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The Biden Administration's Proposed Department of Education Title IX Rules, Explained

In June 2022, the Biden administration's Department of Education proposed new Title IX rules on sex-based harassment and other sex discrimination.¹

Note: Sex-based harassment is a form of sex discrimination. Sex-based harassment includes sexual harassment (including sexual assault), dating violence, domestic violence, stalking, gender-based harassment that doesn't have a sexual component, harassment based on LGBTQI+ status, and harassment based on pregnancy/parenting status.

Biden's proposed changes to the Title IX rules would undo many of the harmful rules put in place in 2020 by the Trump administration ("2020 rules"),² which currently push schools to ignore many incidents of sexual harassment and to use uniquely unfair and burdensome investigation procedures for sexual harassment complaints that are not required for investigations of any other type of student or staff misconduct. In short, the 2020 rules rely on and reinforce the harmful and false myth that people who report sexual harassment—primarily girls and women—tend to be lying about it and therefore need to be subjected to more scrutiny. Other changes to the Title IX rules made in 2020 allow schools to claim religious exemptions from Title IX's requirements with little transparency or notice, putting students at increased risk of discrimination. Unfortunately, the 2020 rules remain in effect until a new rule is finalized.

The Biden administration's proposed Title IX rules are consistent with Title IX's broad mandate to prohibit sex discrimination in education. They would restore and enhance many of Title IX's protections against sex-based harassment and other sex discrimination. The proposed rules would also formalize greater protections against discrimination for LGBTQI+ students and for pregnant and parenting students. Read this explainer to learn about the Biden administration's proposed changes to the Title IX rules.

Note: A "complainant" is someone who reports sex discrimination, and a "respondent" is someone who is reported to have engaged in sex discrimination.

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I. What must schools do to protect students from sex-based harassment?

Background: Sex-based harassment, including sexual harassment, is widely prevalent in preK-12 schools and institutions of higher education. However, most students do not report the harassment to their schools for many reasons, including fear of punishment or being disbelieved, the emotional difficulty in reporting and re-living what happened, or a fear that reporting would make the situation even worse. And when survivors do come forward to ask for help, they are often ignored, disbelieved, or even punished.³ Many survivors end up withdrawing from classes, transferring to another school, or withdrawing from school altogether.⁴ These harms disproportionately fall on women and girls of color,⁵ disabled survivors,⁶ LGBTQI+ survivors,⁷ and pregnant and parenting survivors,⁸ all of whom face stereotypes casting them as less credible when they report sexual harassment. In 2020, the Trump administration issued Title IX regulations that made it even harder for students to report sexual harassment and receive the support they need to learn and feel safe in school.

A. When must schools respond to sex-based harassment?

Under the proposed Title IX rules, schools would be required to respond to a much wider range of incidents of sexual harassment and other sex-based harassment than under the 2020 rules,⁹ consistent with decades of prior Department of Education policy.¹⁰

1. DEFINITIONS OF HARASSMENT

Currently, under the 2020 Title IX rules, schools are required to ignore Title IX complaints¹¹ of sexual harassment that do not meet one of three stringent definitions: (i) unwelcome “quid pro quo” sexual harassment by a school employee (e.g., “I’ll give you an A if you have sex with me”); (ii) an incident that meets federal definitions of “sexual assault,” “dating violence,” “domestic violence,” or “stalking” under the Clery Act; or (iii) “unwelcome conduct” on the basis of sex that is so “severe, pervasive, **and** objectively offensive” that it “effectively **denies**” a person equal access to a school program or activity.¹² The current standard means many victims will be forced to endure repeated and escalating levels of abuse before their complaint even can be investigated.

Under the proposed rules, schools must respond to all forms of sex-based harassment. In addition to sexual harassment, this includes harassment on the basis of sex, sex stereotypes, sex characteristics, sexual orientation, gender identity (see **Part II** below), as well as pregnancy or parenting status, and any related conditions (see **Part III** below)—whether or not the harassment is sexual in nature.¹³

Schools’ obligations to respond to “quid pro quo” harassment and sexual assault, dating violence, domestic violence, or stalking remain the same.¹⁴ Importantly, however, the proposed rules broaden the definition of what is often called “hostile environment” harassment, so that it is consistent with the standard that existed prior to the 2020 rules.¹⁵ To show that sex-based harassment created a hostile environment, the proposed rules would require only that individuals show the harassment is “sufficiently severe **or** pervasive” both “objectively and subjectively” such that it “denies or **limits** a person’s ability to participate in or benefit from...the education program or activity.”¹⁶ In assessing whether conduct is severe or pervasive under this standard, the proposed rules identify several factors for schools to consider, such as the frequency of the conduct and the extent to which it impacts a person’s ability to learn.¹⁷ This change means that schools will be required to respond to a wider range of sex-based harassment, rather than being encouraged to sweep reports under the rug, and that more harassed students will be able to get help from their schools.

Note: The provisions in the 2020 rules requiring schools to dismiss certain Title IX complaints of sexual harassment unfortunately remain in effect until a new rule is finalized. **However, schools may still have non-Title IX sexual harassment policies that address sexual harassment that falls outside of the current Title IX rule’s requirements.** As such, in some cases, students may be able to get help under a non-Title IX school policy, even if the current rules prevent them from getting help under Title IX. Until a new rule is finalized, students should check their school’s code of conduct for the existence of such policies.

2. OFF-CAMPUS HARASSMENT

Currently, under the 2020 Title IX rules, schools are required to ignore Title IX complaints of sexual harassment that occur during study abroad programs, outside of a school program or activity, or outside of a context that is under the school’s “substantial control.”¹⁸ This means schools are currently required to dismiss Title IX complaints by students who are sexually assaulted while studying abroad, at a fraternity that isn’t officially recognized by their university, or in off-campus housing, or who are harassed or

stalked online outside of a school-sponsored program. This is the case even when a student is required to attend class with their rapist or abuser—or even a class taught by their rapist or abuser.

Under the proposed rules, schools would be required to respond to sex-based harassment “occurring under [their] education program or activity in the United States.”¹⁹ The proposed rules stipulate that this would include, but would not be limited to, conduct that occurs in buildings owned or controlled by a student organization officially recognized by a school, as well as conduct that a school has disciplinary authority over. Importantly, the proposed rules also make clear that schools would be required to address off-campus conduct or conduct occurring outside the U.S., when the conduct creates a hostile environment within a school’s program or activity by “effectively den[ying] a person’s ability to participate in or benefit from the education program or activity.”²⁰ In short, if a student is harassed off campus—even outside of the U.S.—a school would be obligated to respond if it contributes to a hostile environment (e.g., due to the respondent’s presence or additional harassment they are experiencing) in an education program or activity.²¹

3. WHEN A COMPLAINANT IS NOT EMPLOYED BY OR ENROLLED AT THE SCHOOL

Currently, under the 2020 rules, schools are required to dismiss Title IX complaints of sex-based harassment by individuals who are not students or employees of the school at the time they file a complaint, even if they are complaining of harassment they experienced as a student or employee and even if their harasser is still enrolled in or employed by the school. (There is an exception if the student is an applicant who intends to enroll in the school, or an alumnus who intends to stay involved in alumni programs).²²

Under the proposed rules, schools would no longer have to dismiss complaints of sex-based harassment by individuals who are not students or employees of the school, so long as the individual experienced the harassment *at the time they were participating or trying to participate in the school’s program or activity.*²³ This means schools would no longer be forced to dismiss Title IX complaints filed by visiting students after they decide not to enroll at the school, by former students after they transfer or graduate, or by former employees after they leave their employment at the school—enabling these individuals to get relief under Title IX where they could not under the current rules.

