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The Changing Landscape of Title IX: How Regulations and Case Law Have Impacted Policies and Procedures

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**Conrad
O'Brien**

**The Changing Landscape
of Title IX: How
Regulations and Case
Law Have Impacted
Policies and Procedures**

**Patricia M. Hamill, Esq.
Lorie K. Dakessian, Esq.**

Rowan University 2019 Title IX Summit

June 3, 2019



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Patricia M. Hamill is the Chair of the Title IX, Due Process and Campus Discipline practice at Conrad O'Brien, PC. She represents college students and professors nationwide who are subjected to campus disciplinary proceedings or who have been disciplined by their colleges for alleged sexual misconduct following such proceedings. Patricia often attempts to resolve cases behind the scenes. Where resolution cannot be achieved, she has filed lawsuits for breach of contract, violation of Title IX (or other civil rights statutes) and tort liability on the basis that colleges' investigation and adjudication procedures failed to ensure the students' fundamental due process rights, discriminated against them on the basis of sex and breached the schools' contractual obligations. Patricia was the lead attorney in *Doe v. Brandeis* in the District of Massachusetts, one of the most often cited cases in this area. Patricia has also used her experience as a platform for advocacy. Recently, Patricia was invited to testify before the US Senate Committee on Health, Education, Labor & Pensions (HELP) at the full committee hearing on "Reauthorizing HEA: Addressing Campus Sexual Assault and Ensuring Student Safety and Rights" Outside of the Title IX arena, Patricia is a commercial litigator who also represents clients regarding government investigations.

Read and Hear Patricia's testimony before the U.S. Senate's HELP Committee, April 2, 2019 here:

https://www.youtube.com/watch?v=To5TVhZ_azE and

<https://conradobrien.com/uploads/attachments/cju1edthe0h40viiwl94a14m7-patricia-hamill-written-testimony-to-us-senate-help-committee-2019-04-03.pdf>

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Lorie Dakesian is the Vice Chair of the Title IX, Due Process and Campus Discipline practice at Conrad O'Brien, PC. She represents college students and professors who are subjected to campus disciplinary proceedings or who have been disciplined by their colleges for alleged violations of sexual harassment and misconduct policies following such proceedings, or complainants who raise and pursue sexual assault or harassment claims, to ensure that each client understands the university's process, seeks procedural safeguards, and is afforded a fair hearing. She works closely with students and their families to help them navigate and fully prepare for investigations and hearings, and is experienced with working with students whose situations may be complicated by mental health concerns or the need for disability accommodations. In addition to her representation of college students, Lorie represents clients in several practice areas, including white collar and internal investigations, complex commercial litigation, and data privacy matters. She also is a Certified Information Privacy Professional (CIPP/US), the global standard for privacy certification.

- **Interpretation of Title IX in Campus Disciplinary Matters: 2011-2019**
- **The Department of Education's 2018 Proposed Regulations: The Highlights**
- **Case Law: Hearings & Cross-Examination**
- **Current Landscape**

2011: Dear Colleague Letter

<https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>

2014: Questions & Answers on Title IX & Sexual Violence

<https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>

2017: Q & A on Campus Sexual Misconduct

<https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>

2018: Proposed Regulations

<https://www2.ed.gov/about/offices/list/ocr/docs/title-ix-nprm.pdf>

2018 – 2019: 100,000+ Comments to Proposed Regulations

<https://www.regulations.gov/document?D=ED-2018-OCR-0064-0001>

The proposed regulation would adopt a **clear definition of sexual harassment** actionable under Title IX:

- A school employee conditioning an educational benefit or service upon a person's participation in unwelcome sexual conduct (often called quid pro quo harassment);
- Consistent with U.S. Supreme Court precedent, unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school's education program or activity; or
- Sexual assault, as the Clery Act defines that crime in 34 C.F.R. § 668.46(a).

Consistent with Supreme Court precedent and the text of Title IX, a school would be obligated to respond when: (1) the school has actual knowledge of sexual harassment; (2) that **occurred within the school's own "education program or activity"**; (3) against a "person in the United States."

Consistent with U.S. Supreme Court precedent, the proposed regulation would hold a school liable under Title IX only when it is "deliberately indifferent" to known sexual harassment, meaning its response is "clearly unreasonable in light of known circumstances."

