DeVos’s New Title IX Sexual Harassment Rule, Explained

In May 2020, Betsy DeVos’s Department of Education announced a final Title IX rule weakening protections against sexual harassment in schools, including protections against sexual assault.¹ If it goes into effect, this rule will make schools more dangerous for all students. This is why it was opposed not only by survivors’ advocates and women’s rights organizations, but also by colleges and universities, superintendents, principals, mental health professionals, and many other stakeholders. The new rule, which is scheduled to take effect on August 14, 2020, explicitly seeks “a reduction in the number of Title IX investigations” schools undertake by making it harder for sexual harassment victims to come forward, requiring schools to ignore victims in many instances when they do ask for help, and denying victims fair treatment when they try to use the system that is supposed to protect them. That’s why the National Women’s Law Center will be fighting in court to ensure the new rule never takes effect.

The below step-by-step walkthrough sets out what the new rule means and how it departs from the Department’s previous policy.

IGNORING VICTIMS

Schools will be allowed—and in many cases, forced—to ignore sexual harassment victims if: (i) they were sexually harassed in the wrong place; (ii) they asked the wrong person for help; (iii) they haven’t suffered enough by DeVos’s standard; (iv) they are no longer participating or trying to participate in the school’s program or activity; (v) their respondent is no longer at their school; or (vi) they don’t submit a written complaint.

• HARASSED IN THE WRONG PLACE: Previously, Department of Education policy required schools to investigate all student complaints of sexual harassment, regardless of where the harassment occurred, to determine if the harassment had affected the student’s ability to participate in classes and other school activities.² Under the new rule, schools will be required to dismiss all complaints of sexual harassment that occurs outside of a school program or activity. According to the Department, the only incidents that occur within a school program or activity (and therefore cannot be dismissed) are those where the school has “substantial control” over both the respondent and the context of the incident, or those that occur in a building owned or controlled by a student organization that is officially recognized...
by a college or university.3

This rule will be devastating for students who are sexually assaulted 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, and then forced to continue attending class with their rapist or abuser—or even a class taught by their rapist or abuser. This is why student body presidents4 and fraternity5 and sorority6 members expressed “deep concern” about this provision, citing the fact that nearly 9 in 10 college students live off campus and many social gatherings occur off campus. Similarly, in their comments on this proposal, school administrators were “shocked”7 by this “serious mistake,”8 which inhibits their ability to provide a safe environment for their students. Campus police officers agreed, noting that under the proposed rule, “[s]exual assault would be the only crime response restricted in this manner,” as schools would not be restricted from disciplining students for off-campus behavior such as robberies, hate crimes, auto theft, or murder.9

• ASKED THE WRONG PERSON FOR HELP: Previously, schools were required to address: (i) any employee-on-student or student-on-student sexual harassment if a “responsible employee” knew or should have known about it, and (ii) all employee-on-student sexual harassment that occurred “in the context of” the employee’s job duties, regardless of whether a “responsible employee” knew or should have known about it.10 A “responsible employee” was defined broadly as anyone whom “a student could reasonably believe” had the authority to redress sexual harassment or had the duty to report student misconduct to appropriate school officials.11 Under the new rule, institutions of higher education will be 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.12

This means under the new rule, colleges and universities can ignore all sexual harassment by a student or school employee unless one of a small subset of high-ranking school employees actually knows about the harassment. Colleges and universities won’t have any obligation to respond when a student tells a residential advisor, teaching assistant, or professor that they are experiencing sexually harassment. They will not even be obligated to address sexual abuse of a college student by a professor—even if the abuse occurs “in the context of” the professor’s job duties—unless the student reports it to the Title IX coordinator or an undefined official with “authority to institute corrective measures.”

