



Education Department Proposes New Title IX Regulations: Responding to Sex Discrimination and Harassment at School

August 10, 2022

The Department of Education (ED) recently [issued](#) a Notice of Proposed Rulemaking (NPRM) to amend its current regulations that implement [Title IX](#) of the Education Amendments Act of 1972 (Title IX). Title IX [prohibits](#) discrimination on the basis of sex in education programs or activities that receive federal financial assistance. As explained in more depth in an earlier [Legal Sidebar](#), ED previously [overhauled](#) its Title IX regulations in 2020. The changes ED made in 2020 focused in large part on delineating how schools must respond to allegations of sexual harassment. The new NPRM, if adopted, would change a school’s responsibilities with respect to such responses in several ways. In addition, the proposal would [define](#) Title IX’s prohibition of sex discrimination to extend to “sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.”

This Legal Sidebar focuses on the changes the NPRM would make regarding a school’s response to allegations of sex discrimination. It begins with an examination of the NPRM’s provisions for a school’s responsibilities under the statute, including training and monitoring requirements, as well as what conduct counts as sex-based harassment for purposes of Title IX. The Sidebar then focuses on the NPRM’s requirements for recipient schools’ grievance procedures when responding to allegations of sex discrimination generally and concludes by addressing the NPRM’s more specific grievance procedures proposed for postsecondary institutions when investigating and adjudicating allegations of sex-based harassment. (A future Sidebar will focus on the NPRM’s proposed change to interpret the scope of Title IX’s ban on sex discrimination to include discrimination based on sexual orientation and gender identity.) Given the complex background of Title IX, including ED guidance documents, prior rulemaking activity, and various judicial decisions, this Sidebar builds on previous CRS [reports](#) and [Sidebars](#) that discuss such materials in more depth.

General School Responsibilities

Like various other [civil rights statutes](#), Title IX makes compliance with its discrimination [ban](#) a condition for receiving federal financial assistance, although its scope is limited to educational programs. While the

Congressional Research Service

<https://crsreports.congress.gov>

LSB10804

statute does not explicitly mention sexual harassment, the Supreme Court has ruled that a “deliberately indifferent” response of a recipient educational institution to incidents of sexual harassment—both by [teachers against students](#) and [between students](#)—can constitute discrimination based on sex in violation of Title IX.

In addition to enforcement by courts, the statute is also enforced administratively. For instance, ED has adopted various Title IX [regulations](#) that predate the 2020 rulemaking that impose obligations on recipient schools, such as directing the appointment of a Title IX coordinator and the adoption of grievance procedures to resolve complaints under the law. The agency has also issued [guidance documents](#) that further elaborate expectations for schools. The 2020 Title IX [regulations](#) defined what conduct constitutes sexual harassment under Title IX and established a number of procedural requirements that schools must use when responding to allegations of sexual harassment.

Conduct That Can Constitute Sex-Based Harassment

The NPRM, if adopted, would retain certain aspects of ED’s current definition of what conduct counts as sexual harassment under its Title IX regulations. Before adoption of the 2020 regulations, ED [guidance](#) described sexual harassment as generally falling into two categories: (1) quid pro quo harassment by a teacher or employee, described as conditioning of an educational decision or benefit on a student’s acquiescence to unwelcome sexual conduct; and (2) hostile environment harassment, which was described as unwelcome conduct that is “sufficiently serious” to limit or deny a student’s ability to benefit from or participate in a school’s program.

The 2020 regulations altered this approach and currently [define](#) sexual harassment for purposes of Title IX as conduct on the basis of sex that meets at least one of three prongs. The first prong is when an employee conditions the provision of an aid, benefit, or service on an individual’s participation in unwelcome sexual conduct (quid pro quo harassment). Another prong is when a student or employee commits sexual assault, dating violence, domestic violence, or stalking. Finally, “[u]nwelcoming conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity” constitutes sexual harassment. This standard draws from the Supreme Court’s decision in [Davis v. Monroe County Board of Education](#), which crafted a standard applicable to private suits for damages liability against schools for a “deliberately indifferent” response to student-to-student harassment.

The NPRM proposes a modified approach. It would [establish](#) a definition of prohibited “sex-based harassment” as including sexual harassment; harassment based on sex stereotypes, sex characteristics, sexual orientation, gender identity, and pregnancy or related conditions; as well as conduct that meets the requirements of one of the three prongs identified in the 2020 regulations, subject to certain changes. The proposal would largely retain the first two prongs of conduct—quid pro quo harassment (although it expands the definition to include a school’s agent or other person authorized to provide services), as well as sexual assault, dating violence, domestic violence, and stalking.