4. WHEN A RESPONDENT IS NOT ENROLLED IN OR EMPLOYED BY THE SCHOOL

Currently, under the 2020 Title IX rules, schools are allowed to dismiss sexual harassment complaints at any time if the reported harasser has transferred, graduated, or, in cases where the harasser is an employee, retired—even if an investigation is already pending.²⁴

Under the proposed rules, schools would still be allowed to dismiss Title IX complaints of sexual harassment if the respondent has transferred, graduated, or retired.²⁵ However, the proposed rules would implement additional safeguards to ensure that students are protected from further harm if the school dismisses a complaint because the respondent is no longer employed by or enrolled in the school. These safeguards include requiring that a school provides supportive measures to the complainant (see **Part I.B.2** below), and that the Title IX coordinator take measures to prevent further sex discrimination in the school’s program and protect both the complainant and all students from such discrimination.²⁶ These measures can range from the Title IX coordinator barring a third party (for example, a former student or employee) from visiting the school’s campus if the coordinator discovers that they are attending school events and engaging in harassment, to conducting staff trainings on how to monitor for risks of sex discrimination in a specific class, department, athletic team, or program where discrimination has been reported in the past.²⁷

5. NOTICE OF HARASSMENT

Currently, K-12 schools must respond to sexual harassment when any employee has “actual knowledge” of any incident of sexual harassment.²⁸ However, colleges and universities are allowed to ignore all incidents of sexual harassment unless the Title IX coordinator or a school official with “the authority to institute corrective measures” has “actual knowledge” of the incident.²⁹ This means colleges and universities do not have any obligation to respond when a student tells a residential advisor, teaching assistant, or professor that they are experiencing sexual harassment, unless the school has designated these employees as school officials with “the authority to institute corrective measures.”

Under the proposed rules, K-12 schools would be required to address *all sex discrimination* occurring in their program or activity; the rules would require all employees to report possible sex discrimination to the school’s Title

IX coordinator,³⁰ but with an exception for employees designated as “confidential employees.”³¹

In colleges and universities, upon learning about possible sex discrimination occurring in a program or activity, *all* employees would have to either report it to the Title IX coordinator or explain to the person experiencing discrimination how to contact the Title IX coordinator themselves.³² The following college employees would have to report possible sex discrimination *against a student* to the Title IX coordinator rather than simply explaining to the student how to contact the Title IX administrator: 1) employees with “the authority to institute corrective measures” and 2) employees with “responsibility for administrative leadership, teaching, or advising.”³³ Upon learning of possible sex discrimination *against an employee*, any employee with “responsibility for administrative leadership, teaching, or advising” must *either* report it to the Title IX coordinator or explain to the person providing such information how to contact the Title IX coordinator themselves.³⁴ In all of these cases, “confidential employees” would be exempted from reporting possible sex discrimination to a Title IX coordinator.³⁵ Additionally, the proposed rules would allow Title IX coordinators to avoid responding to information they might learn about sex-based harassment during an event held to raise awareness about such harassment, such as a “Take Back the Night” rally—unless there is an immediate threat to the school community’s safety.³⁶ However, schools still must use this information to prevent sex-based harassment; for example, they could use it to develop training to prevent harassment.

B. How must schools respond to sex-based harassment?

1. STANDARD OF CARE

Currently, the Title IX rules allow a school’s response to sexual harassment to be “unreasonable,” as long as it is not “clearly unreasonable” or “deliberately indifferent.”³⁷ This allows schools to provide sexual harassment victims with less support and, in some cases, even to mistreat student survivors, as long as the school’s actions are not *clearly* unreasonable.

Under the proposed rules, in contrast, schools would be required to take “prompt and effective action” to (i) end any sex-based harassment that has occurred in their programs and activities, (ii) prevent the harassment from recurring, and (iii) remedy the effects of the harassment on all people

harmed.³⁸ This includes a requirement that schools offer supportive measures to the individual reporting sex-based harassment (see **Part I.B.2** below).³⁹

2. SUPPORTIVE MEASURES

Currently, schools are required to provide supportive measures to individuals who report sexual harassment (“complainants”) and whose complaints are not dismissed. However, supportive measures for complainants must be “non-disciplinary”, “non-punitive”, or “unreasonably burden[some]” on the respondent.⁴⁰ Given the other 2020 rules that favor respondents over complainants, many schools thus believe that they cannot impose one-way (“unilateral”) no-contact orders to prohibit harassers from contacting their victims, and that they must force victims to change their own classes and dorms to avoid their rapist or abuser so as to not unreasonably burden the respondent.

Under the proposed rules, schools would have to offer supportive measures to all complainants who report any type of sex-based harassment, regardless of whether they have requested an investigation or an informal resolution,⁴¹ and even if their complaint is dismissed.⁴² For example, schools could provide a complainant with a unilateral no-contact order and other types of supportive measures that are “reasonably available” (e.g., counseling, extensions of deadlines and other course-related adjustments, leaves of absence).⁴³ Schools could also provide supportive measures to both complainants and respondents to enable them to participate in an investigation or informal resolution.⁴⁴ If a complainant or respondent is negatively affected by their school’s decision to provide, deny, change, or end a supportive measure, the school would be required to give them an opportunity to challenge the school’s decision.⁴⁵

The proposed rules, like the current rules, also require supportive measures for complainants be “non-disciplinary,” “non-punitive,” and not “unreasonably burden[some]” on the respondent.⁴⁶ However, *if there is an ongoing investigation*, schools would be allowed to “burden” a respondent for “non-punitive and non-disciplinary reasons” in order to protect the complainant’s safety or the educational environment or to prevent further harassment.⁴⁷ For example, during an investigation, a school could prohibit the respondent from contacting the complainant or make involuntary changes to the respondent’s classes, work, housing, extracurriculars, or other activities, even if there isn’t a comparable alternative to offer the respondent.⁴⁸

3. INFORMAL RESOLUTIONS

Currently, under the Title IX rules, schools are allowed to use an informal resolution process, such as mediation or a restorative process, to resolve any complaint of student-on-student sexual harassment.⁴⁹ An informal resolution is allowed as long as all parties: (i) receive written notice of their rights and obligations, (ii) give written consent to the process, (iii) can withdraw at any time before the end to do a traditional investigation, and (iv) are not required to participate in an informal resolution or to waive their right to an investigation in order to continue accessing any educational benefit.⁵⁰

Under the proposed rules, schools would continue to be allowed to use an informal resolution process, including mediation or a restorative process, to resolve any complaint of student-on-student sex-based harassment, unless it is prohibited by another law.⁵¹ The proposed rules would impose similar requirements as the current rules for conducting informal resolutions (see above). But, even if all students agree to an informal resolution, a school would be allowed to refuse to do it if, for example, the school believes the alleged conduct would pose a future risk of harm to others.⁵² Furthermore, if the parties revert to an investigation, they would not be able to use any information gained solely through the informal resolution.⁵³

