

Title IX Proposed Regulations: What you need to know to submit comment

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Angela's Disclaimers



- I am not an attorney, and this presentation does not represent legal advice.
- The concerns represented in this webinar reflect my own views as a professional, certified Victim Advocate who has been addressing the issue of campus Sexual Violence since 1991, and working directly with victims professionally at UD since 2002.

This webinar does not represent the views of my employer.

Rep. Patsy Mink of Hawaii



What is Title IX?

- The U.S. Department of Education's Office for Civil Rights (OCR) enforces Title IX of the Education Amendments of 1972.
- "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."



To what institutions does Title IX apply?

- The U.S. Department of Education, Office for Civil Rights requires that any school that receives federal funds must comply → if they receive even \$1 of federal funds
 - ❖ Almost all K-12 schools
 - ❖ Undergraduate colleges & universities
 - ❖ Graduate Schools
- Most schools do receive some federal funds. This means *almost all schools* must comply.
 - ❖ If private schools offer pell grants to students, they must comply
 - ❖ If private schools offer a free lunch program, they must comply
- Exception is a small number of private schools (religious-based or prep) that have actively sought to have no federal funding so that they could avoid having to comply with federal Civil Rights laws.

Two ways that Title IX is enforced

- A student can sue an institution in the courts for failing to meet Title IX requirements.
- A student can file a complaint with the U.S. Department of Education, Office for Civil Rights – which can then investigate, impose sanctions and require changes, or revoke federal funds.

Title IX Guidance

- 2001 - Sexual Harassment Guidance (still in effect)
- 2011 - Dear Colleague Letter with detailed guidance
- 2014 – Issued Question & Answers about the 2011 guidance
- 2016 – DCL on Transgender Students
- 2017 - Rescinded all prior Guidance except 2001 guidance
- 2018 - Notice of **Proposed** Regulations (New)
- Now until Jan 28, 2019 at midnight - Notice and Comment Period regarding Proposed Regulations → **YOU get to submit your input**

Concerns about New Proposed Regulations – summarized:

- Requires schools to ignore and dismiss most harassment.
- Moves from an equal standard to tipping the scales in favor of those accused of harassment. Makes it more challenging for victims to seek recourse.
- Makes it harder for victims to remain in school and have recourse to address the impact of the sexual harassment on their education.

Proposed Changes

Definition of Sexual Harassment

- 2011/2014: Unwanted acts of a sexual nature = sexual harassment, creates a hostile environment. The more severe the conduct (rape) the less need to show a repetitive series of incidents to be a hostile environment.
- Proposed Rule: Narrower definition – unwanted acts of a sexual nature must be so “severe and pervasive” that it denies the victim access to their education. Would require that a lot of harassment be dismissed and only the worst harassment be addressed.

UD's Sexual Harassment Definition 2011

"Sexual harassment includes the unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when..."

- Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment or academic advancement
- Submission to or rejection of such conduct by an individual is used as the basis for employment decisions or academic decisions affecting such individual
- Such conduct has the purpose or effect of unlawfully interfering with an individual's work or academic performance or unlawfully creating *an intimidating, hostile, or offensive* working or academic environment

UD's Sexual Harassment Definition 2018

"Means unwelcomed verbal, nonverbal or physical conduct of a sexual nature when:

- submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment or academic advancement;
- submission to or rejection of such conduct by an individual is used as the basis for employment or academic decisions affecting such individual; or
- such conduct is:
 - sufficiently *severe or pervasive* to alter an individual's working or academic conditions;
 - creates a *hostile or abusive* working, living or academic environment; or
 - sufficiently *severe or pervasive* to limit an individual's ability to participate in or benefit from an educational program or opportunity."

www.udel.edu/knowmore

Proposed Changes

Standard of Evidence

- 2011: Preponderance of the Evidence standard (More likely than not, 51% certainty that misconduct occurred) to be used in sexual harassment/assault
- Proposed Rule: Schools can choose between Preponderance Standard (51%) and Clear and Convincing Standard (75%). However the rule says that **if schools use Clear and Convincing Standard** in any place (ex: Union employees, faculty/staff) **then they must also use it in sexual harassment/assault.**

Beyond a Reasonable Doubt

- Used in criminal court
- 98-99% positive

Clear and Convincing

- Used in civil court, for cases involving civil liberties and custody
- 75% positive

Preponderance of the Evidence

- Used in some civil proceedings & private conduct matters
- 51% or more positive, more likely than not

Proposed Changes

Mediation

- 2011: Schools were prohibited from encouraging or allowing mediation in place of a formal hearing to address a complaint.
- Proposed Rule: Mediation is allowable (but does not require the respondent to take responsibility for their actions). If complainants choose informal resolution, the school can prevent them from opting to to a formal adjudication process.