As survivors from Michigan State University, University of Southern California, and Ohio State University have pointed out, had the proposed rule previously been in place, their schools would have had no responsibility to stop serial predators like Larry Nassar, George Tyndall, or Richard Strauss—just because the victims reported the abuse to coaches and trainers instead of the “right” employees—even though Nassar, Tyndall, and Strauss sexually abused countless students in the context of their jobs as medical doctors.13 Again, it’s no surprise that in their comments opposing this proposal, school officials in higher education were alarmed by the “terrible consequences”14 of this requirement.

• HASN’T SUFFERED ENOUGH: Previously, schools were required to investigate all complaints of sexual harassment, which was defined as “unwelcome conduct of a sexual nature.”15 Under the new rule, schools will be required to dismiss all complaints that do not meet one of DeVos’s three stringent definitions of “sexual harassment”: (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 the definition of “sexual assault,” “dating violence,” “domestic violence,” or “stalking” under the Clery Act; or (iii) “unwelcome conduct” on the basis of sex that is “determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access” to a school program or activity.16

This means under the new rule, schools are arguably required to ignore complaints of sexual harassment unless the victim can show that the harassment has been so severe that it is affecting their ability to do their schoolwork or attend classes. This means many victims will be forced to endure repeated and escalating levels of abuse before they can get help. By the time their school intervenes, they may have already dropped out. It’s not surprising that school officials commenting on the proposed rule thought this provision made “little sense”17 and pushed schools in the “opposite direction”18 from student safety. Title IX exists to ensure that sex discrimination, including sexual harassment, is never the end of anyone’s education, and accordingly, schools
should respond to sexual harassment complaints long before students are “effectively denied” equal access to education.

• **VICTIM NO LONGER PARTICIPATING OR TRYING TO PARTICIPATE IN THE SCHOOL’S PROGRAM OR ACTIVITY:** Under this new rule, for the first time, students will only be able to file a sexual harassment complaint with a school where they are still “participating in or attempting to participate in the education program or activity” when they file the complaint. This means that schools will not be allowed to investigate a complaint of sexual harassment—even if the respondent is still enrolled or teaching at the school—if the victim has already graduated, transferred, or even dropped out because of the harassment. Similarly, if a visiting high school student is sexually assaulted by a college student or a professor during an admit weekend, the survivor will not be able to file a complaint with that college unless they are still planning to enroll there. This will tie the hands of schools that want to respond to known sexual harassment, particularly by individuals who are still affiliated with the school and who could be a serial rapist or abuser. Unfortunately, students and other stakeholder weren’t given a chance to comment on the harms of this rule, as it wasn’t included in the Department’s proposal.

• **RESPONDENT NO LONGER AT THE SCHOOL:** Under the new rule, for the first time, schools will be allowed to dismiss complaints—even during a pending investigation or hearing—because the respondent is no longer enrolled in or employed by their school. This means if a student graduates or transfers to another school after sexually assaulting another student, the school will no longer have to investigate or provide supportive measures to help the survivor continue their education. Similarly, if a teacher retires or resigns after his sexual abuse of many students over several years comes to light, the school will no longer have to investigate or provide supportive measures to help the survivor continue their education. Unfortunately, students and other stakeholder weren’t given a chance to comment on the harms of this rule, as it wasn’t included in the Department’s proposal.

• **NO FORMAL WRITTEN COMPLAINT:** Under the new rule, for the first time a school will not be required to investigate any report of sexual harassment unless it receives a “formal complaint” filed by the victim (or their parent or guardian) or signed by the Title IX coordinator, requesting an investigation. This requirement is especially harmful for young children, whose complaints of sexual assault or other harassment are typically made verbally, and students with disabilities that inhibit their ability to read, write, or sign a complaint.

**MISTREATING VICTIMS:**

Previously, when alerted to possible sexual harassment, schools were required to respond “reasonably” to sexual harassment by investigating, providing remedies, and preventing the harassment from occurring again. Under the new rule, schools’ responses are deemed acceptable as long as they are not “clearly unreasonable” or “deliberately indifferent”—regardless of whether the victim is able to feel safe again in school.