4. RETALIATION

Currently, the Title IX rules prohibit any school or person from threatening, discriminating against, or otherwise punishing anyone because they have reported sexual harassment or otherwise participated or refused to participate in a sexual harassment investigation.⁵⁴ This means complainants (as well as respondents and witnesses) cannot be punished for conduct that is related to the reported sexual harassment or that is discovered as a result of the student reporting the sexual harassment.⁵⁵ In addition, a complainant cannot be punished for making a false statement during an investigation simply because the school ultimately decides in the respondent's favor.⁵⁶ Complaints of retaliation must be investigated using "prompt and equitable" procedures.⁵⁷

Under the proposed rules, all of the prohibited conduct listed in the current rules (see above) would be prohibited retaliation; in addition, these retaliation protections would apply to all reports of sex-based harassment (not just sexual harassment)⁵⁸ and to any person's participation or refusal to participate in informal resolutions or other efforts

by the school to address sex-based harassment (not just investigations).⁵⁹ In addition, the proposed rules would specifically prohibit a school from punishing a complainant for engaging in consensual sexual activity simply because the school ultimately decides in the respondent's favor.⁶⁰ If a student reports retaliation, the school would be required to offer supportive measures, and if the student makes an oral or written complaint of retaliation, the school would be required to investigate.⁶¹

5. PREEMPTION (FEDERAL VS STATE/LOCAL REQUIREMENTS)

Currently, the Title IX rules prevent schools from complying with a state or local law that conflicts with the federal rules.⁶² This means that even if schools are required by state or local law to provide stronger protections for victims of sexual harassment, they are currently prohibited from doing so to the extent that such protections are different from the current Title IX rules.

Under the proposed rules, the current preemption requirement would be removed,⁶³ and schools would be able to comply with state or local laws that provide greater protections from sex-based harassment than those set out in the federal rules.⁶⁴ This would return Title IX to its proper role as a floor, not ceiling, for civil rights protections.

C. How must schools investigate sex-based harassment?

1. TIME FRAME & DELAYS

Currently, schools must investigate sexual harassment in a "prompt" manner, but they can impose "temporary" delays for "good cause," including if there is an ongoing criminal investigation.⁶⁵ In addition, schools' sexual harassment investigations must take a *minimum* of 20 days—as schools are required to allow the parties at least 10 days to inspect and respond to the evidence and at least 10 days to review and respond to the school's investigative report summarizing the evidence.⁶⁶

Under the proposed rules, schools would also have to conduct "prompt" investigations and set "reasonably prompt timeframes" for all major stages of an investigation of sex-based harassment.⁶⁷ The proposed rules would also allow schools to impose "reasonable" delays for "good cause" (but the proposed rules do not mention any examples of good cause).⁶⁸ In colleges and universities, the parties would have a right to review and respond to

the evidence or to an investigative report summarizing the evidence,⁶⁹ but there would not be a required minimum number of days for this process.

2. PRESUMPTION OF NON-RESPONSIBILITY

Currently, schools are required to presume that the respondent is not responsible until the end of an investigation of sexual harassment and to inform all parties of this presumption at the start of an investigation.⁷⁰

Under the proposed rules, schools would be required to follow the same presumption requirement for all investigations of sex-based harassment (not just sexual harassment).⁷¹

3. QUESTIONING PARTIES AND WITNESSES

Currently, when investigating sexual harassment, **colleges and universities** must allow each party's advisor to directly cross-examine the other party and all witnesses at a live hearing.⁷² Advisors have the right to ask any questions of a party or witness unless they seek evidence that is irrelevant, privileged, or prohibited sexual evidence (see **Part I.C.4** below).⁷³ At any party's request, the live hearing must be conducted in separate rooms using technology that allows all participants to see and hear one another.⁷⁴

In K-12 schools, the parties have the right to submit written questions for the decision-maker to ask on their behalf, subject to the same evidentiary restrictions as colleges and universities.⁷⁵

In both K-12 schools and institutions of higher education, the decision-maker must determine whether a proposed question is permissible under the rules and explain any decision to exclude a question.⁷⁶

Note: The 2020 rules also originally included an "exclusionary rule," which required **colleges and universities** to ignore any oral or written statements made by a party or witness who did not submit to cross-examination.⁷⁷ Fortunately, this exclusionary rule was struck down in July 2021 by a federal judge in a lawsuit brought by the National Women's Law Center and other advocates,⁷⁸ and the Department of Education announced in August 2021 that it is no longer enforcing the exclusionary rule.⁷⁹ (The current rules also instruct decision-maker(s) not to draw any inferences about whether sexual harassment occurred based solely on a person's refusal to answer cross-examination questions.)

Under the proposed rules, when investigating sex-based harassment, **colleges and universities** would be required to either: (i) have a decision-maker interview the parties and witnesses, whether at a live hearing⁸⁰ or in individual meetings; or (ii) have the parties' advisors directly cross-examine the other party and all witnesses at a live hearing. If the decision-maker asks the questions, the parties could propose questions and follow-up questions, as long as they don't seek evidence that is irrelevant, privileged, or prohibited sexual evidence.⁸¹ If the parties' advisors ask the questions at a live hearing, the advisors would have the right to ask the same types of questions and follow-up questions, and the school would be required to provide an advisor (who may or may not be an attorney) to a party who doesn't have one to conduct questioning.⁸² Under the proposed rules, a live hearing must be conducted virtually if any party requests it, using technology that allows all participants to see and hear one another.⁸³

Like the current rules, the proposed rules would also require the decision-maker at a college or university to determine whether a proposed question is impermissible under the rules, including because it is harassing or confusing, and to explain any decision to exclude a question⁸⁴ (Note: unlike the current rules, the proposed rules do not impose a similar requirement on decision-makers in K-12 schools).

While different in scope from the current rules, the proposed rules also include an exclusionary rule: if a party or witness at a college and university does not respond to a question "related to their *credibility*" (the proposed rules do not give any examples of this), their school would be required to ignore any oral or written statement they make that "supports their position."⁸⁵ Under this proposed rule, a survivor who refuses to answer a single question related to their credibility may have all of their oral and written statements excluded from the evidence. Like the current rules, the proposed rules also instruct decision-makers not to draw any inferences about whether sex-based harassment occurred based "solely" on a person's refusal to respond to questions related to their credibility.⁸⁶ Nonetheless a complainant whose statements are excluded would have to rely solely on their witnesses' statements in order to prove their case.

Under the proposed rules, K-12 schools would be required to allow all parties to present their witnesses and evidence⁸⁷ and, if credibility is at issue, to use a process that enables the decision-maker to assess the credibility of the parties and witnesses.⁸⁸

4. EVIDENCE OF PAST SEXUAL BEHAVIOR

Currently, schools are prohibited from asking questions or using evidence about a complainant’s “sexual predisposition” or “prior sexual behavior” unless the prior sexual behavior: (i) involves a person other than the respondent and is offered to prove mistaken identity, or (ii) involves a “specific incident” with the respondent and is offered to prove “consent.”⁸⁹

Under the proposed rules, schools would similarly be prohibited from asking questions or using evidence about a complainant’s “sexual interests” or “prior sexual conduct,” unless the prior sexual conduct falls into the same two exceptions that are currently in place (see above).⁹⁰ The proposed rules would also explicitly add that consensual “prior sexual conduct” between the parties does not prove or imply that the complainant consented to the alleged sex-based harassment.⁹¹

5. STANDARD OF PROOF

Currently, when investigating sexual harassment, schools can choose between using the “preponderance of the evidence” standard (i.e., “more likely than not”) or the “clear and convincing evidence” (i.e., “highly and substantially more likely than not”), as long as they use the same standard when investigating students and employees.⁹² The preponderance standard is the same standard that is used by courts in all civil rights cases⁹³ and is the only standard of proof⁹⁴ that recognizes complainants and respondents have equal stakes in the outcome of a proceeding—which is their ability to access education, as survivors are also pushed out of school programs and activities as a result of the harassment. In contrast, the “clear and convincing evidence” standard tilts the scales in favor of reported harassers. Allowing schools to apply the “clear and convincing evidence” standard only in investigations of sexual harassment (but not other types of misconduct) reinforces the harmful rape myth that sexual harassment reports are inherently less credible than reports of other types of misconduct and therefore need to be subjected to greater scrutiny.

