

## Title IX rules remain in flux

### Recent changes by the U.S. Department of Education stir uncertainty at schools and colleges

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Title IX coordinators have been on a bit of a roller coaster for some time now, and unfortunately, the ride isn't over yet.

As school administrators are well aware, Title IX is the federal law that prohibits any educational program or activity that receives federal funding from discriminating on the basis of sex. Sexual harassment is, of course, a form of sex discrimination that educational institutions must address and remedy under Title IX. If that seems simple and straightforward to you, think again.

Title IX itself is a mere 33 words: “No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance.” While the language sets forth a clear prohibition on discrimination, it leaves schools hanging when it comes to concrete guidance on how to respond to complaints of sexual harassment in a manner that complies with the law.

But over the years — specifically, in 1997, 2001, 2011 and 2017 — the U.S. Department of Education has issued various forms of “guidance” on how schools should go about investigating and resolving claims of sexual harassment. These documents address issues as whether schools should allow for, or require, informal methods of resolving complaints, like mediation; whether schools should provide interim measures to one or both parties to a complaint in order to address burdens that exist during the course of the investigation process; what standard of proof schools should use in determining whether the evidence supports that a policy violation has occurred; and whether one or both parties to a complaint should be afforded an opportunity to appeal the final determination.

**Lurking underneath all of this guidance** is an effort to find the proper balance between the rights of the accused and the rights of the complainant. Over time (or perhaps from the very beginning), two opposing camps have formed: those who believe that Title IX should be implemented in a manner that supports victims of sexual harassment in order to encourage them to come forward; and those who believe it should be enforced in a manner that protects the due process rights of the accused.

Schools investigating Title IX complaints, in turn, are increasingly facing a “choose your lawsuit” scenario, as Title IX claims by both complainants and responding parties are on the rise.

It is under these circumstances that many educational institutions came to rely heavily, in drafting and enforcing their Title IX policies, on publications issued by the DoE that explained how the department’s Office for Civil Rights would measure a school’s compliance with the law.

However, 2017 guidance from the Trump administration left many educational leaders feeling unsettled and they scrambled to revise their Title IX policies in response to what they viewed to be a change in department policy. In addition, several women’s rights advocacy groups filed a lawsuit challenging it, but on Oct. 1, 2018, that lawsuit was dismissed after the court found that the 2017 guidance constitutes a “bare statement of the agency’s opinion” and that the guidance “does not suggest that schools are immediately required to comply with the department’s guidance or else face legal consequences.”

**“Simply put,” the court said,** “if a school disagreed with the 2017 Guidance and chose not to follow it, it would suffer no legal consequences as long as it continued to comply with Title IX and its implementing regulations.” On the other hand, the court noted that “[a] school defending a deliberate indifference claim under Title IX could not simply point to its compliance with the 2017 Guidance and escape liability.”

For the time being, unfortunately, the rules are still in flux. The DoE, however, is hard at work on new rules, a draft of which recently became public. They are expected to encompass a number of changes relating to, among other things, the applicable burden of proof, the appeals process, cross-examination of victims and mediation. They are also expected to address the scope of a school’s responsibility, potentially limiting that responsibility to conduct that occurs on campus.

Educational institutions would be well-advised to review the draft rules and begin thinking about whether their current Title IX policies will need to be revised to ensure compliance if and when the rules take effect.

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