Educators in K-12 and higher education alike objected to the parts of this rule that were proposed, because, along with the other proposed changes, it will “perversely” give students in school—including children—“less protection” from sexual harassment than adults in the workplace. They also criticized this rule for creating “confusion and absurdity” for individuals who are protected from sexual harassment under both Title IX and Title VII—such as college and graduate students who are employed by their schools and school employees in both K-12 and higher education—but who would receive different and conflicting levels of civil rights protection if the proposed Title IX rule were to be finalized.

**UNFAIR INVESTIGATION AND HEARING PROCEDURES**

When a sexual harassment victim is able to get an investigation, schools will still be allowed—and in many cases, forced—to use unfair and re-traumatizing procedures that aren’t required in any other investigations of student or staff misconduct—including: (i) creating unnecessary delays, (ii) presuming the harassment never occurred, (iii) re-traumatizing the survivor through direct, live cross-examination, and (iv) using an unfair standard of proof that tilts the investigation in favor of named harassers.

• **UNNECESSARY DELAYS:** Previously, the Department of Education recommended that schools finish
investigations within 60 days.\textsuperscript{27} If there was an ongoing criminal investigation, schools were required to “promptly resume” the school’s investigation as soon as the police had finished gathering evidence—not wait for the ultimate outcome of the criminal investigation (which can take a very long time).\textsuperscript{28}

The new rule drops the 60-day recommendation and allows schools to delay their own Title IX investigations for an unspecified period if there is an ongoing criminal investigation\textsuperscript{29}—despite the fact that such investigations can be very lengthy. The new rule ignores the fact that Title IX is a civil rights law, not a criminal law, and that schools are required to conduct their own investigations independent of the police. The rule will make it particularly difficult for K-12 students who suffer sexual abuse to have a timely Title IX investigation, since most K-12 employees are required by state law to report child sexual abuse to the police,\textsuperscript{30} which will trigger a criminal investigation. Student survivors have noted that many school investigations already take more than 180 days or even up to 519 days to resolve.\textsuperscript{31} State attorneys general commenting on the proposed rule pointed out that creating additional grounds for delay will only further “re-victimize” survivors “as the process drags on without resolution or relief.”\textsuperscript{32}

- **PRESUMPTION OF NO SEXUAL HARASSMENT:** Under the new rule, for the first time, schools will be required to start all sexual harassment investigations with the presumption that no sexual harassment occurred\textsuperscript{33}—even though no such presumption is required for other school investigations of student or employee misconduct, like physical assault or religious harassment. In other words, schools will be effectively forced to presume that all students who report sexual harassment are lying. This presumption, which improperly imports a criminal law standard into a non-criminal investigation, perpetuates the sexist myth that women and girls frequently lie about sexual assault and other forms of sexual harassment. As the state attorneys general and campus police officers pointed out when opposing the proposed rule, this requirement not only “improperly tilts the process” in favor of named sexual harassers\textsuperscript{34} but also wrongly imports a criminal law presumption into non-criminal investigations.\textsuperscript{35}

- **RETRAUMATIZING LIVE CROSS-EXAMINATION:** Previously, schools were “strongly” encouraged to have students submit their investigation or hearing questions to a “trained third party,” who would ask the questions on their behalf.\textsuperscript{36} Under the new rule, in higher education, survivors and witnesses in sexual harassment investigations will be forced to submit to cross-examination “directly, orally, and in real time” by the respondent’s “advisor of choice” if they want their statements to be considered as evidence by the school.\textsuperscript{37} The respondent’s advisor could be an angry parent or fraternity brother of the respondent, a faculty member who oversees the survivor’s academic work, or an “attack dog” criminal defense lawyer—even if the survivor cannot afford an attorney. This live, adversarial cross-examination will occur without the legal protections, including rules of evidence, that are available in courtroom proceedings, ensuring that many student survivors will be retraumatized or deterred from coming forward at all, and that many witnesses will refuse to participate in investigatory processes. In K-12 schools, schools will have the option of forcing students to undergo this process,\textsuperscript{38} despite evidence showing that hostile cross-examination makes it especially difficult for children to provide accurate testimony.