The proposed regulation would require schools to investigate every formal complaint and to respond meaningfully to every known report of sexual harassment.

The proposed regulation highlights the importance of supportive measures designed to preserve or restore access to the school's education program or activity, with or without a formal complaint.

Where there has been a finding of responsibility, the proposed regulation would require remedies designed to restore or preserve access to the school's education program or activity.

- A **presumption of innocence** throughout the grievance process, with the **burden of proof on the school**;
- **Live hearings** in the higher education context
- A prohibition of the single-investigator model, instead requiring **a decision-maker separate from the Title IX Coordinator or investigator**
- The clear and convincing evidence or preponderance of the evidence standard, subject to limitations
- The opportunity to test the credibility of parties and witnesses through **cross-examination**, subject to “rape shield” protections
- Written notice of allegations and an equal opportunity to review the evidence
- Title IX Coordinators, investigators, and decision-makers free from bias or conflicts of interest
- Equal opportunity for parties to appeal, where schools offer appeals
- Permits **Informal Resolutions** prior to reaching a determination regarding responsibility

Three aspects to the Proposed Regulations:

- (1) Definitions and conditions that activate a school's obligation;
- (2) Provisions giving schools more flexibility to take constructive, non-punitive steps to resolve specific concerns and prevent recurrence of inappropriate behavior while still ensuring that both parties can pursue their education; and
- (3) Procedural protections required for formal Title IX proceedings.

More than 100,000 Comments to the Proposed Regulations

View Rule
[Printer-Friendly Version](#) [Download RIN Data in XML](#)

ED/OCR RIN: 1870-AA14 Publication ID: Spring 2019

Title: Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

Abstract:
 On November 29, 2018, the Secretary issued a notice of proposed rulemaking to clarify and modify the obligations of recipients of Federal financial assistance in readdressing sex discrimination, including complaints of sexual misconduct, and the procedures by which they must do so.

Agency: Department of Education(ED) **Priority:** Other Significant

CFR Citation: [34 CFR 106](#)

Legal Authority: [20 U.S.C. 1681 et seq.](#)

Legal Deadline: None

Timetable:

Action	Date
NPRM	11/29/2018
NPRM Comment Period End	02/15/2019
Final Action	09/00/2019

Regulatory Flexibility Analysis Required: No **Government Levels A**

Small Entities Affected: No **Federalism:** No

Included in the Regulatory Plan: Yes

RIN Information URL:

<https://www.regulations.gov/document?D=ED-2018-OCR-0064-0001>

See Comments of Concerned Lawyers and Educators in Support of Fundamental Fairness for All Parties in Title IX Grievance Proceedings, signed by 40 practicing lawyers and professors (Jan. 28, 2019):

<https://conradobrien.com/uploads/attachments/cjrjac2cb0cmt01iw4vzo4aev-comments-of-concerned-lawyers-and-educators-in-support-of-fundamental-fairness-for-all-parties-in-title-ix-grievance-proceedings-1-28-2019.pdf>

Comments of Patricia M. Hamill (Jan. 28, 2019):

<https://conradobrien.com/uploads/attachments/cjrjaco9u0cmszciwf8gq9jfj-comment-of-p-hamill-on-proposed-title-ix-regulations-1-28-2019.pdf>

Definition of sexual harassment actionable under Title IX:

- A school employee conditioning the provision of an educational benefit or service upon a person's participation in unwelcome sexual conduct;
- Consistent with U.S. Supreme Court precedent, unwelcome conduct on the basis of sex that is so **severe, pervasive, and objectively offensive** that it effectively denies a person equal access to the school's education program or activity; or
- Sexual assault, as the Clery Act defines that crime in 34 CFR § 668.46(a).

U.S. Dep't of Educ., Proposed Title IX Fact Sheet and Proposed Regulations "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," 83 Fed. Reg. 61462, 61466 (proposed Nov. 29, 2018), *available at* <https://www.federalregister.gov/documents/2018/11/29/2018-25314/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>.

* *See also* Comment on Proposed Title IX Rulemaking, (Jan. 30, 2019), J. Gersen, N. Gertner, & J. Halley

A school would be obligated to respond when: (1) the school has actual knowledge of sexual harassment; (2) that **occurred within the school's own "education program or activity"**; (3) against a "person in the United States."

