

FRIDAY, MARCH 31, 2023

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## New Title IX rules will require new approaches to resolution

By Angela Reddock-Wright

**W**e've all heard the shocking stories. Over the past three years, students at Michigan State University, the University of Michigan, and the University of Southern California reported having been sexually assaulted by doctors employed by the schools. Druggings and sexual assaults were said to have occurred at a fraternity house on the USC campus. Schools large and small moved into the crosshairs of investigators, as students and administrators struggled to understand their rights and obligations.

Alleged bad actors and criminal activity on campus are nothing new, but the processes and procedures for investigating, verifying and compensating student victims of sexual misconduct have been in a state of flux. Title IX, enacted in 1972, says that "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."

Best known for protecting women from discrimination in sports, Title IX was originally intended to protect girls from any discrimination that interfered with their receiving an education equal to other students. The law bans sex discrimination, harassment, assault, domestic violence, and stalking in public schools, colleges and universities that receive federal funding.

The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act), signed into law in 1990, requires colleges to report crimes that occur "on campus" and to document school safety policies through an Annual Security Report (ASR). The Clery Act also requires schools to send timely warnings to the school community when there are known risks to public safety on campus. The Clery Act includes the Campus Sexual Assault Victim's Bill of Rights, which calls upon colleges to disclose educational programming, campus disciplinary process, and victim rights regarding sexual violence complaints.

Schools' responsibilities under Title IX have evolved over the years. Federal courts ruled in the 1980s that sexual harassment was a form of sex discrimination under Title VII of the Civil Rights Act, and they later applied similar rules under Title IX. The Supreme Court delineated the boundaries in two 1990s cases, *Gebser v. Lago Vista Independent School District* (524 U.S. 274 (1998)), and *Davis v. Monroe County Board of Education* (526 U.S. 629 (1999)), ruling that a school receiving federal money could be held liable if they had actual knowledge of misconduct so severe, persistent, and objectively offensive that it effectively barred the victim's access to educational opportunity, and the school responded with deliberate indifference.

During the Obama administration, the Office of Civil Rights expanded schools' responsibilities with measures designed to end harassment, eliminate any hostile envi-

ronment, and prevent harassment from occurring again. The policy required schools to use a preponderance of the evidence standard in disciplinary hearings and discouraged live hearings and cross-examination. Schools were urged to employ a single-investigator model, with one person appointed by the school's Title IX coordinator authority to investigate alleged misconduct and determine guilt or innocence.

In 2019, the Trump administration rewrote the Title IX rules via a formal rulemaking process. Schools no longer had an affirmative obligation "to take effective action to prevent, eliminate, and remedy sexual harassment" by "changing the culture." They were simply obligated to address particular cases of serious sexual misconduct. Live hearings with cross-examination were now required, and the evidence standard was heightened.

The Biden administration is now taking steps to reverse many of the Trump administration's actions. On Jan 4, 2023, the Department of Education released a policy roadmap outlining its regulatory agenda for the year, with final Title IX regulations to be published as early as May 2023. The new regulations are unlikely to be published before the end of the 2022-2023 academic year.

The proposed rules would revamp the way schools investigate allegations of sexual harassment and assault. They would expand the definition of what is considered sexual harassment, as well as the types of incidents schools must investigate.

The rules would clarify that a university must address all incidents of sexbased discrimination and harassment that contribute to a hostile educational environment, even if the incident occurred or was reported off-campus, outside of a student's educational programming or activity or not in the United States. The rules would increase the requirements for schools to conduct "reliable and impartial" investigations of complaints in order to protect more students, while requiring that schools treat both complainants and respondents equitably. The proposed regulations also specifically direct schools not to "intimidate, threaten, coerce or discriminate against someone" because they reported an incident or participated in the Title IX process.

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That includes protecting students from retaliation by other students.

Of note, the proposed rules would for the first time include protections for transgender and nonbinary students, and they would extend protections to pregnant and parenting students. Significantly, there would be no requirement that live hearings take place and the evidentiary standard would return to a “preponderance of the evidence,” rather than “clear and convincing.”

A Title IX investigation is not a legal investigation. It examines violations of school policy, and schools that fail to appropriately respond to such violations could lose federal funding. Institutions of higher education should therefore have formal, thorough processes for receiving, investigating, and resolving reports of alleged violations.

The proposed rules allow institutions to offer informal resolution

for sex discrimination complaints. Ideally, such a forum would bring the claimant or alleged victim and his or her attorney together with the school’s Title IX coordinators, investigators, decision makers and facilitators, as well as an experienced professional mediator or neutral whose role would be to listen to the parties and help them identify a path toward settlement and resolution, while targeting issues that require change. The mediator would also help the parties explore avenues for helping the alleged victim move forward while ensuring that other students are not similarly victimized.

The timing of the new rules is significant. Recent reports have shown that few alleged perpetrators face penalties or expulsion. An Interagency Task Force on Sexual Violence in Education was established in 2022 under the Departments of Education, Justice,

and Health and Human Services. The task force was charged with developing recommendations for the Biden administration and for schools and colleges to increase efforts to prevent sexual and dating violence, support survivors, and create culturally responsive training and education for students and staff.

On Nov. 30, 2022, the task force released its first report to Congress on sexual violence in education. The report looked at gaps in Title IX investigations and in the enforcement, recruitment and retention of Department of Education Office for Civil Rights (OCR) and Clery investigators; outreach and training for law enforcement and educational institutions; and best practices in the areas of campus sexual violence prevention, investigation and response. The report noted that OCR was developing new Clery Act guidance and that

the Department of Education was developing a standardized campus climate survey tool to be used by higher education institutions.

Schools subject to Title IX have an obligation to fairly and thoroughly investigate all allegations of sexual assault, wherever they occur on campus. They must take such allegations seriously and take appropriate action when evidence supports a finding of alleged misconduct. All victims should be given assurance that they will not face retaliation for reporting assaults, and schools should commit to doing everything in their power to ensure a just and equitable resolution of reported incidents. Of course, mediation and other modes of alternative dispute resolution continue to be highly effective tools for helping all parties resolve their differences and establishing a clear and thoughtful plan for moving forward in a positive direction.