A requirement that schools conduct live, quasi-criminal trials with live cross-examination only in sexual misconduct investigations—and not in investigations of other types of student or staff misconduct—communicates the toxic and false message that allegations of sexual harassment are uniquely unreliable. The Supreme Court has never required this type of live adversarial cross-examination in school investigations.\textsuperscript{39} Student survivors who have been subjected to live cross-examination by their rapist’s advisor have reported tremendous stress and trauma as a result.\textsuperscript{40} Furthermore, as many attorneys and educators pointed out when criticizing the proposed rule, it is “nonsensical”\textsuperscript{41} to require school administrators to make “on-the-spot” or “real-time evidentiary decisions”\textsuperscript{42} during cross-examination when even judges in courtrooms are not required to do so. Ultimately, this rule will only “inhibit the Department’s stated goals of discovering the truth.”\textsuperscript{43}

- **TILTED STANDARD OF PROOF:** Previously, schools were required to use a “preponderance of the evidence” standard (i.e., “more likely than not”) in all sexual harassment investigations.\textsuperscript{44} This is the same standard that is used by courts in all civil rights cases\textsuperscript{45} and is the only standard of proof\textsuperscript{46} that treats both sides equally. Under the new rule, schools will be able to choose between using the preponderance standard or the much
higher standard of “clear and convincing evidence” (i.e., “highly and substantially more likely than not”) to determine responsibility for sexual harassment, as long as they use the same standard against student and staff respondents. Because some school employees’ collective bargaining agreements require use of the “clear and convincing evidence” standard for all employee misconduct investigations, some schools will thus be required to use the “clear and convincing evidence” standard in student sexual harassment investigations, even if they continue to use the preponderance standard for all other investigations of student misconduct, like a fist fight or religious harassment.

Allowing schools to use a “clear and convincing evidence” standard that tilts the scales in favor of respondents and to apply this standard only in sexual harassment investigations is inequitable and discriminatory. This rule again appears to be based on the harmful rape myth that students who report sexual harassment are inherently less credible than students who report other types of misconduct.

HARMFUL RESPONSES

Schools will be allowed to use mediation to resolve student-on-student sexual assault complaints and will be permitted to fail to provide survivors with meaningful support. Both of these changes threaten significant harm to students who experience sexual assault or other forms of sexual harassment.

• MEDIATING STUDENT-ON-STUDENT SEXUAL ASSAULT:
  Previously, schools were prohibited from using mediation to resolve sexual assault complaints, because mediation assumes both parties share responsibility for the assault, because mediation can allow assailants to pressure survivors into inappropriate resolutions, and because mediation often requires direct interaction between the assailant and survivor, which can be retraumatizing. Under the new rule, schools will be allowed to use mediation to resolve any sexual harassment complaint, including student-on-student sexual assault (but not employee-on-student sexual assault).

Students, survivors, and advocates alike opposed this rule when it was proposed because mediation can “foster coercion,” allows abusers to manipulate victims, and allows students to be “pressured by administrators” into entering mediation.

• LACK OF MEANINGFUL SUPPORT FOR VICTIMS:
  Supportive measures (or “interim measures”) are reasonable steps that schools are required to take—before, during, or without an investigation—to ensure that sexual harassment does not interfere with a student’s education. Supportive measures can include changes to class schedules or housing assignments to separate the students, counseling services, tutoring services, excused absences, or changes in assignments and tests. Previously, schools were instructed to minimize the burden of these measures on the complainant. For example, schools were permitted to issue a one-way no-contact order prohibiting the named harasser from contacting the complainant (instead of a mutual no-contact order prohibiting both parties from contacting each other).

Under the new rule, schools will be prohibited from providing supportive measures that are “disciplinary,” “punitive,” or that “unreasonably burden” the other party. This may lead some schools only to impose mutual no-contact orders, which puts victims at risk of discipline, given that abusers often manipulate victims into violating mutual no-contact orders. This could also mean that schools will force victims to change their own classes and dorms to avoid their rapist or abuser, because changes to the respondent’s schedule may be seen as unreasonably burdensome.