For the third prong, harassment that creates a hostile environment, the NRPM would [define](#) this as “[u]nwelcoming sex-based conduct that is sufficiently severe *or* pervasive, that, based on the totality of the circumstances and evaluated subjectively and objectively, denies *or limits* a person’s ability to participate in or benefit from the recipient’s education program or activity” (emphases added). The threshold to establish harassment under this prong would thus appear to be somewhat easier to meet than the standard in the current regulations. According to ED, the new standard would [more effectively](#) protect against sex discrimination because it covers a broader range of misconduct than the current regulations do.

Standard of Response for Schools

ED also proposes to change the standard expected of schools when responding to certain conduct. Before ED's 2020 regulations, ED [guidance](#) provided that in cases of sexual harassment, schools were responsible for taking prompt and effective action to stop the harassment and prevent its recurrence. In some cases, a school might also be required to remedy the effects of the harassment.

The 2020 regulations, drawing again from the Supreme Court's decision in *Davis*, which concerned damages liability against recipient schools in cases of student-on-student harassment (as well as *Gebser v. Lago Vista Independent School District*, which focused on a teacher's harassment of a student), [provide](#) that recipient schools with actual knowledge of sexual harassment "must respond promptly in a manner that is not deliberately indifferent." According to *Davis* and the 2020 [regulations](#), deliberate indifference means a clearly unreasonable response in light of known circumstances.

The NPRM would eliminate the deliberate indifference standard and instead [establish](#) more specific requirements for schools when responding to sex discrimination claims generally, obligating schools to "take prompt and effective action to end any sex discrimination ... prevent its recurrence, and remedy its effects." Under the NPRM, a school's Title IX coordinator must affirmatively monitor for "barriers to reporting information about conduct that may constitute sex discrimination" and take steps to address them.

Training Requirements

The NPRM would expand training requirements as well. The 2020 regulations [require](#) schools to provide training for Title IX coordinators, investigators, and the individual(s) rendering decisions (decisionmaker) under the grievance procedures (addressed below), as well as anyone who facilitates informal resolution procedures. The NPRM would [require](#) Title IX training for all of a school's employees, with more specific requirements for investigators, decisionmakers, facilitators of informal resolution procedures, as well as Title IX coordinators.

Procedures Required in Response to Allegations of Discrimination

Before adoption of the 2020 regulations, ED's Title IX [regulations](#) already required schools to establish grievance procedures to address complaints of sex discrimination in educational programs but did not specify in detail what those procedures needed to include. ED's 2020 regulations [establish](#) more specific standards and requirements for schools in responding to allegations of sexual harassment. The regulations require schools to follow a grievance process in response to formal complaints of sexual harassment that includes procedures for investigations and determinations of responsibility; before a decision is made, schools may also offer a voluntary informal resolution process.

Grievance Provisions for Recipients Generally In Response to Sex Discrimination

The NPRM [proposes](#) to require certain baseline procedures for schools when responding to sex discrimination claims generally for all recipients, rather than being limited to sexual harassment in particular (as the 2020 regulations are). The proposal would also [provide](#) that an informal resolution may be offered even if no complaint has been made.

Decisionmaker: The 2020 regulations [provide](#) that when making a determination of responsibility in cases of allegations of sexual harassment, the decisionmaker(s) cannot be the same person as the Title IX coordinator or the investigator of the allegations. According to ED, this [separation](#) prohibits the “single investigator model” that was used by some schools to adjudicate Title IX complaints prior to the 2020 regulations. The NPRM, by contrast, [proposes](#) to allow the decisionmaker in a case of alleged discrimination to be the Title IX coordinator or the investigator. This would authorize the single investigator model for adjudicating allegations of discrimination.

Access to Evidence: The proposal also appears to alter requirements concerning access to evidence used in proceedings. The 2020 regulations [require](#) a school’s grievance procedures in cases of sexual harassment to provide both parties an equal opportunity to inspect and review any evidence “directly related” to allegations raised in a formal complaint (including evidence a school does not intend to rely on). The NPRM instead [proposes](#) to require schools in cases of alleged discrimination to provide each party with a description of “relevant” evidence that is not otherwise impermissible (with an exception for postsecondary institutions in cases of sexual harassment discussed below).

Determining Whether Sex Discrimination Occurred: The 2020 regulations [provide](#) that schools may apply the preponderance of the evidence standard (greater than 50% chance), or the more demanding clear and convincing standard for determining responsibility in cases of sexual harassment, but must apply the same standard to formal complaints against students as it does against employees, including faculty. Thus, if a school uses the clear and convincing standard for complaints against faculty (which might be required under a collective bargaining agreement), it must use that standard for complaints between students.