Under the proposed rules, when investigating sex-based harassment, schools would be required to use the preponderance standard, unless the school uses the “clear and convincing evidence” standard in all other “comparable” investigations, including for all other types of harassment and discrimination.⁹⁵ Schools would thus be required to use a uniform standard of proof to investigate

complaints of discrimination based on sex, race, disability, religion, etc. However, the proposal does not explain what other “comparable” investigations would be, apart from investigations of harassment and discrimination. For example, if a school uses the preponderance standard to investigate all complaints of physical assault, would it nevertheless be able to use the clear and convincing evidence standard to investigate all complaints of harassment and discrimination, including sexual assault?

6. APPEALS

Currently, the Title IX rules require schools to offer appeals in sexual harassment investigations to both parties based on a procedural irregularity, new evidence, or a Title IX official’s bias or conflict of interest that affected the outcome.⁹⁶ Schools can also offer additional bases for appeal to both parties equally.⁹⁷

Under the proposed rules, K12 schools would not be required to offer appeals in investigations of sex-based harassment. Colleges and universities would be subject to the same requirements as in the current rules when offering appeals.⁹⁸

D. What must schools do to prevent sex-based harassment?

1. TRAINING

Currently, the Title IX rules specify that a narrow group of employees must receive training on Title IX and sexual harassment; that is, only Title IX personnel must be trained, which includes Title IX coordinators, investigators, and decision-makers.⁹⁹ Among other things, these employees must be trained on the 2020 rules’ narrow definition of sexual harassment, the “scope of the recipient’s education program or activity;” how to oversee the grievance process, and how to conduct it impartially by avoiding conflicts of interest and bias.

Under the proposed rules, all employees would have to be trained on a school’s duties under Title IX to address sex discrimination, what conduct constitutes sex discrimination (including the definition of sex-based harassment), and their duty to report possible sex discrimination to the Title IX coordinator.¹⁰⁰

The proposed rules would necessitate additional training for “investigators, decisionmakers, facilitators of informal resolution processes, and “other persons who are

responsible for implementing...grievance procedures or have the authority to modify or terminate supportive measures.” This would ensure that all people who are involved in the investigation and resolution of a Title IX complaint are properly trained to do so.¹⁰¹ In addition to what the current rules require, the Title IX coordinators would also have additional training requirements that emphasize their responsibilities to prevent discrimination against pregnant and parenting students (see **Part III.B** below).¹⁰²

2. PREVENTION & MONITORING

Currently, the Title IX rules do not discuss prevention and monitoring of sexual harassment.

Under the proposed rules, schools would be required to prevent sex discrimination, which includes sex-based harassment, from reoccurring.¹⁰³ This includes requiring the Title IX coordinator to look for and address barriers to reporting sex discrimination,¹⁰⁴ including by conducting campus climate surveys to assess how frequently students are experiencing sex discrimination without reporting it or seeking feedback from students and employees about their experiences reporting sex discrimination.¹⁰⁵ And, even where a school might dismiss a complaint because the respondent is no longer at the school, Title IX coordinators would also have to take measures to ensure that sex discrimination does not persist or reoccur in the school’s program or activity (see **Part I.A.4** above).¹⁰⁶

II. What must schools do to protect LGBTQI+ students from discrimination?

Background: All students deserve to learn in safe and inclusive environments, yet LGBTQI+ students consistently face high rates of discrimination in the form of assault, harassment, bullying, and blame by school faculty when seeking help for mistreatment.¹⁰⁷ Over 80 percent of LGBTQI+ students ages 13 to 21 report being verbally harassed during any given school year, with LGB students most commonly experiencing harassment due to their sexual orientation.¹⁰⁸ Transgender, nonbinary, and intersex students also face significant discrimination while in school: 77 percent of adults who were out as transgender or perceived as transgender while they were in K12 schools experienced mistreatment in school, including verbal harassment or being physically or sexually assaulted,¹⁰⁹ and almost 25 percent of transgender and nonbinary students experience sexual assault while in college.¹¹⁰ A recent survey

found that intersex youth (those born with variations in their sex characteristics, e.g., genitals, chromosomes, hormones, internal organs) reported high rates of mistreatment, with 45 percent of intersex students experiencing gender-based harassment or discrimination from teachers or faculty during the past year.¹¹¹

In addition, LGBTQI+ students have faced an onslaught of attacks on their rights through state policies.¹¹² Despite all students needing safe and equal access to school restrooms, locker rooms, and school sports, transgender, nonbinary, and intersex students are often denied access to such facilities or singled out by being required to use separate, out-of-the-way facilities.¹¹³ They are also targeted by discriminatory policies banning them from their school sports teams or taking away their rights to privacy. These restrictions cause them to miss class, experience physical harm from avoiding restroom use, face discipline for being who they are, and face further harassment and psychological suffering by singling them out for mistreatment. This worsens the high risk LGBTQI+ youth already face for depression and suicidality, primarily linked to bias and isolation.¹¹⁴ The Trump administration exacerbated this discrimination when its Departments of Justice and Education rescinded guidance protecting LGBTQI+ students’ rights to access sex-separated spaces in schools¹¹⁵—all but ensuring that they would not have the support they needed to learn in safety.

A. Are schools required to address anti-LGBTQI+ discrimination?

Currently, the Title IX rules do not explicitly address anti-LGBTQI+ discrimination. Nonetheless, for years, courts have held that Title IX prohibits discrimination based on sexual orientation, gender identity, and transgender status.¹¹⁶ In 2020, the Supreme Court confirmed that Title VII, a federal law that bans sex discrimination against workers, protects workers facing discrimination because of their sexual orientation, or gender identity.¹¹⁷ Since then, federal courts have applied the same standard to Title IX protections in schools to affirm anti-discrimination.¹¹⁸ And, in 2021, the Department of Education shared resources for schools to meet their Title IX obligations by protecting LGBTQI+ students from harassment and attacks.¹¹⁹

Under the proposed rules, the Title IX rules would clarify for the first time that “sex discrimination” under Title IX includes discrimination based on sexual orientation, gender identity, sex-related characteristics (including intersex traits), status

as transgender or nonbinary, or sex stereotypes.¹²⁰

B. What must schools do to protect LGBTQI+ students' equal access to school facilities and programs?

Under the proposed rules, the Title IX rules would clarify for the first time, consistent with court decisions and Title IX's broad promise of equality, that LGBTQI+ students must be allowed to participate fully in school—and when a school's policy or practice stops students from participating because of their gender identity or transgender status, that is generally harmful and will violate Title IX.¹²¹ This means every student has the right to be who they are at school, including using school facilities, dressing, being addressed by staff and students, and otherwise participating in schools in a manner consistent with their gender.

