

## Public comment on Department of Education's proposed Title IX rules due January 30

January 24, 2019

On November 29, 2018, the U.S. Department of Education (ED) published in the Federal Register a [notice of proposed rulemaking](#) (NPRM) to amend ED's regulations implementing Title IX of the Education Amendments of 1972 (Title IX). Under Title IX, a school that receives federal funds must ensure that no student is deprived of access to educational opportunities on the basis of sex. ED is accepting comments on the proposed rules through January 30, 2019. ED will review public comments and is required to take those comments into consideration before publishing final regulations.

The proposed rules were issued after ED in 2017 [withdrew](#) previous statements of policy and guidance issued in April 2011 and April 2014 under the Obama administration. In September 2017, ED issued an interim [Q&A on Campus Sexual Misconduct](#) to provide guidance to schools until the current rulemaking process is completed.

While much of the public discussion about Title IX and the NPRM has focused on colleges and universities, Title IX applies and any new regulations will apply to K-12 schools as well.

As written, the NPRM would do the following, among other things.

- **Define sexual harassment prohibited by Title IX.** With respect to primary and secondary schools, the proposed rule would define sexual harassment to include: (1) quid pro quo harassment by a school employee; or (2) unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school's education program or activity. With respect to the second prong, the NPRM would define "sexual harassment" more narrowly than the rescinded ED guidance documents because ED seeks "to better align the Department's regulations with the text and purpose of Title IX and Supreme Court precedent and other case law."
- **Specify when a school is obligated to respond.** Under the NPRM, a school's obligation to respond to allegations of sexual harassment would be triggered only if:

- **The school has actual knowledge of the allegations or harassment.** A school would have actual knowledge if a report was made to the school's Title IX coordinator, to "an official with authority to take corrective action," or to a teacher. Under the previous guidance documents, a school was required to respond if it "reasonably" should have known about harassment.
- **The alleged harassment involves conduct within the school's own program or activity.** ED has stated that it does not intend to "create an artificial bright-line" between harassment occurring on school grounds and off. Rather, schools would be expected to consider whether the harassment occurred at a location or under circumstances where the school owns the premises; exercised oversight, supervision, or discipline over the location or participants; or funded, sponsored, promoted, or endorsed the event. The NPRM does not specify, for example, whether schools would be responsible for harassment that occurs at student parties or that occurs online outside of school.
- **Specify *how* a school must respond to reports of sexual harassment.** The NPRM explains that a school could be held liable under Title IX if it knows of sexual harassment allegations and responds to them in a way that is "deliberately indifferent," meaning "clearly unreasonable in light of the known circumstances." This is a lower standard than under the rescinded guidance documents. The NPRM addresses how a school must respond to allegations of sexual harassment:
  - **Complaints versus reports:** A school would be required to launch a formal investigation and use its Title IX grievance procedures only if an individual makes a "formal complaint," which would be defined as a document signed by the complainant. For reports that are not formal complaints, the school could offer "supportive measures" to the complainant and the respondent. Supportive measures are nondisciplinary services such as counseling, no-contact orders, leaves of absence, or other accommodations.
  - **Process requirements:** The NPRM outlines certain protections that must be afforded to both the complainant and respondent if a formal complaint is filed. For example, schools would be required to provide the respondent with written notice detailing the allegations. The school would be required to allow each party to review all of the evidence gathered during the investigation, to present witnesses and evidence, and to provide a response to a required written investigative report of the investigation. The school also would be required to provide a mechanism – through a live hearing or some other process – for each party to ask questions and follow-up questions of each other and any witnesses. Each party would be given the right to have an advisor of their choice accompany them to meetings or proceedings during the investigation.
  - **Different investigator and decision-maker:** Under the NPRM, ED would require different individuals serve as Title IX coordinator, investigator, and decision-maker. The "single investigator" model, where one person fills more than one of these roles, would not be allowed. As a result, schools may need to identify and train more individuals to be involved in resolving Title IX complaints.
  - **Standard of evidence:** Under the rescinded Obama administration guidance documents, schools were required to use the "preponderance of the evidence" or "more likely than not" standard in disciplinary proceedings under Title IX. The

NPRM would permit schools to use the higher "clear and convincing" evidence standard instead.

**Conclusion**

Schools and school districts should review the NPRM to understand how, if implemented as written, the proposed regulations could require changes to their current Title IX policy and procedures to respond to sexual harassment.

Schools and school districts should consider submitting comments to ED to express support for or voice concerns about the proposed rules, in whole or in part, or to ask ED for clarification on points that may be unclear. ED has specifically asked elementary and secondary schools to comment on whether (1) there are parts of the proposed rule that would be "unworkable" at the elementary and secondary school level, (2) there are parts of the proposed rule that should "take into account the age and development level of the parties involved and involve parents or guardians", and (3) there are other unique aspects of addressing sexual harassment at the elementary and secondary school level that ED should consider, such as systematic differences between colleges and K-12 schools. ED also has asked schools to provide comments on whether the proposed rule adequately addresses the needs of students with disabilities who may be parties to a sexual harassment complaint. Schools may submit comments on these directed questions and other parts of the NPRM. ED is accepting public comments until January 30, 2019.

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