment, the nature of that response, and the behavior that is prohibited while mandating procedures favoring the accused. Unless and until these regulations are overturned by a court (court challenges are being filed), students will be left without a remedy for sexual harassment in a number of situations.

- Schools will no longer have a legal obligation to respond to and investigate student harassment complaints brought against students or staff for harassment that occurs outside of a school program or activity or outside the United States. Students harassed in programs abroad or in off campus housing will have no remedy.
- Formal complaints for sexual harassment that occurred while a student was enrolled will be dismissed once the complainant is no longer participating or attempting to participate in the school's programs at the time the complaint is filed. Students who have graduated, transferred, or otherwise left the school because of the harassment will have no remedy.
- Schools can exempt themselves from Title IX obligations without any oversight by or notice to the Department of Education or to its students, including during an investigation into their compliance with Title IX.
- Colleges and universities will not investigate a complaint unless the complainant notified one of a small group of specific people (either the Title IX Coordinator or a school official with the authority to institute corrective measures), even if the student told someone else, and filed a formal complaint.
- Schools have no legal obligation to investigate complaints that don't meet the new drastically narrow definition of sexual harassment which requires complainants to demonstrate that they were subjected to *severe, pervasive, and objectively offensive* conduct that effectively denies them equal access to education. Instead, students will be forced to suffer repeated and escalating abuse before the school will recognize it or leave school for their own well-being.

- Schools do not need to respond to complaints of sexual harassment in a manner that is intended to prevent sexual harassment and remedy its effects. Schools need only respond in a way that is not deliberately indifferent (not clearly unreasonable), a standard that up to now has only been applied in a court when a school is sued for not responding appropriately and requires a minimal response, instead of the lower standard that applies in an administrative complaint seeking remedial assistance.
- Schools may dismiss a formal complaint without an investigation if the student does not set forth allegations that meet the specific thresholds set forth in the rules, an overly legalistic requirement to impose on a young person who is in crisis and lacks legal training.
- Schools may not offer supportive services and accommodations, such as changes in class schedules or housing assignment, to students who have been subjected to sexual harassment if they are disciplinary, punitive or unreasonably burden the other party, a requirement that will likely result in the issuance of only mutual no-contact orders that penalize the complainant and insufficient measures to ensure the complainant's safety and ongoing education.
- Complainants will be faced with specific procedures that favor accused students and harm complainants.
  - Schools are now required to import a presumption from criminal cases—even though school grievance proceedings are not criminal cases—that accused students will be presumed to not have harassed the complainants, reinforcing a common myth that complainants are not credible.
  - Schools are not bound by any timelines to complete investigations and can permit delays, rendering the protective intention of Title IX precarious and uncertain.
  - College and university students will be forced to participate in live hearings and subjected to traumatizing cross-examination by the accused's advisor, despite long-held court precedent that due process and fairness in school adjudication processes do not require it. Elementary and secondary schools may require a hearing.
  - Schools will be allowed to raise the evidentiary standard for determining sexual harassment violations from the equality "preponderance of the evidence" standard to the "clear and convincing" standard, a historic shift in favor of accused students that is out of sync with other civil rights standards.
  - Schools will be permitted to offer informal processes such as mediation without requiring school oversight or even the presence of a facilitator.