The Trump administration rescinded guidance in 2017 recognizing transgender students' right to safe and equal facilities access and claimed that transgender students had no such rights.¹²² The Trump administration took this position based on Department of Education rules stating that schools may maintain some separate facilities, such as restrooms, locker rooms, or dormitories, for boys and girls so long as all students have comparable access, and even argued that the mere presence of transgender students in sex-separated spaces violates the rights of cisgender students.¹²³ Courts have repeatedly rejected these arguments, ruling that Title IX and the Constitution prohibit such discrimination.¹²⁴

The proposed rules would make clear that while schools may generally maintain separate boys' and girls' or men's and women's restrooms, they may not deny students access to facilities that are consistent with their gender.

C. What must schools do to ensure LGBTQI+ students have equal opportunities to play school sports?

Participating in school sports benefits students' emotional and physical health and academic success. For over a decade, many states have had transgender-inclusive policies permitting students to participate in sports in accord with their gender identity.¹²⁵ Unfortunately, 17 states recently passed laws that prohibit many or all transgender, nonbinary, and intersex students from participating in school sports, either in K-12 schools, college, or both.¹²⁶ These discriminatory laws have no scientific basis and harm students by depriving them of the benefits of participating

in school sports, and often make them an obvious target for bullying and assault. In some cases, even girls who are not transgender, nonbinary, or intersex may be subject to intrusive questioning and medical tests if someone believes they are not feminine enough.

Under the proposed rules, the Title IX rules would not directly address athletics but would make clear that the law prohibits schools from excluding students from activities, which would include school sports and other activities, because they are transgender or intersex. The Department of Education has indicated that it plans to issue a separate proposed Title IX rule to address equal opportunities to play school sports.¹²⁷

D. What must schools do to address anti-LGBTQI+ harassment?

Under the proposed rules, schools must take steps to address sex-based harassment, including anti-LGBTQI+ harassment, consistent with the requirements detailed in **Part I** above. The proposed rules would clarify that sex-based harassment includes harassment that is based on a student's sexual orientation, gender identity, sex characteristics (including intersex traits), or sex stereotypes.¹²⁸ Case law and common sense make clear that this would include mocking, taunting, or publicly ridiculing a student using names or gendered titles known to be both offensive and harmful to their ability to learn. This would be consistent with a recent Department of Education investigation and case resolution, which found that a school district violated Title IX when it did not respond effectively to a transgender student being harassed over several months—being mocked for her name, voice, and appearance, with the harasser intentionally using incorrect pronouns and an incorrect name to make the student feel unsafe and anxious.¹²⁹ The school violated Title IX by not protecting this student from harassment that affected her grades and mental health over a large part of the school year.¹³⁰

III. What must schools do to protect pregnant and parenting students from discrimination?

Background: Becoming pregnant or a parent should not derail a student's education. Unfortunately, pregnant and parenting students continue to face barriers to completing their education such as discrimination and inflexible

attendance policies. They may also lack access to resources such as high quality, affordable child care, which makes it harder for them to remain in school. Only half of teenage mothers earn a high school diploma by age 22¹³¹ and less than 2 percent of teen mothers graduate from college by age 30.¹³² The current Title IX regulations regarding pregnancy and related medical conditions were introduced in 1975 and have not been substantively changed since, though the Department of Education has clarified, through more recent guidance, the scope of protections for pregnant students. The proposed rules would provide new protections to ensure pregnant and parenting students have equal access to education and receive the support they need to thrive in school.

A. Are schools required to address discrimination against pregnant and parenting students?

Currently, schools may not discriminate against students because of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery from any of these conditions.¹³³ Schools also cannot exclude a student from an education program or activity, including athletic programs, because of pregnancy or a related medical condition.¹³⁴ Additionally, a student's participation in an alternate program for pregnant students must be voluntary and such program must be comparable in quality to mainstream education programs or activities.¹³⁵

Under the proposed rules, schools similarly would be prohibited from discriminating against pregnant and parenting students.¹³⁶ However, the language covering protections would be changed to better reflect the sex discrimination that students may experience because of their potential to become pregnant. Instead of prohibiting discrimination based on "pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery from any of these conditions" the new language would prohibit discrimination based on "current, potential, or past pregnancy or related conditions."¹³⁷ The proposed rules would also clarify that the term "related conditions" includes childbirth, termination of pregnancy, lactation, and "medical conditions" or "recovery" related to any of these conditions.¹³⁸

B. What are schools' responsibilities to pregnant and parenting students?

1. SCHOOL RESPONSIBILITIES

Currently, Schools are prohibited from discriminating against or excluding a student from the education program or any activities based on the student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery.¹³⁹ Where schools operate separate programs for pregnant students, these programs must be comparable to those offered to students who are not pregnant.¹⁴⁰ Schools must also treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery like any other temporary disability.¹⁴¹ Schools must excuse all pregnancy-related absences for as long as medically necessary and students must be given a reasonable amount of time to make up missed work.¹⁴²

Under the proposed rules, schools would also need to provide the student with the option of reasonable modifications to policies, practices, or procedures due to pregnancy or related conditions, allow voluntary leaves of absence beyond the medically necessary minimum and ensure access to a private and sanitary lactation space that is not a bathroom.¹⁴³ Employees at the school would also be required to promptly provide a student with contact information for the Title IX coordinator once they are informed of a student's pregnancy or related conditions by the student or a legal representative on the student's behalf.¹⁴⁴

2. TITLE IX COORDINATOR RESPONSIBILITIES

Currently, the Title IX rules do not clarify the role Title IX Coordinators play in enforcing pregnant and parenting students' rights or responding to pregnancy discrimination.¹⁴⁵

Under the proposed rules, there are specific actions that the Title IX coordinator would have to take upon learning that a student is pregnant or experiencing related conditions, to prevent discrimination and ensure equal access to education.¹⁴⁶ These actions would include promptly informing the student of the school's obligations to allow a voluntary leave of absence, ensure the availability of a private and sanitary lactation space, and allow modifications to policies, practices and procedures for pregnancy or related conditions.¹⁴⁷ The Title IX coordinator would also be required to provide voluntary reasonable

modifications to the school's policies for the student's pregnancy or pregnancy related conditions, allow a voluntary leave of absence at minimum to cover the time deemed medically necessary by a healthcare provider, and ensure the availability of a private and sanitary lactation space for expressing breast milk or breastfeeding.¹⁴⁸

C. How must schools treat absences for pregnancy and related conditions?

Currently, schools must excuse absences for pregnancy and related conditions for as long as the student's physician deems medically necessary.¹⁴⁹ Upon the student's return, the student must be reinstated to their status prior to their leave.¹⁵⁰

Under the proposed rules, the current provisions would be expanded to make clear that any leave of absence must be voluntary.¹⁵¹ At a minimum, students would be able to take a voluntary leave of absence from their program for a period deemed medically necessary by a healthcare provider (not just a physician).¹⁵² Where the school maintains a leave policy that provides more leave than medically necessary, the student could choose to take additional leave under that policy.¹⁵³ Upon return, the student would have to be reinstated to their prior academic status and, where practicable, their prior extracurricular status.¹⁵⁴