Live Hearings with Cross-Examination

- 2011: Schools could choose between a Formal Hearing and an Investigative process (more trauma-informed). Complainant did not have to be in same room with respondent.
- Proposed Rule: In college setting (not K-12) there **must be** a live hearing with cross-examination by the respondent's representative. If victim declines to be subjected to cross-examination, then none of their statements count. If accused has no advisor, school must provide one to do cross-examination.

Proposed Changes

Location of the Offense

- 2011/2014: A school must process all complaints of sexual violence, regardless of where the conduct occurred. Schools must consider the effects of the off-campus misconduct in creating a hostile environment on campus or in an off-campus education program, and must protect students who allege off-campus violence from further harassment.
- Proposed Rule: Unless the harassment is on campus or part of an educational program or activity, the school has to dismiss it under Title IX. (In college, this means offenses in off-campus student apartments, or online offenses, would be ignored even if they create a hostile environment for the victim on-campus. K-12 schools are governed by mandatory reporting of abuse to minors under other laws so they would still be required to report to authorities.)

Responsibility to Investigate

- 2011/2014: A school has notice and must take action when any "Responsible Employee" knew or should have known about the violence. The school determines who are responsible employees. At many schools all faculty/staff are required to report disclosures to the Title IX Coordinator.
- Proposed Rule: Only reports to certain people, with corrective authority, must be acted on.

Proposed Changes

Unequal Right to Appeal

- 2011: Any rights provided to one party must also be provided to the other.
- Proposed Rule: Students found responsible for sexual harassment/assault can appeal sanction as too severe, but **accuser cannot appeal** sanction as not severe enough. By this rule schools cannot give the same rights to appeal to both parties. (Also a violation of the Campus SaVE Act which was codified in VAWA 2013.)

Religious Exemptions

- Prior guidance: The written assurances policy allowed students to be aware of whether their school reserved the right to discriminate based on sex.
- Proposed Rule: A religious school may, but **is not required to**, seek assurance of its religious exemption by submitting a written request for the assurance to the Assistant Secretary. So if Dept of Ed investigates a Title IX report against the school, the school could claim a religious exemption on the spot rather than identifying this exemption in advance.

Proposed Changes

Time Frame

- 2011/2014: Investigations must be prompt, typically resolved within 60 days from notice (with the ability to extend as needed). A school should not wait until a criminal investigation/proceeding concludes in order to initiate its own Title IX investigation. (Fact-finding may need to be delayed temporarily, but Interim measures should be put in place and parties updated.)
- Proposed Rule: No time frame required or recommended to wrap up proceedings. Schools are allowed to delay investigations for unspecified periods when a concurrent law enforcement investigation is ongoing.

Presumption of Not Responsible

- Proposed Rule: Universities must have a presumption that the accused student is not responsible until found responsible. Respondent will get a letter in writing to say that they are presumed not to have done this.

Proposed Changes

Supportive Measures

- 2011/2014: Schools are required to take steps to ensure equal access to education, including providing complainants with Interim Measures, remedies and accommodations to address the impact of sexual harassment/assault
- Proposed Rule: Schools can provide "Supportive Measures" to victims
 - No Contact Orders *must be* mutual
 - Interim Measures can be provided (academic deadlines extended, counseling) but none are remedial in nature (ex: re-take exams, tuition credits, removal of impacted grades)
 - Supportive measures *must be non-disciplinary, non-punitive, and must not unreasonably burden* the accused student. This means schools cannot remove an accused student from class or residence hall.
 - Supportive services are "*designed to*" restore and preserve the victim's education, rather than saying a school must restore and preserve a student's education, or remedy the effects of the sexual harassment on the student. (Gives school an out.)

Proposed Changes

Protections

- 2011/2014: Title IX protects *all* students from sexual harassment/violence. Schools must investigate same-sex sexual violence through the same process as for straight students, and investigate incidents against International students and Undocumented students. Schools must ensure that forms, info & training are accessible.
- Proposed Rule: Title IX protects all students. NO LANGUAGE around LGBTQ students. Dept. is looking for comments about students with disabilities, and the rule.

Accountability

- 2011: Dept. of Education can hold schools accountable through investigations, sanctions, and removal of federal funds
- Proposed Rule: Limits the Dept. of Education to holding schools accountable only when they are "deliberately indifferent" to sexual harassment.

