
THE BIDEN ADMINISTRATION'S PROPOSED TITLE IX RULE: AN INTERSECTIONAL EXAMINATION

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INTRODUCTION

On the fiftieth anniversary of Title IX,¹ the Biden administration (“Administration”) revealed its new proposed rule (“Proposed Rule”) for implementing the statute, demonstrating its commitment to intersectionality. With this Proposed Rule, the pendulum is swinging² away from the Trump administration’s respondent-friendly Title IX to a more equitable system. While it is unclear which aspects of the Proposed Rule will remain in the finalized rule, one thing is certain: the Administration’s Proposed Rule is a substantial step towards a more intersectional Title IX.

The Proposed Rule outlines several new provisions that, if executed effectively, would incorporate an intersectional lens. The Proposed Rule (1) incorporates an inclusive definition of sexual harassment and discrimination; (2) fosters an inclusive environment through the expansion of supportive measures and informal resolutions and through the creation of barrier-monitoring strategies; and (3) includes proactive measures like training and the inclusion of disability-related school staff in the Title IX process.³ These changes are positive steps towards an intersectional Title IX. While these steps are significant, I urge the Administration to take even greater steps. Particularly, the Administration should require training that specifically includes intersectional identities and bolster and reframe its informal⁴ resolution process.

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¹ Title IX of the Education Amendments Act of 1972, 20 U.S.C. §§ 1681-88.

² See Naomi Mann, *Classrooms into Courtrooms*, 59 HOUS. L. REV. 363, 368 (2021).

³ Here, “disability-related school staff” means individuals who are knowledgeable about a student’s Individualized Education Plan (IEP), Section 504 Plan, and disability-based services provided in post-secondary institutions.

⁴ See generally Lexi Weyrick, *The Neglect of Alternative Resolution Processes in Title IX and the Need for Change*, 103 B.U. L. REV. ONLINE 103 (2023).

I. INTERSECTIONALITY AND THE PROPOSED RULE

Over thirty years ago, legal scholar Kimberlé Crenshaw created the term intersectionality⁵ to “describe how race, class, gender, and other individual characteristics ‘intersect’ with one another and overlap.”⁶ Today, intersectionality is now more visible in mainstream media and has become part of the bedrock of colloquial liberal language.⁷ As many legal scholars have recognized,⁸ and as Lexi Weyrick and I emphasized in our previous article,⁹ focusing on intersectionality is crucial to an effective Title IX. Students with intersectional identities are disproportionately targeted for acts of sexual harassment because of their identities and often underreport¹⁰ the instances of sexual harassment they experience.¹¹ When intersectional identities are not actively incorporated into Title IX’s regulations, Title IX does not fulfill its promise: equal access to education for all. The Proposed Rule outlines three key changes that demonstrate the Administration’s commitment to an intersectional Title IX.

A. *Inclusive Definition of Sexual Harassment and Discrimination*

First, the Proposed Rule’s new definition of sexual harassment is conduct “sufficiently severe *or* pervasive” (emphasis added) that—based on the totality of the circumstances—denies or limits an individual’s ability to participate in or benefit from a recipient’s educational programs.¹² This new definition of sexual harassment also requires an objective and subjective analysis of the conduct.¹³ The objective standard requires an analysis using a reasonable person standard—

⁵ Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 (1989).

⁶ Jane Coaston, *The Intersectionality Wars*, VOX (May 28, 2019, 9:09 AM), <https://www.vox.com/the-highlight/2019/5/20/18542843/intersectionality-conservatism-law-race-gender-discrimination> [<https://perma.cc/29Y5-F5LU>].

⁷ *Id.*

⁸ See Mann, *supra* note 2, at 424; Nancy Chi Cantalupo, *And Even More of Us Are Brave: Intersectionality & Sexual Harassment of Women Students of Color*, 42 HARV. J. L. & GENDER 1, 19 (2019).

⁹ Kelsey Scarlett & Lexi Weyrick, *Transforming the Focus: An Intersectional Lens in School Response to Sex Discrimination*, 57 CAL. W. L. REV. 391, 411 (2021).

¹⁰ There is sparse data related to the underreporting of marginalized students. For this reason, I commend the Administration’s inclusion of data collection in the Proposed Rules and continue to encourage the Administration to collect data related to marginalized identities in its endeavors to create an intersectional Title IX. See Cantalupo, *supra* note 8, at 74-75, 77-78.

¹¹ *Id.*

¹² Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390, 41569 (July 12, 2022) (to be codified at 34 C.F.R. pt. 106) [hereinafter The Proposed Rule].

¹³ *Id.*

which considers whether a reasonable person would find the conduct severe or pervasive—while a subjective standard requires that the complainants themselves perceive the conduct as severe or pervasive.¹⁴ Importantly, this definition is different than the current standard for sexual harassment. In its current form, sexual harassment must be severe, pervasive *and* objectively offensive, meaning conduct that cannot satisfy all three elements will not meet the standard for Title IX sexual harassment.¹⁵ If this new definition is adopted, the Proposed Rule would expand Title IX’s protections to many more students by accounting for conduct that would not have met the current standard for sexual harassment.

Additionally, the Proposed Rule’s new definition of sexual harassment codifies protections against discrimination based on gender identity, sexual orientation, sexual characteristics and stereotyping, and pregnancy.¹⁶ For the first time, Title IX’s regulations would explicitly include gender identity and sexual orientation in the definition of sexual harassment and discrimination.¹⁷ Members of the LGBTQIA+ community will finally have codified protections to utilize under Title IX, making clear that preventing someone from participating in school programs and activities because of their gender identity or sexual orientation is a harm in violation of Title IX.¹⁸

The Proposed Rule’s new definition of sexual harassment also prohibits discrimination based on sexual characteristics. Discrimination based on a student’s sexual characteristics refers to discrimination based on physiological sexual characteristics or other traits that are inherently sex-based traits.¹⁹ For example, this would provide protections for intersex²⁰ students, who typically

¹⁴ Notably, Trump administration’s definition also required both a subjective and objective analysis. *Id.* at 41413.