D. Can schools require a pregnant or parenting student to obtain a doctor's note?

Currently, if a school requires students with other temporary medical conditions to provide a physician's note authorizing their participation in an educational program or activity, then the school can require a similar note for students who are pregnant or have a pregnancy-related medical condition.¹⁵⁵

Under the proposed rules, schools would similarly be required to treat pregnancy and related conditions like a temporary disability with regard to any policies, medical or hospital benefits, services, or plans offered to students.¹⁵⁶ However, in general, schools would not be able to require students who are pregnant or have a related condition to provide certification from a healthcare provider that the student is able to participate in a class, program, or extracurricular activity.¹⁵⁷ (There would be some exceptions if *all* students must provide certification from a healthcare provider or the information is not used as a basis for discrimination against the student.¹⁵⁸)

E. What services and supports must schools offer to pregnant and parenting students?

1. SERVICES AND ACCOMMODATIONS

Currently, under the Title IX rules, schools must offer services and accommodations that are offered to temporarily disabled students to pregnant students and students with pregnancy-related medical conditions.¹⁵⁹ Such services and accommodations include, but are not limited to, homebound instruction or tutoring.¹⁶⁰ The Department of Education has also previously clarified through a guidance document that schools must make reasonable modifications that are responsive to a pregnant student's needs, such as access to an elevator, a larger desk, or permission for more frequent trips to the bathroom.¹⁶¹

Under the proposed rules, schools would be given more clarity about their responsibility to ensure that students who are pregnant or experiencing related conditions do not experience discrimination. Schools would be required to make reasonable modifications to policies, practices, or procedures for students who are pregnant or experiencing related conditions, as long as schools are not imposing these modifications against the students' will.¹⁶² These modifications would have to be implemented, coordinated, and documented by the Title IX coordinator.¹⁶³ Modifications could include, but would not be limited to: breaks during class to attend to health needs, express breast milk, or breastfeed; changes in physical space or supplies (e.g., larger desk, footrest); changes in schedule or course sequence; or access to online or other homebound education.¹⁶⁴

2. LACTATION SUPPORT AND SPACE

Currently, the Title IX rules are silent on lactation accommodations. In an earlier guidance document, the Department of Education recommended that schools designate a private room for students to breastfeed, pump milk, or address other needs related to breastfeeding during the school day.¹⁶⁵

Under the proposed rules, schools' Title IX coordinators would be required to ensure that there is a clean, private lactation space that is not a bathroom where students may express breast milk or breastfeed.¹⁶⁶

F. Can schools treat students differently based on their parental or familial status?

Currently, schools cannot apply a rule concerning a student's or applicant's "actual or potential" parental, family, or marital status if the rule treats students differently on the basis of sex.¹⁶⁷

Under the proposed rules, schools would receive greater clarity about the scope of the current provisions. For example, the proposed rules would make clear that schools may not "adopt or apply any policy, practice, or procedure" based on a student's or applicant's "current, potential, or past" parental, family, marital status if it treats them differently on the basis of sex,¹⁶⁸ while the current rules simply state that schools may not "apply any rule" or "policy" that so discriminates.¹⁶⁹

G. What must schools do to address harassment based on pregnancy or parenting status?

Currently, the Title IX rules do not explicitly mention schools' obligation to address harassment of pregnant or parenting students.

Under the proposed rules, the Title IX rules would make clear that harassment based on pregnancy or parenting status is a form of prohibited sex-based harassment under Title IX. Schools would be required to maintain grievance procedures to address this form of harassment in a prompt and equitable manner, consistent with the requirements detailed above in **Part I** above for all types of sex-based harassment.¹⁷⁰

H. What about pregnant and parenting employees in schools?

Currently, the Title IX rules prohibit schools from engaging in sex-based discrimination in employment actions. This specifically includes leave policies for pregnancy, childbirth, false pregnancy, termination of pregnancy and leave for persons of "either sex" to care for children or dependents, or any other leave.¹⁷¹

Under the proposed rules, schools would be prohibited from adopting or applying practices, procedures, or employment actions on the basis of sex, and this would include current, potential, or past parental, family, or marital status.¹⁷² Schools also would be prohibited from

discriminating against employees or applicants for employment due to current, potential, or past pregnancy or related conditions.¹⁷³ Schools would be required to provide a lactation space for employees other than a bathroom that is clean and private¹⁷⁴, and provide a reasonable break time for employees to express breast milk or breastfeed.¹⁷⁵ Pregnancy, related conditions, or any resulting temporary disability would have to be treated as any other temporary disability for job-related purposes, such as leave policies, disability income and seniority.¹⁷⁶ Where there is no leave policy for employees or an employee has insufficient leave, schools would have to treat pregnancy or related conditions as a voluntary leave of absence without pay for a reasonable period of time.¹⁷⁷

IV. What must schools do to address other sex discrimination?

The Biden administration's proposed Title IX regulations would, for the first time, impose detailed requirements on school procedures to address all reports of sex discrimination—not just sexual harassment. In this document, we will use the phrase "other sex discrimination" to refer to any sex discrimination that does not constitute sex-based harassment (*i.e.*, sex discrimination that is not sexual harassment, or other harassment based on sex, including LGBTQI+ status, sex stereotypes, or pregnancy/parenting status).

A. How must schools respond to complaints of other sex discrimination?

Currently, the Title IX rules do not create any specific requirements for grievance procedures addressing complaints of other sex discrimination, aside from being prompt and equitable.¹⁷⁸ They also do not discuss the availability of supportive measures or remedies for students who report other sex discrimination.

Under the proposed rules, when a complaint alleges that the *school's policy or practice* is the cause of the other sex discrimination, the school must investigate using "prompt and equitable" procedures.¹⁷⁹

And when a complaint alleges that a *person* is the cause of the other sex discrimination, schools would be required to *respond* consistent with the criteria detailed above in **Parts I.A.2-5**, and **I.B** above.¹⁸⁰ And the school would be required to *investigate* consistent with the criteria detailed above in

Parts I.C.1-2 and I.C.4-6 and with the requirement for K-12 schools in Part I.C.3 (i.e., allow all parties to present their witnesses and evidence and, if credibility is at issue, to use a process that enables the decision-maker to assess the credibility of the parties and witnesses).¹⁸¹

B. What must schools do to prevent other sex discrimination?

Currently, the Title IX rules do not require schools to prevent other sex discrimination until someone within a narrow set of employees has “actual knowledge” of sex discrimination,¹⁸² as explained above in Part I.D.2.

Under the proposed rules, schools would be required to monitor and prevent other sex discrimination consistent with the requirements detailed above in Part I.D.2 above.¹⁸³

V. Which schools can claim a religious exemption under Title IX, and when can they do it?

Background: Title IX provides that schools controlled by religious organizations are not required to follow any Title IX provisions that are inconsistent with their religious tenets. For years, schools have claimed religious exemptions under Title IX to be able to discriminate against women, pregnant and parenting students, students who access or are seeking access to abortion or birth control, and LGBTQ+ students—all in the name of religion. In 2020, the Trump administration made two changes to the Title IX regulations that allow more schools to claim a religious exemption, with less transparency to students and their families about their intention to discriminate (see below). Unfortunately, the Biden administration’s Title IX proposed rules do not address religious exemptions at all, and the administration has not yet announced when it plans to propose changes to undo the Trump administration’s changes to the Title IX regulations on religious exemptions.