NO NOTICE OF RELIGIOUS EXEMPTIONS

Schools that believe they have a religious exemption from Title IX that allows them to discriminate based on sex won’t have to inform the Department of Education or students and families in advance that they are claiming this exemption, which can especially harm women and girls, LGBTQ students, pregnant or parenting students, and students who access or attempt to access birth control or abortion.

• Under the new rule, the Department of Education is assuring schools that they will not be required to claim a religious exemption from Title IX exemption from the Department, or give students or their families any notice that they are claiming a religious exemption, before they engage in sex discrimination. Schools can simply claim a religious exemption after they are already under investigation for violating Title IX.

• On top of this, in a separate Title IX rule, DeVos has proposed expanding the religious exemption to allow
many more schools to *discriminate based on sex in the name of religion.* This new proposed rule would allow schools that have only a tangential relationship—or even no relationship—to religion to claim a right to discriminate simply because they subscribe to “moral beliefs or practices.” This means that in DeVos’s view, a school could discriminate based on not only moral principles that often have religious undertones like “modesty” or “purity,” but also common secular principles like “fairness,” “honesty,” or “intellectual freedom.”

- These two Title IX rules, separately and together, will be especially dangerous for women and girls, LGBTQ students, pregnant or parenting students, and students who access or attempt to access birth control or abortion.

For all these reasons, the rule was strongly opposed by a wide array of stakeholders when it was proposed:

- **Students**, including student survivors, fraternity and sorority members, and student body presidents at 76 colleges and universities in 32 states.

- **Educators**, including American Federation of Teachers, American Council on Education, Association for Student Conduct Administration, Association of American Universities, Association of Title IX Administrators, International Association of Campus Law Enforcement Administrators, National Education Association, The School Superintendents Association, and 73 law professors from 26 states.


- **Medical experts**, including American Psychological Association and 900+ mental health professionals, and **Government officials**, including 145 state legislators from 41 states, 36 United States senators, and 19 state attorneys general.


10 2001 Guidance, supra note 2, at 10, 12, 13.

11 Id. at 13.

12 34 C.F.R. § 106.30(a)(1) (defining “actual knowledge”); see also § 106.44(a).


15 2001 Guidance, supra note 2, at 2.

16 34 C.F.R. § 106.30(a) (defining “sexual harassment”); see also § 106.45(b)(3)(i). Note: The new rule does not create new Title IX protections against domestic violence, dating violence, and stalking. Title IX prohibits all forms of sex-based harassment, which includes non-sexual conduct associated with domestic violence, dating violence, and stalking.

17 Letter from Pepper Hamilton LLP on behalf of 24 Private Liberal Arts Colleges and Universities to Betsy DeVos, Sec’y, Dep’t of Educ., at 16 (Jan. 30, 2019) [Letter from Letter from 24 Private Liberal Arts Colleges and Universities], https://www.wesleyan.edu/inclusion/dc/PH%20Comment%20Letter%20Department%20of%20Education.pdf.

18 Letter from The School Superintendents Association, supra note 7, at 4.

19 34 C.F.R. § 106.30(a) (defining “formal complaint”).

20 § 106.45(b)(3)(i). (defining “actual knowledge”); see also §§ 106.44(b), 106.45.

22 2001 Guidance, supra note 2, at 15-16.

23 34 C.F.R. § 106.44(a); see also § 106.44(b)(2).

24 Letter from The School Superintendents Association, supra note 7, at 4.


26 Letter from National Education Association, supra note 25, at 9.

27 2014 Guidance, supra note 2, at 31-32; 2011 Guidance, supra note 2, at 12.