Potential Impact

- Chilling effect → Victims may not feel safe to come forward, with fewer & less equal protections in place and an adjudication process that is not trauma-informed.
- LGBTQ students and students with disabilities, who experience significantly higher rates of sexual violence than their peers, may especially be impacted.
- Changes to religious exemption gives schools an out for not meeting Title IX requirements. RE has been used in the past as justification to discriminate against LGBTQ students and to deny women's reproductive rights.



Potential Impact



- The 60-day time frame could be, at times, difficult to stick to. Most Title IX Coordinators and those responsible for investigating may appreciate the time frame being removed. However, having no time frame releases schools from an expectation to conduct the process in a timely manner and a case could drag on unnecessarily for the complainant, or past the time when a respondent graduates.
- Faculty (especially those who teach classes about sexual & domestic violence, criminal justice, women's issues, and related topics where disclosures of abuse are more common) have concerns that the requirement that all faculty are "Responsible Employees" and thus mandated reporters has had a chilling effect on student disclosures. Removing this designation may be a positive.

The Importance of Public Comments

- When the Federal Administration issues proposed rules, they do so with the intent of ensuring policies are thoroughly considered
- The goal is to give input to **Improve the Rule**
- Comments create a Public Record and can be referenced in future actions (i.e., legal, administrative)
- Numbers Matter – Each comment is supposed to be read by the Administration
 - The volume of comments demonstrates collective concerns
 - Increases attention to a concern
 - Ensures further consideration by the Administration

How to Submit Comments

There are 2 ways to submit comment:

1. Electronic Submission Via <https://www.regulations.gov/document?D=ED-2018-OCR-0064-0001>
2. Written letters can be mailed to the Department of Education, Office of Civil Rights:

Attn. Brittany Bull
 US Dept. of Education
 400 Maryland Ave, SW
 Room 6E310
 Washington, DC 20202



Making Effective Comments

1. Cite Docket No. ED-2018-OCR-0064 - Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance
2. Introduce Yourself – Help the administration understand who you are, what your background is, and why you are providing comments. Whether you are a student, parent, teacher, victim advocate, law enforcement, or concerned citizen you have a unique perspective that needs to be heard!
3. Identify Each Concern or Point of Support
 - a) list them either by referring to the Proposed Regulation number or Title
 - b) Explain why you believe will be harmful to survivors. Use examples if privacy can be maintained.
 - c) Support your point with DATA, expert opinions, research, articles, etc.
 - d) If possible, propose an alternative or state why current practice should remain
 - e) Repeat with the next issue of concern
4. If you submit online at Regulations.gov, you can submit up to 10 attachments. It is good to submit anything you think would be relevant to your points.
5. Close with a brief summary and your contact information
6. Save a Copy for your records.

Tips on Submitting STRONG Comments

- Spend some time reviewing the Proposed Rules and Current Comments; Decide the points you want to make and focus on them.
- Remember to write in your own unique voice
- Draft it in Word and organize your comments clearly; citing specific sentences, phrases, or paragraphs
- Include supporting documents as attachments
- Suggest alternatives to what is proposed
- Remember: The Department's policy is to make all comments received available for public viewing in their entirety on the Federal eRulemaking Portal at www.regulations.gov. Therefore, commenters should be careful to include only information that they wish to make publicly available.

Considerations with Advocating

- Federal employees must follow the Anti-Lobbying Act
- DE State Employees must follow the state laws & policies
- Non-Profits must follow the state and federal laws but are permitted to lobby as defined by the IRS
 - Insubstantial Part
 - 501 (h)
- Private citizens can engage in a variety of activities but need to consider the rules to avoid conflicts with codes of conduct with professional groups, employers, volunteer services

The Deadline to Submit Comments is...

on or before January 28, 2019

Individuals & Agencies can respond.



Resources



- The full Proposed Rule (Nondiscrimination on the Basis of Sex) is posted on the Federal Register: <https://www.federalregister.gov/documents/2018/11/29/2018-25314/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>
- National Women's Law Center Comment Guide: <https://nwc.org/resources/devos-proposed-changes-to-title-ix-explained>
- National Women's Law Center Sample Comment: <https://docs.google.com/document/d/1>
- Know Your IX's 9 Things to Know Comment Guide: https://actionnetwork.org/user_files/user_files/000/028/107/original/Two_pager_on_proposed_rule.pdf
- Know Your IX's Data Guide: [https://actionnetwork.org/user_files/user_files/000/028/106/original/Mini_Data_Guide_\(N_C\).pdf](https://actionnetwork.org/user_files/user_files/000/028/106/original/Mini_Data_Guide_(N_C).pdf)
- "Let Her Learn: Stopping School Pushout for Girls Who Have Suffered Harassment and Sexual Violence" (with a stats on K-12) - https://nwc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2017/04/final_nwc_Gates_HarassmentViolence.pdf