



Protecting Students from Sexual Violence

Revision of Recent Title IX Regulations

The number of students who have experienced sexual assault is staggering: 13 percent of students reported being subject to nonconsensual sexual contact by physical force or inability to consent,¹ and 21 percent of middle school students reported that they had been pinched, touched, or grabbed in a sexual way.² The harmful effects of sexual assault can scar a victim for life.

Despite the devastating toll of sexual assault on students, in May 2020, Secretary of Education Betsy DeVos amended the U.S. Department of Education's Title IX regulations to address a school's obligation to respond to sexual harassment and sexual violence, and dramatically weakened protections for survivors of sexual assault in myriad ways. The Title IX rule changes the liability standard that schools are held to when responding to allegations of sexual harassment, narrows the geographic scope of a school's responsibility, and imposes onerous procedural requirements on schools for determining responsibility.

To ensure students have the protections they deserve, the next Administration should issue a new Notice of Proposed Rulemaking (NPRM)

to reverse these actions and reinstate previous standards for Office of Civil Rights (OCR) investigations and administrative enforcement that are necessary to satisfy Title IX, and include other provisions that improve upon prior enforcement standards.

To ensure that a new NPRM can be issued quickly, the Department should immediately convene a public hearing to allow stakeholders and advocacy groups to provide feedback on the Final Rule. The transition team should begin drafting a new NPRM as soon as possible, and must carefully consider how promulgating a new set of regulations would impact, and possibly burden, students and schools, and determine which, if any, provisions of the Final Rule can be preserved.

The new NPRM should propose to rescind the following provisions of the Final Rule, and propose replacing them with the previous standards:

► **Liability standard.**

- A school must address sexual harassment of which it had actual or constructive notice.
- Schools must respond "promptly and effectively" to sexual harassment.

13% of students reported being subject to nonconsensual sexual contact by physical force or inability to consent, and **21%** of middle school students reported that they had been pinched, touched, or grabbed in a sexual way.

- Schools must respond to incidents that occurred off school grounds and outside a school's education program or activity if the continuing effects are experienced at school and effectively deny equal access to an education program or activity.

► **Grievance process.**

- Schools must use the preponderance-of-the-evidence standard when resolving peer harassment allegations under Title IX, consistent with Supreme Court decisions under Title VII of the Civil Rights Act of 1964, and OCR resolutions.

- A school’s response to sexual harassment must not be delayed due to concurrent law enforcement activity.

The Department should gather feedback on the following provisions to determine if they should be revised, amended, or rescinded:

▶ **Definition of sexual harassment.**

Consider whether to preserve the Final Rule’s definition of sexual harassment or reinstate the “hostile environment” standard. If the Final Rule’s definition is preserved, then the Department should clarify what constitutes an effective denial of equal access to an education program or activity and compare it to the “hostile environment” standard.

▶ **Liability standard.**

- *Obligation to all students.* Add a provision regarding a school’s obligation to provide a safe and nondiscriminatory environment for all students, not only the parties, including the responsibility to institute measures to prevent the recurrence of harassment (e.g., training for the school community).
- *Supportive measures.* Preserve the Final Rule’s requirement regarding supportive measures. Consider whether schools should be required to monitor the effectiveness of supportive measures provided.

▶ **Complaint process**

- *Elementary and secondary level.* Gather feedback on whether the formal complaint process is suitable for students at all educational levels.

- *Confidentiality.* Collect information regarding whether the Final Rule’s requirements for disclosure of a complainant’s identity would deter potential complainants from reporting incidents or filing a formal complaint, particularly in the context of domestic violence and dating violence, and leave incidents of sexual violence uninvestigated and unaddressed.
 - *Complainant.* Consider whether to preserve the Final Rule’s requirement regarding who may file formal complaints.
- ▶ **Grievance process.** The Final Rule added a much greater level of detail regarding the grievance process that schools must use to address formal complaints of sexual harassment.
- *Tailored investigations.* Consider whether schools should have the flexibility to tailor investigations based on the nature of the allegations, the age of the students involved, and the size and the administrative structure of the school.
 - *Right to an advisor.* Contemplate whether to preserve the requirement that schools must allow parties to be accompanied by a representative to any related meeting or proceeding.
 - *Single-investigator model.* Solicit feedback on the single-investigator model and whether a blanket prohibition should be preserved. Continue to monitor case law addressing whether this model is consistent with due process and basic fairness protections.
 - *Live hearings.* Conduct a legal analysis to determine whether the Final Rule’s requirement that postsecondary institutions

conduct live hearings should be preserved to be consistent with federal appellate case law, as well as gather feedback on the costs, burdens, and benefits of this requirement, and possible alternatives.

- *Cross-examination.* Conduct a legal analysis for each educational level to determine whether the cross-examination requirement should be preserved to be consistent with federal appellate case law, as well as gather feedback on the costs, burdens, and benefits, of this requirement, and possible alternatives (e.g., cross-examination by the decisionmaker(s)).
- *Sharing evidence.* Solicit feedback on whether the Final Rule’s requirements for sharing evidence are sufficient to ensure that irrelevant, and potential damaging, information is not shared.
- *Requiring appeals.* Collect feedback on whether the appeals requirement should be preserved.
- *Allowing informal resolution.* Gather feedback on whether the Final Rule’s approach for allowing informal resolutions of sexual harassment complaints adequately protects the parties’ rights and is appropriate at all educational levels.

Endnotes

1 Ass’n of Am. Univ., *Report on the AAU Campus Climate Survey on Sexual Assault and Misconduct*, at ix (rev. Jan. 17, 2020), [https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/Revised%20Aggregate%20report%20and%20appendices%201-7_\(01-16-2020_FINAL\).pdf](https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/Revised%20Aggregate%20report%20and%20appendices%201-7_(01-16-2020_FINAL).pdf).

2 Univ. of Ill. at Urbana-Champaign, *Sexual Harassment Common Among Middle School Children, Study Finds*, Phys. Org. (Dec. 9, 2016), <https://phys.org/news/2016-12-sexual-common-middle-school-children.html>.