A. Which schools can claim a religious exemption?

Before the 2020 rules, a school could request a religious exemption from Title IX if it was *controlled by a religious organization*, as set out in the Title IX statute.¹⁸⁴

Currently, under the Trump administration’s 2020 rules, a school can claim a religious exemption from Title IX even

if it’s not actually controlled by a religious organization—for example, if: (i) it is a divinity school, (ii) it requires its students or staff to follow a certain religion, (iii) its charter claims it is controlled by a religious organization, (iv) it has a doctrinal statement of religious beliefs or practices that it requires its students to follow, or (v) its mission statement refers to religious beliefs.¹⁸⁵

Under the proposed rules, the current requirements for religious exemptions would not be changed.

B. When can schools claim a religious exemption?

Before the 2020 rules, for many years, schools would notify the Department of Education in advance of their intent to rely on a religious exemption, as this is the best way to ensure exemption claims are sincere.

Currently, under the Trump administration’s 2020 rules, schools are not required to give the Department, students, or their families any advance notice that they are refusing to follow any part of Title IX’s nondiscrimination mandate.¹⁸⁶ Instead, schools can now simply assert a religious exemption after they are already under investigation for violating Title IX.¹⁸⁷ This is inconsistent with the Title IX rule requirement that schools must provide notice of their nondiscrimination policies.¹⁸⁸ It also makes it more difficult for current and prospective students and their families to make informed decisions when choosing a school, as they are not given notice that schools are asserting they can discriminate in violation of Title IX based on religion.

Under the proposed rules, the current requirements would not be changed.

- 1 Dep't of Educ., Office for Civil Rights, *The U.S. Department of Education Releases Proposed Changes to Title IX Regulations, Invites Public Comment* (June 23, 2022) [hereinafter Proposed Rules Press Release], <https://www.ed.gov/news/press-releases/us-department-education-releases-proposed-changes-title-ix-regulations-invites-public-comment>. The Department of Education also released a chart summarizing the changes the proposed rules would make to the harmful Title IX rules put into place by the Trump administration. See Dep't of Educ., Office for Civil Rights, *Summary of Major Provisions of the Department of Education's Title IX Notice of Proposed Rulemaking* (June 2022), <https://www2.ed.gov/about/offices/list/ocr/docs/t9nprm-chart.pdf>.
- 2 National Women's Law Center, *DeVos's New Title IX Sexual Harassment Rule, Explained* (May 12, 2020), <https://nwlc.org/resource/devos-new-title-ix-sexual-harassment-rule-explained>.
- 3 Know Your IX, *The Cost of Reporting: Perpetrator Retaliation, Institutional Betrayal, and Student Survivor Pushout* 12-16 (2021), <https://www.knowyourix.org/wp-content/uploads/2021/03/Know-Your-IX-2021-Report-Final-Copy.pdf>.
- 4 *Id.* at 4-6.
- 5 See, e.g., Nancy Chi Cantalupo, *And Even More of Us Are Brave: Intersectionality & Sexual Harassment of Women Students of Color*, 42 HARV. J.L. & GENDER 1, 16, 24-29 (2018); Georgetown Law Center on Poverty and Inequality, *Girlhood Interrupted: The Erasure of Black Girls' Childhood*, 1 (2018), <https://www.law.georgetown.edu/poverty-inequality-center/wp-content/uploads/sites/14/2017/08/girlhood-interrupted.pdf>.
- 6 See, e.g., The Arc, *People with Intellectual Disabilities and Sexual Violence* 2 (Mar. 2011), <https://www.thearc.org/document.doc?id=3657>; Nat'l Inst. of Justice, *Examining Criminal Justice Responses to and Help-Seeking Patterns of Sexual Violence Survivors with Disabilities* 11, 14-15 (2016), <https://www.nij.gov/topics/crime/rape-sexual-violence/Pages/challenges-facing-sexual-assault-survivors-with-disabilities.aspx>.
- 7 See, e.g., Gillian R. Chadwick, *Reorienting the Rules of Evidence*, 39 CARDOZO L. REV. 2115, 2118 (2018), <http://cardozolawreview.com/heterosexism-rules-evidence>; Laura Dorwart, *The Hidden #MeToo Epidemic: Sexual Assault Against Bisexual Women*, MEDIUM (Dec. 3, 2017), <https://medium.com/@lauramdorwart/the-hidden-metoo-epidemic-sexual-assault-against-bisexual-women-95fe76c3330a>.
- 8 See generally National Women's Law Center, *Let Her Learn: Stopping School Pushout for Girls Who are Pregnant or Parenting* 11 (2017) https://nwlc.org/wp-content/uploads/2017/04/Final_nwlc_Gates_PregParenting.pdf (explaining the stereotypes that pregnant and parenting students must contend with, such as being viewed as promiscuous or deserving of sexual harassment).
- 9 While the 2020 rules allow schools to address dismissed sexual harassment complaints under "another provision" of the school's code of conduct, the Department has not provided any details on how that "non-Title IX policy" would work. 34 C.F.R. § 106.45(b)(3); e.g., 85 Fed. Reg. 30026, 30216, 30282.
- 10 See, e.g., Department of Education, Office for Civil Rights, *Q&A on Campus Sexual Misconduct* (Sept. 22, 2017; rescinded Aug. 14, 2020), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>; Department of Education, Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence* (Apr. 29, 2014; rescinded Sept. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>; Department of Education, Office for Civil Rights, *Dear Colleague Letter: Sexual Violence* (Apr. 4, 2011; rescinded Sept. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>; Department of Education, Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 66 Fed. Reg. 5,512 (Jan. 19, 2001; rescinded Aug. 14, 2020), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html>.
- 11 While the 2020 rules require schools to dismiss certain Title IX complaints of sexual harassment, schools may still have non-Title IX sexual harassment policies to respond to sexual harassment complaints that do not meet the 2020 Title IX rule standard.
- 12 34 C.F.R. § 106.30(a) (defining "sexual harassment"); see also § 106.45(b)(3)(i).
- 13 Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390, 41571 (proposed July 12, 2022) (to be codified at 34 C.F.R. pt. 106) [hereinafter Proposed Rules], available at <https://federalregister.gov/d/2022-13734> (proposed 34 C.F.R. § 106.10).
- 14 Proposed Rules, 87 Fed. Reg. at 41569 (proposed 34 C.F.R. §§ 106.2(1), (3)).
- 15 See, e.g., Department of Education, Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence* (Apr. 29, 2014; rescinded Sept. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>; Department of Education, Office for Civil Rights, *Dear Colleague Letter: Sexual Violence* (Apr. 4, 2011; rescinded Sept. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>; Department of Education, Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 66 Fed. Reg. 5,512 (Jan. 19, 2001; rescinded Aug. 14, 2020), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html>; Department of Education, Office for Civil Rights, *Sexual Harassment Guidance*, 62 Fed. Reg. 12,034 (Mar. 13, 1997).
- 16 Proposed Rules, 87 Fed. Reg. at 41569 (proposed 34 C.F.R. § 106.2(2)).
- 17 Proposed Rules, 87 Fed. Reg. at 41569 (proposed 34 C.F.R. §§ 106.2(2)(i)-(v)).
- 18 34 C.F.R. §§ 106.44(a), 106.45(b)(3)(i); 85 Fed. Reg. at 30105, 30199. See also Dep't of Educ., Office for Civil Rights, *Questions and Answers on the Title IX Regulations on Sexual Harassment*, 8-10 (July 2021; updated June 28, 2022), <https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf>.
- 19 Proposed Rules, 87 Fed. Reg. at 41571 (proposed 34 C.F.R. § 106.11).
- 20 *Id.*
- 21 Proposed Rules, 87 Fed. Reg. at 41576, 41573 (proposed 34 C.F.R. § 106.45(d)(4)(i); § 106.44(g)). Even if off-campus harassment is not shown to contribute to a hostile environment and, as such, a school dismisses a complaint of it, the Title IX coordinator would still be encouraged under the proposed rules to offer the complainant supportive measures to preserve their access to the school's education program or activity. Proposed Rules, 87 Fed. Reg. at 41403.
- 22 34 C.F.R. § 106.30(a) (defining "formal complaint").
- 23 Proposed Rules, 87 Fed. Reg. at 41567 (proposed 34 C.F.R. § 106.2).
- 24 34 C.F.R. § 106.45(b)(3)(ii).
- 25 Proposed Rules, 87 Fed. Reg. at 41575 (proposed 34 C.F.R. § 106.45(d)(1)(ii)).
- 26 Proposed Rules, 87 Fed. Reg. at 41575-76 (proposed 34 C.F.R. §§ 106.45(d)(4)(i)-(iii)). See also *id.* at 41573 (proposed 34 C.F.R. § 106.44(f)(6)).
- 27 Proposed Rules, 87 Fed. Reg. at 41446-47.
- 28 34 C.F.R. § 106.30(a) (defining "actual knowledge").
- 29 34 C.F.R. § 106.30(a) (defining "actual knowledge"); see also § 106.44(a).
- 30 Proposed Rules, 87 Fed. Reg. at 41572 (proposed 34 C.F.R. § 106.44(c)(1)).
- 31 The proposed rules stipulate that there are three kinds of confidential employees who do not have to report possible sex discrimination to a school's Title IX coordinator. The first are school employees whose communications (which must be made or received in the course of their job) are deemed confidential under state or federal law, such as pastoral counselors or therapists. The second are employees who the school has designated as confidential resources for the purpose of connecting individuals who have experienced sex-based discrimination with resources in the wake of such discrimination (including explaining how to report sex-based discrimination and providing the contact information of the school's Title IX Coordinator). The third are college or university employees who receive information about sex discrimination while conducting a research study approved by an Institutional Review Board that is specifically designed to gather information about sex discrimination. See Proposed Rules, 87 Fed. Reg. at 41567, 41573 (proposed 34 C.F.R. §§ 106.2, 106.44(d)).
- 32 Proposed Rules, 87 Fed. Reg. at 41572-73 (proposed 34 C.F.R. § 106.44(c)(2)(iv)).