U.S. Dep't of Educ., Proposed Title IX Fact Sheet and Proposed Regulations "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," 83 Fed. Reg. 61462, 61466-68 (proposed Nov. 29, 2018), *available at* <https://www.federalregister.gov/documents/2018/11/29/2018-25314/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>.

Schools would be prohibited from using a single-investigator model, and instead would be required to have a decision-maker separate from the Title IX Coordinator or investigator.

U.S. Dep't of Educ., Proposed Title IX Fact Sheet and Proposed Regulations "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," 83 Fed. Reg. 61462, 61478 (proposed Nov. 29, 2018), *available at* <https://www.federalregister.gov/documents/2018/11/29/2018-25314/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>.

Written Notice of Allegations

- Upon receipt of a formal complaint, a school must provide written notice to the parties of the recipient's grievance procedures and of the allegations.
- Notice must include:
 - (A) sufficient details (such as the identities of the parties involved in the incident, if known, the specific section of the recipient's code of conduct allegedly violated, the conduct allegedly constituting sexual harassment under this part and under the recipient's code of conduct, and the date and location of the alleged incident, if known) and
 - (B) provide sufficient time to prepare a response before any initial interview.
 - (C) Include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process.
 - (D) Inform the parties that they may request to inspect and review evidence.
 - (E) Inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.
- If the School decides later to investigate allegations not included in the notice, it must provide notice of the additional allegations.

U.S. Dep't of Educ., Proposed Title IX Fact Sheet and Proposed Regulations "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," 83 Fed. Reg. 61462, 61474 (proposed Nov. 29, 2018), *available at* <https://www.federalregister.gov/documents/2018/11/29/2018-25314/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>.

Schools should not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence

U.S. Dep't of Educ., Proposed Title IX Fact Sheet and Proposed Regulations "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," 83 Fed. Reg. 61462, 61474 (proposed Nov. 29, 2018), *available at* <https://www.federalregister.gov/documents/2018/11/29/2018-25314/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>.

Respondent must be presumed not responsible throughout the grievance process, and the school (not the parties) will bear the burden of proof and the burden of gathering evidence to sufficient to reach a determination regarding responsibility.

U.S. Dep't of Educ., Proposed Title IX Fact Sheet and Proposed Regulations "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," 83 Fed. Reg. 61462, 61474 (proposed Nov. 29, 2018), *available at* <https://www.federalregister.gov/documents/2018/11/29/2018-25314/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>.

Preponderance of the Evidence vs. Clear and Convincing Evidence

- In reaching a determination regarding responsibility, the school must apply either the preponderance of the evidence standard or the clear and convincing evidence standard.
- The school may employ the preponderance of the evidence standard only if the recipient uses that standard for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction.
- The school must also apply the same standard of evidence for complaints against students as it does for complaints against employees, including faculty.

U.S. Dep't of Educ., Proposed Title IX Fact Sheet and Proposed Regulations "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," 83 Fed. Reg. 61462, 61477 (proposed Nov. 29, 2018), *available at* <https://www.federalregister.gov/documents/2018/11/29/2018-25314/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>.

Schools may facilitate an informal resolution process (such as mediation)

- Before reaching a determination regarding responsibility
- Obtain parties' voluntary, written consent to the process
- Provide parties written notice disclosing:
 - The allegations
 - The requirements of the informal resolution process
 - Consequences resulting from participating in the informal resolution process

U.S. Dep't of Educ., Proposed Title IX Fact Sheet and Proposed Regulations "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," 83 Fed. Reg. 61462, 61479 (proposed Nov. 29, 2018), *available at* <https://www.federalregister.gov/documents/2018/11/29/2018-25314/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>.

Increase in Restorative Justice Efforts

Doe v. Brandeis, 177 F. Supp. 3d 561, 573, 605 (D. Mass. 2016)

- “Brandeis appears to have substantially impaired, if not eliminated, an accused student’s right to a fair and impartial process. ... If a college student is to be marked for life as a sexual predator, it is reasonable to require that he be provided a fair opportunity to defend himself and an impartial arbiter to make that decision.”
- “Here there were essentially no third-party witnesses to any of the events in question, and there does not appear to have been any contemporary corroborating evidence. The entire investigation thus turned on the credibility of the accuser and the accused. Under the circumstances, the lack of an opportunity for cross-examination may have had a very substantial effect on the fairness of the proceeding.”

