



Public hearings on Title IX raise questions for coming guidance and regulatory changes

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Educational institutions all over the country have been grappling with the nuances of Title IX compliance since the new Title IX regulations were released last summer. With many stakeholders unhappy with the final regulations, the Biden administration has signaled its intention to issue new guidance and proposed regulatory changes to address some of the perceived shortcomings of the current compliance requirements.

From June 7, 2021, to June 11, 2021, the U.S. Department of Education (DOE) held a virtual public hearing, seeking public recommendations and comments for improving Title IX enforcement. The DOE's Office for Civil Rights (OCR) sought public opinions on steps the DOE should take to ensure thorough Title IX guidance for schools to provide students with educational environments free from sex-based discrimination and harassment. Hearing participants included college and university administrators, K-12 teachers, K-12 administrators, school board members, education non-profit leaders, Title IX compliance consultants, law professors, parents, students and attorneys. Commentators generally requested the DOE provide clearer guidance on the measures and grievance procedures necessary to mitigate and respond to allegations of sexual assault, sexual violence, sex discrimination and sexual harassment.

Summarized below are the top takeaways from the hearings.

1. Defining sexual harassment

Prior to 2020, "sexual harassment" was defined as unwelcome conduct that a reasonable person would find so "severe or

pervasive” so as to deny a person equal educational access. Under the 2020 updates, conduct qualifying as “sexual harassment” has to be “severe, pervasive, and objectively offensive,” creating a higher evidentiary threshold to meet this part of the new definition.

During the virtual public hearing, many education administrators and survivor-advocates recommended the DOE readopt the 2011 Title IX definition of sexual harassment, lessening the burden of proof required for complainants to successfully assert a sexual harassment claim.

2. Actual knowledge

Under the Obama administration, educational institutions (both K-12 and higher education) were responsible for responding to an incident of harassment if a “responsible employee” knew or reasonably should have known about the harassing conduct. Under these guidelines, most educational entities considered all employees to be “mandatory reporters,” requiring employees to follow their institution’s procedures for reporting conduct that implicated Title IX.

Under the 2020 Title IX regulations, higher education institutions have a requirement to respond when a Title IX coordinator is notified of qualifying conduct but can choose to limit their institution’s imputation of “actual knowledge” beyond the coordinator to only a select few employees, rather than continuing to use the “responsible employee” framework.¹

Those advocating for an expansion of complainants’ rights advocated for a reversal of the 2020 approach, imputing the lower “know or should reasonably know” standard on all educational institutions.

3. “Start-by-believing” and trauma-informed approaches:

Under the Obama-era guidelines, some educational institutions adopted a trauma-informed, “start-by-believing” approach to responding to allegations of Title IX misconduct. This approach seeks to center the experiences of the complainants, using a trauma-informed approach which starts by first believing that what the complainant has reported is true. This approach, particularly when adopted in a way that benefits only complainants, has been controversial.

During the hearings, the arguments for and against trauma-informed Title IX investigations continued to be robust. Advocates of the trauma-informed approach cited victim-centered practices as critical to encouraging students to report Title IX violations. These same advocates felt that a “start-by-believing” practice does not re-traumatize complainants by making them feel as though they have to defend their allegation.

On the other hand, many opponents of the trauma-informed approach during the hearings cited a lack of scientific evidence supporting the efficacy of the approach in promoting fairness. Opponents often argued that the “start-by-believing” approach biased the judges and hearing officers, and did not allow for a fair investigation overall.

4. Addressing sexual orientation, gender identity and gender expression

One of the most common topics raised during the public hearing was the issue of gender and sexual orientation inclusivity in the Title IX regulations. In light of the recent *Bostock* ruling, many participants requested that the DOE provide clarity as to what extent Title IX protects discrimination on the basis of gender identity, gender expression and sexual orientation. Some commentators voiced their concern with the religious exemption and the effect it has on further marginalizing LGBTQ+ students. Those particular commentators recommended that the religious exemption be narrowed to the greatest extent possible.

Advocates of broader inclusivity within Title IX recommended that the regulation be explicit in its inclusion of transgender students, particularly transgender student athletes. Opponents of a gender-inclusive approach to sex discrimination, particularly among parents and some student athletes, argued that allowing transgender athletes to participate in gender affirming teams is biologically unfair.

Since the hearings, OCR has confirmed that Title IX protects students from discrimination based on sexual orientation and gender identity via a “[Notice of Interpretation](#)” issued June 16, 2021.

5. Live hearings and cross-examinations

Many attorneys, parents and institution administrators advocated in favor of the live hearings, citing increased fairness and protection of students' due process rights. Many noted the importance of establishing a fair, unbiased process by which both the complainant and respondent have the opportunity to fully examine the incident, including through cross-examination. Those representing a variety of viewpoints noted the rule that precludes all of a party's or witness's statements if they are not subject to cross-examination is difficult to implement. For example, some speakers suggested creating exceptions for statements against interest.

On the other hand, opponents of the live hearing requirement voiced a variety of concerns ranging from the requirement's economic burden to its potential traumatic impacts. Some administrators from smaller higher education institutions and community colleges shared that requiring live hearings is burdensome for institutions that do not have the finances or staffing resources necessary to conduct the hearings. Additionally, some participants cautioned that requiring live hearings perpetuates inequity among students who have the means to afford outside counsel and those who cannot. Finally, opponents of the requirement shared that live hearings have a chilling effect on a complainant's desire to report an allegation of sexual assault, harassment or violence.

6. The grievance process generally

Many students and other representatives advocated for clearer guidance on the investigative process generally, including the institution's geographic jurisdiction under Title IX, investigation timelines and mediation provisions. Some students advocated for the removal of mediation. However, there were a significant number of participants of all backgrounds who supported the informal resolution process.

Many participants recommended the DOE require higher education institutions to respond to Title IX misconduct that occurs off-campus and during study abroad trips. Several participants additionally noted that Title IX provides little to no guidance on anti-retaliation practices and requested this be addressed in the upcoming regulations.

Many educational administrators also advocated for increased training, particularly for those in reporting and investigative roles (i.e., school resource officers in K-12 districts), but also generally regarding gender inclusivity.

Conclusion

In a [Dear Educator letter](#) issued on June 23, 2021, OCR reaffirmed its intention to issue a new Q&A document answering questions about the current regulations, as well as its intention to issue a Notice of Proposed Rule Making (NPRM) to address at least some of the concerns raised during the hearings. The [Unified Agenda](#) for the U.S. Department of Education indicates that they expect to issue their NPRM for new Title IX regulations in **May 2022**. Therefore, the current regulations will remain in effect for the coming 2021–2022 school year, and perhaps longer.

In sum, as Title IX again faces new revisions, educational institutions should remain both alert and flexible so as to ensure timely compliance with the DOE's guidance. The Biden administration's updates to Title IX could include revised definitions of key regulatory terms, detailed guidance on investigative policies and procedures, and the expansion of Title IX's coverage.

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¹ Under the 2020 regulations, K-12 institutions are considered to have "actual knowledge" of sexual harassment if any employee of the school district has notice of the harassment, which was consistent with prior practice.

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