

DOE Title IX Revamp of Campus Disciplinary Process Casts Wide Net



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Perkins Coie's Markus Funk and the University of South Carolina's Ella Uhde analyze the broad scope of the Department of Education's proposed changes to Title IX's implementing regulations, and the effect finalized rules would have on campus disciplinary procedures.

This October, the Department of Education is slated to make sweeping changes across Title IX's implementing regulations. The expansive proposed revisions would impact college and university grievance procedures, which are designed to promptly and equitably resolve complaints alleging discrimination on the basis of sex.

Federal departments and agencies typically make only micro-adjustments to general and permanent rules in the Code of Federal Regulations. But the DOE's 2022 proposed Title IX rulemaking stood out because of its size (700 pages) and its ambition.

Unsurprisingly, the proposed rewrites have generated significant attention. The agency has received more than 240,000 comments, prompting a delay of finalized rules until this fall.china's new data laws

TITLE IX

Title IX of the Education Amendments of 1972 is a civil rights law prohibiting discrimination based on sex in all education programs and activities receiving federal dollars. Covered institutions include public and private elementary and secondary schools, school districts, and colleges and universities—commonly called “recipients” because they receive federal funds.

The implementing regulations, codified in 34 CFR Part 106, require qualifying colleges and universities to respond promptly and effectively to discrimination claims on the basis of sex—including sexual harassment and sexual assault. Further, if a school knows or reasonably should know about instances of such discrimination, it must take immediate action to eliminate discrimination, prevent recurrence, and address its effects. A school might risk investigation for failing to comply with Title IX, and loss of federal funding.

KEY PROPOSED CHANGES

Broadened Reach. The proposed regulations continue to cover quid pro quo, hostile environment harassment, and incidents of sexual assault, dating violence, domestic violence, and stalking. They also cover other forms of sex discrimination, including discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.

Includes Off-Campus Conduct. Under proposed § 106.11, recipients must respond to allegations of sex discrimination within the recipient's “off-campus” education programs, including study abroad programs, as well as when it allegedly occurred in buildings owned or controlled by recognized student organizations, including fraternities and sororities. Off-campus conduct involving two students will also be actionable.

Live Hearing Right Removed. Live hearings, including opportunities for cross-examination, will no longer be required, per proposed § 106.46(g).

Loosening of Standard of Proof Rules. Proposed § 106.45(h)(1) would require a recipient to use the preponderance of the evidence standard of proof to determine whether sex discrimination occurred, unless the recipient uses the clear and convincing evidence standard of proof in “all other comparable proceedings,” including proceedings relating to other discrimination complaints.

Single-Investigator Model Endorsed. Rejecting concerns about conflicts, politicization, and accuracy in fact finding, the DOE in proposed § 106.45(b)(2) would allow one individual to both investigate the facts of the case and decide on its outcome.

Expanded Coordinator Role. Proposed § 106.45(b)(2) would permit a school's Title IX coordinator/investigator to serve as the sole decision-maker.

Right to Present Expert Witnesses Limited. Proposed § 106.46(e)(4) would remove the parties' right to present expert witnesses and gives schools the discretion to permit them to do so.

Access to Evidence Upon Request & Disclosure. Proposed § 106.46(e)(6) gives schools the option of first providing the investigative report and thereafter permitting access to underlying evidence only if one or more parties explicitly request it. Additionally, proposed § 106.46(e)(6)(iii) requires schools take reasonable steps to prevent and address any unauthorized disclosures of grievance procedure evidence and information.

Different Standards of Proof. Per the DOE, employees' distinguishable functions and obligations justify evaluating allegations of employee misconduct based on different (higher) standards of proof than allegations of student misconduct. Even assuming the identical evidence, it would be more difficult to reach a determination that an employee violated a code provision.

Adverse Inference Limitation. Proposed § 106.46(f)(4) prohibits decision-makers from drawing adverse inferences based solely on a party's or witness's absence from a live hearing or refusal to respond to questions about credibility.

Narrowed False Statement Disciplinary Options. Proposed § 106.45(h)(5) prohibits disciplinary action against a party for making false statements based solely on the grievance procedure's conclusion that no sex discrimination occurred.

College and university disciplinary proceedings, particularly when they involved discrimination, are serious business. The institutions can impose significant sanctions on those found to have violated their codes, ranging from requiring apology letters and revoking diplomas to suspension and expulsion. Adverse findings can have long-lasting impacts on the sanctioned party's professional and academic future.

Though some observers raise due process concerns about the proposed limitations to the procedural rights of those accused of misconduct, the DOE and its Office for Civil Rights maintain that the changes promote efficiency and access while not violating the accused's due process rights.

But the high stakes make significant follow-on litigation a virtual certainty, so colleges and universities, with qualified counsel's assistance, must take a fresh look at their disciplinary procedures.

AUTHOR INFORMATION

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