- School's grievance procedure must provide for a live hearing.
- At the hearing, the decision-maker must permit each party to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.
- Cross-examination must be conducted by the party's advisor of choice... If a party does not have an advisor present at the hearing, the recipient must provide that party an advisor aligned with that party to conduct cross-examination.
- Exclude evidence of the complainant's sexual behavior or predisposition, unless such evidence about the complainant's sexual behavior is offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the evidence concerns specific incidents of the complainant's sexual behavior with respect to the respondent and is offered to prove consent.
- If requested, parties can be located in separate rooms with technology enabling the decision-maker and parties to simultaneously see and hear the party answering questions.
- The decision-maker must explain to the party's advisor asking cross-examination questions any decision to exclude questions as not relevant.
- If a party or witness does not submit to cross-examination at the hearing, the decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility

- *Noakes v. Syracuse University*, No. 5:18-CV-43, 2019 WL 936875 (N.D. N.Y. Feb. 26, 2019):
- *Norris v. Univ. of Colorado Boulder*, 2019 WL 764568, 362 F. Supp. 3d 1001, 1119-20 (D. Colo. 2019)
- *Doe v. Univ. of Scis.*, No. CV 19-358, 2019 WL 632022, at *4 (E.D. Pa. Feb. 14, 2019)
- *Oliver v. Univ. of Texas, Southwestern Medical School*, No. 18-1549, 2019 WL 536376, at *11, 13 (N.D. Tex. Feb. 11, 2019)
- *Doe v. White*, BS171704 (Cal. Super. Ct. Feb. 7, 2019), <https://kcjohnson.files.wordpress.com/2019/02/doe-v-white-csu-northridge.pdf>
- *Doe v. Univ. of Mississippi*, 2019 WL 238098, 361 F. Supp. 3d 597, 612-13 (S.D. Miss. 2019)
- *Doe v. Baum*, 903 F.3d 575, 585-86 (6th Cir. 2018)
- *Doe v. Pennsylvania State Univ.*, 336 F. Supp. 3d 441, 449 (M.D. Pa. 2018)
- *Powell v. Montana State Univ.*, 2018 WL 672801, at *7 (D. Mont. Dec. 21, 2018)
- *Lee v. Univ. of New Mexico*, No. 17-1230, Order, at 2-3 (D. N.M., Sept. 20, 2018)
- *Gischel v. University of Cincinnati*, 302 F. Supp. 3d 961 (S.D. Ohio Feb. 5, 2018)
- *Doe v. Univ. of Cincinnati*, 872 F.3d 393 (6th Cir. 2017)
- *Doe v. Rector and Visitors of George Mason Univ.*, 149 F. Supp. 3d 602, 611, 618-19 (E.D. Va. 2016)

See also FIRE summary of judicial opinions: Tyler Coward, *Mountain of evidence shows the Department of Education's prior approach to campus sexual assault was 'widely criticized' and 'failing,'* FIRE (Nov. 15, 2018), <https://www.thefire.org/mountain-of-evidence-shows-the-department-of-educations-prior->

Doe v. Univ. of Cincinnati, 872 F.3d 393 (6th Cir. 2017): enjoined university from suspending a male student because complainant did not appear at hearing, issues turned on credibility, and plaintiff had no opportunity to confront her.

Doe v. Miami University, 882 F.3d 579 (6th Cir. 2018): male student was allowed to proceed with claims that the university did not adequately consider inconsistencies in a complainant's statement, did not apply its own definition of consent, and treated the parties differently, failing to take seriously the male student's allegations that the female student engaged in non-consensual conduct.

Doe v. Baum, 903 F.3d 575 (6th Cir. 2018): male student was allowed to proceed with Title IX and due process claims because credibility was at issue and plaintiff was not given a hearing or "an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder." Court also held that Doe/plaintiff had plausibly alleged that university officials "discredited all males, including Doe, and credited all females, including Roe, because of gender bias." Court noted that if "a public university has to choose between competing narratives to resolve a case, the university must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder."

Guided by the Dept. of Education's 2017 Interim Guidance

- Adequate, reliable, and impartial investigation
- Notice
- No Gag Orders
- Inculpatory / Exculpatory Evidence
- Trained Investigators
- Informal Resolutions

U.S. Dep't of Educ., *2017 Q&A on Campus Sexual Misconduct* (Sept. 2017), available at <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>