28 2014 Guidance, supra note 2, at 28; 2011 Guidance, supra note 2, at 10. See also 2001 Guidance, supra note 2, at 21 (“because legal standards for criminal investigations are different, police investigations or reports may not be determinative of whether harassment occurred under Title IX and do not relieve the school of its duty to respond promptly and effectively”).

29 34 C.F.R. § 106.45(b)(1)(iv).


31 Letter from Know Your IX to Kenneth L. Marcus, Ass’t Sec’y for Civil Rights, Dep’t of Educ., at 42-46 (Jan. 30, 2019) [hereinafter Letter from Know Your IX], https://actionnetwork.org/user_files/user_files/000/029/219/original/Know_Your_IX_Comment_on_Created_Titel_IX_Rule_(1).pdf.


33 34 C.F.R. § 106.45(b)(1)(iv).

34 Letter from 19 State Attorneys General, supra note 32, at 35.

35 Letter from Campus Law Enforcement Administrators, supra note 9, at 6.

36 2014 Guidance, supra note 2, at 31; 2011 Guidance, supra note 2, at 12.

37 34 C.F.R. § 106.45(b)(6)(i).

38 34 C.F.R. § 106.45(b)(6)(i).

39 Goss v. Lopez, 419 U.S. 565, 566, 579 (1975) (holding that students in public schools facing short-term suspensions require only “some kind of” “oral or written notice” and “some kind of hearing”); see also id. at 583 (holding that a 10-day suspension does not require “the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident”).

40 E.g., Letter from Know Your IX, supra note 31, at 34.

41 Letter from 61 Higher Education Associations, supra note 8, at 10.

42 Letter from 24 Private Liberal Arts Colleges and Universities, supra note 17, at 13.

43 Letter from 19 State Attorneys General, supra note 32, at 40-41.

44 2014 Guidance, supra note 2, at 13, 26; 2011 Guidance, supra note 2, at 10-11.


47 34 C.F.R. § 106.45(b)(viii).

48 2011 Guidance, supra note 2, at 8; 2001 Guidance, supra note 2, at 21.

49 34 C.F.R. § 106.45(b)(9).

50 E.g., Letter from Know Your IX, supra note 31, at 39.

51 Letter from 76 College and University Student Body Presidents, supra note 4, at 2.


53 2014 Guidance, supra note 2, at 33; 2011 Guidance, supra note 2, at 15-16.

54 2011 Guidance (“the school may prohibit the alleged perpetrator from having any contact with the complainant pending the results of the school’s investigation”).

55 34 C.F.R. § 106.30(a) (defining “supportive measures”).

56 Letter from National Women’s Law Center, supra note 46, at 22.


58 34 C.F.R. § 106.12(b).

59 Id.


62 Id. at 15, 21.

63 Id. at 21.

64 E.g., Letter from Know Your IX, supra note 31; Letter from End Rape on Campus to Kenneth L. Marcus, Ass’t Sec’y for Civil Rights, Dep’t of Educ. (Jan. 30, 2019), https://static1.squarespace.com/static/51f82234e4b097de73d4a373/t/55cb6bce21e677207ba88a5/1548905423597/End+Rape+on+Campus+Comment.pdf.

65 E.g., Letter from a UC Davis Fraternity President, supra note 5; Letter from a UC Davis Sorority, supra note 6.

66 Letter from 76 College and University Student Body Presidents, supra note 4.


68 Letter from 61 Higher Education Associations, supra note 8.

69 Letter from 5 Student Affairs Associations, supra note 14.


72 Letter from Campus Law Enforcement Administrators, supra note 9.

73 Letter from National Education Association, supra note 25.

74 Letter from The School Superintendents Association, supra note 7.


78 Letter from Leadership Conference on Civil and Human Rights, supra note 45.


80 Letter from Leadership Conference on Civil and Human Rights, supra note 45, at 11.


83 Letter from Leadership Conference on Civil and Human Rights, supra note 45, at 11.

84 Id.


88 Letter from 36 U.S. Senators, supra note 57.

89 Letter from 19 State Attorneys General, supra note 32.