- 33 Proposed Rules, 87 Fed. Reg. at 41572 (proposed 34 C.F.R. § 106.44(c)(2)(i)-(ii)).
- 34 Proposed Rules, 87 Fed. Reg. at 41572 (proposed 34 C.F.R. § 106.44(c)(2)(iii)).
- 35 Proposed Rules, 87 Fed. Reg. at 41572-73 (proposed 34 C.F.R. § 106.44(c)(2)(iv)).
- 36 Proposed Rules, 87 Fed. Reg. at 41573 (proposed 34 C.F.R. § 106.44(e)).
- 37 34 C.F.R. § 106.44(a); *see also* § 106.44(b)(2).
- 38 Proposed Rules, 87 Fed. Reg. at 41572 (proposed 34 C.F.R. § 106.44(a)).
- 39 Proposed Rules, 87 Fed. Reg. at 41573 (proposed 34 C.F.R. §§ 106.44(f)(3), (g)). Schools would also be required to offer supportive measures to the reported harasser if needed to preserve or restore that student’s access to education.
- 40 34 C.F.R. § 106.30(a) (defining “supportive measures”).
- 41 Proposed Rules, 87 Fed. Reg. at 41576 (proposed 34 C.F.R. §§ 106.44(g)).
- 42 Proposed Rules, 87 Fed. Reg. at 41575-76 (proposed 34 C.F.R. §§ 106.45(d)(4)(i)).
- 43 Proposed Rules, 87 Fed. Reg. at 41573 (proposed 34 C.F.R. § 106.44(g)(1)); *id.* at 41450 (“non-mutual restrictions on the parties,” “one-way no-contact orders”).
- 44 Proposed Rules, 87 Fed. Reg. at 41569 (proposed 34 C.F.R. § 106.2) (“supportive measures”).
- 45 Proposed Rules, 87 Fed. Reg. at 41573-74 (proposed 34 C.F.R. § 106.44(g)(4)).
- 46 Proposed Rules, 87 Fed. Reg. at 41569 (proposed 34 C.F.R. § 106.2) (“supportive measures”).
- 47 *Id.* (“supportive measures”); *Id.* at 41573 (proposed 34 C.F.R. § 106.44(g)(2)).
- 48 Proposed Rules, 87 Fed. Reg. at 41573 (proposed 34 C.F.R. § 106.44(g)(1)).
- 49 34 C.F.R. § 106.45(b)(9).
- 50 34 C.F.R. §§ 106.45(b)(9), (9)(i), (9)(ii).
- 51 Proposed Rules, 87 Fed. Reg. at 41574 (proposed 34 C.F.R. § 106.44(k)(1)).
- 52 Proposed Rules, 87 Fed. Reg. at 41574 (proposed 34 C.F.R. § 106.44(k)(1)(i)-(ii)).
- 53 Proposed Rules, 87 Fed. Reg. at 41574 (proposed 34 C.F.R. § 106.44(k)(3)(vii)).
- 54 34 C.F.R. § 106.71.
- 55 *Id.* For example, a complainant can’t be punished for being underage and intoxicated during their own sexual assault or for engaging in consensual sexual activity on school grounds prior to their assault—unless the school has a zero-tolerance policy that always imposes the same punishment for such conduct, regardless of the circumstances. Department of Education, Office for Civil Rights, *Questions and Answers on the Title IX Regulations on Sexual Harassment* (July 2021) at 30 (July 20, 2021), <https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf>.
- 56 34 C.F.R. § 106.71(b)(2).
- 57 34 C.F.R. § 106.71.
- 58 Proposed Rules, 87 Fed. Reg. at 41579 (proposed 34 C.F.R. § 106.71).
- 59 Proposed Rules, 87 Fed. Reg. at 41568, 41574 (proposed 34 C.F.R. §§ 106.2 (“retaliation”), 106.71).
- 60 Proposed Rules, 87 Fed. Reg. at 41567 (proposed 34 C.F.R. § 106.45(h)(5)). Note: this would not be defined as retaliation, but it would nevertheless be prohibited.
- 61 Proposed Rules, 87 Fed. Reg. at 41579 (proposed 34 C.F.R. § 106.71).
- 62 34 C.F.R. § 106.6(h).
- 63 Proposed Rules, 87 Fed. Reg. at 41404.
- 64 Proposed Rules, 87 Fed. Reg. at 41569 (proposed 34 C.F.R. § 106.6(b)).
- 65 34 C.F.R. § 106.45(b)(1)(v).
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