The NPRM [proposes](#) to [remove](#) the requirement that schools use the same standard of proof for students and employees. It would require schools to apply the preponderance of the evidence standard in sex discrimination cases, but permit a school to apply the clear and convincing standard if it does so in all comparable proceedings, including proceedings regarding other discrimination complaints such as race, color, national origin, and disability. [According to ED](#), allegations of sex discrimination by a *student* are comparable to allegations of other types of discrimination by a *student*; in contrast, allegations of sex discrimination by an *employee* are comparable to other kinds of discrimination by an *employee*. Thus, the NPRM would, for example, allow schools to use the clear and convincing standard of proof in proceedings concerning employee misconduct, and the preponderance of the evidence standard for student misconduct.

Postsecondary Institutions: Sex-Based Harassment

For allegations of sex-based harassment at postsecondary institutions, the NPRM would require schools to generally follow the procedures described above, as well as another set of measures (sometimes different) specific to the higher education context.

Background Appellate Decisions

In recent years, various individuals have challenged in federal courts the procedures used by postsecondary institutions to investigate and adjudicate allegations of sexual harassment. ED’s 2020 regulations and its new NPRM as to postsecondary institutions are perhaps best understood within that context. While schools have a responsibility under Title IX to respond appropriately with respect to an alleged victim of harassment, constitutional requirements may constrain a public university’s investigation and determination of responsibility as to an alleged perpetrator under the Due Process Clause, although courts have taken different approaches to what is required. For instance, the U.S. Court of Appeals for the Sixth Circuit has [ruled](#) that the Due Process Clause requires that when a student is accused of misconduct, a public university must provide some type of hearing before imposing a sanction such as expulsion or suspension. In addition, when a decision turns on a credibility determination, the

university “must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder.” By contrast, the First Circuit has **concluded** that while the Due Process Clause does require public universities to conduct “real-time cross examination,” this requirement can be satisfied through an inquisitorial system, such as questioning by a hearing panel, rather than a party or party’s representative. The Fifth Circuit has **also agreed** with the First Circuit’s reasoning.

Postsecondary Grievance Procedures for Sex-Based Harassment

The NPRM would establish specific procedures for postsecondary institutions when responding to allegations of sex-based harassment.

Access to Evidence: As noted above, the 2020 regulations require certain grievance procedures when responding to a formal complaint of sexual harassment. Schools **must** allow both parties to inspect and review evidence “directly related” to the allegations. The NPRM would **require** postsecondary institutions responding to allegations of sex-based harassment to allow the parties access to “relevant” and not otherwise impermissible evidence upon request.

Hearings and Credibility Assessments: The 2020 regulations **require** a postsecondary institution’s grievance procedures to provide for a live hearing. Each party’s advisor must “directly, orally, and in real time” ask the other party and any witness relevant questions, including ones challenging credibility. Upon request, this questioning can occur in separate rooms with the aid of technology. Before answering questions, decisionmakers must determine whether they are relevant and may exclude nonrelevant questions.

The NPRM **proposes** to eliminate the requirement for a live hearing for postsecondary institutions, although schools may conduct them if they choose. (ED acknowledges the possibility that some schools may have to conduct a hearing consistent with applicable judicial decisions.) The proposal would instead require schools to establish a process to assess credibility of parties and witnesses if credibility is in dispute and relevant. Schools can either allow the decisionmaker to question parties during an individual meeting or allow a party adviser to ask questions during a live hearing.

Conclusion

The expectations of what recipient schools must do when responding to allegations of sexual harassment have shifted through successive presidential administrations; at the same time, courts have imposed their own requirements in cases challenging the procedures schools have used to adjudicate these issues. ED’s NPRM, if adopted, would once again alter the responsibilities of recipient schools when responding to allegations of sexual harassment; and establish new procedures for responding to complaints of sex discrimination generally.

Given these shifting expectations and requirements for recipient schools, if Congress decides that a school’s responsibilities under Title IX should be made explicit in statutory text, options include amending Title IX to provide a definition of sexual harassment or delineating more specifically obligations under the statute. Alternatively, were the NPRM adopted, **pursuant** to the Congressional Review Act, Congress could pass a joint resolution of disapproval within the time limits that statute requires. Finally, Congress may also seek to limit enforcement of those aspects of a regulation it might disagree with through appropriations riders, though these provisions generally expire at the end of the relevant appropriations cycle.

An upcoming Sidebar will examine another significant shift the NPRM would make: a proposal to define the scope of Title IX’s prohibition on sex discrimination to include gender identity and sexual orientation.

Author Information

Jared P. Cole
Legislative Attorney

Disclaimer

This document was prepared by the Congressional Research Service (CRS). CRS serves as nonpartisan shared staff to congressional committees and Members of Congress. It operates solely at the behest of and under the direction of Congress. Information in a CRS Report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to Members of Congress in connection with CRS's institutional role. CRS Reports, as a work of the United States Government, are not subject to copyright protection in the United States. Any CRS Report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS Report may include copyrighted images or material from a third party, you may need to obtain the permission of the copyright holder if you wish to copy or otherwise use copyrighted material.