¹⁵ 34 C.F.R. § 106.30(a)(2).

¹⁶ The Proposed Rule, *supra* note 12, at 41410.

¹⁷ LGBTQIA+ stands for lesbian, gay, transgender, queer, intersex, asexual and leaves space for other identities. Additionally, while it is important to note that one of the Administration’s first actions related to Title IX involved an executive order protecting members of the LGBTQIA+ community, this regulation is the first proposing the codification of this protection in the Code of Federal Regulations. *See* Exec. Order No. 14021, 86 Fed. Reg. 13803 (Mar. 11, 2021).

¹⁸ Of note, the Proposed Rule remains silent on LGBTQIA+ students’ Title IX protections in sports. I urge the Administration to support and protect LGBTQIA+ students’ choice in all aspects of sports, in particular transgender students’ right to be on a sports team that aligns with their gender identity.

¹⁹ The Proposed Rule, *supra* note 12, at 41532.

²⁰ The Proposed Rule defines intersex students as students “with variations in physical sex characteristics . . . [that] may involve anatomy, hormones, chromosomes, and other traits that differ from expectations generally associated with male and female bodies.” *Id.* at 41532. For an example of intersex discrimination, please read the story of Caster Semenya, a Black, cisgender, intersex woman and athlete who was prohibited from participating in several sporting events because of her natural testosterone level. Derrick Clifton, *Caster Semenya Takes Fight for Trans and Intersex Athletes to Human Rights Court*, THEM (Nov. 18, 2020),

face discrimination rooted in perceived inconsistencies between their sexual characteristics and those considered typical for their sex assigned at birth. Further, Title IX's protections against sex stereotyping will reaffirm the well-established legal principle²¹ that sex-based discrimination exists when individuals are treated differently based on their conformity or nonconformity to "stereotypical notions of masculinity and femininity."²² Finally, the Proposed Rule's new definition of sexual harassment includes protections for pregnancy and related conditions.²³ Specifically, "related conditions" refer to the recovery from and medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation.²⁴

B. *Supportive Measures, the Informal Resolution Process, and New Reporting Requirements*

Second, the Proposed Rule helps foster an environment where students with intersectional identities are encouraged to report instances of sexual harassment and discrimination by providing more robust supportive measures and greater access to informal resolution processes. Further, schools would be required to monitor barriers that prevent students from reporting instances of sexual harassment and/or discrimination.²⁵ Because intersectional students often underreport instances of sexual harassment and discrimination, creating a safe environment that encourages reporting is imperative.

Supportive measures provide protections for students who choose to come forward, which may allow intersectional students to feel more comfortable reporting discrimination. Under the Proposed Rule, schools are required to offer supportive measures for all types of sex-based discrimination, not just sexual harassment.²⁶ Examples of supportive measures include counseling, class schedule changes, and no-contact orders. Importantly, the Proposed Rule now allows supportive measures to temporarily burden the respondent, as long as the respondent has the opportunity to seek modification or reversal of the supportive measures.²⁷ This means even when a supportive measure is considered to be a burden to the respondent—for example, changes to class schedules, housing, or extracurricular activities to minimize contact with the complainant—schools could still require respondents to comply with these supportive measures, if

<https://www.them.us/story/caster-semenya-fight-for-trans-and-intersex-athletes-human-rights-court> [<https://perma.cc/42R6-QUS7>].

²¹ See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251-52 (1989).

²² The Proposed Rule, *supra* note 12, at 41411.

²³ *Id.* at 41515.

²⁴ *Id.*

²⁵ *Id.* at 41435.

²⁶ *Id.* at 41448.

²⁷ *Id.* at 41421.

necessary.²⁸ Overall, the Proposed Rule broadens schools' obligations to provide supportive measures.

Additionally, the Proposed Rule provides students with greater flexibility surrounding informal resolution processes, which are "alternative avenue[s] through which parties may reach a resolution" to a Title IX complaint.²⁹ Unlike the current regulations, the Proposed Rule allows students to pursue an informal resolution process without filing a formal complaint.³⁰ This option may interest students who do not wish to participate in the current lengthy and cumbersome grievance processes. The Proposed Rule also clarifies that schools have the discretion to decide when an informal resolution process is proper. For example, in circumstances where the alleged conduct would present a future risk of harm to others, an informal resolution may be less appropriate, and schools could decide against the use of an informal process.³¹

Further, the Proposed Rule requires Title IX coordinators to identify possible impediments present in the school's educational activities or programs that may hamper or prevent students from reporting sex-based discrimination. When Title IX coordinators identify an existing barrier, the school "must take steps reasonably calculated to address the barrier."³² This provision ensures that schools monitor the "conditions in its educational environment that might have the effect of chilling reporting of sex discrimination."³³ To address possible barriers, school administrators may enact mitigating measures through mechanisms such as: "conducting regular campus climate surveys, seeking targeted feedback from students and employees who have reported or made complaints of sex-based discrimination, participating in public awareness events for purposes of receiving feedback from student and employee attendees, or publicizing and monitoring" anonymous feedback forums related to reporting.³⁴ By addressing possible barriers through proactive measures, this requirement is significant to students with intersectional identities. They can play an active role in Title IX's implementation by utilizing new mechanisms to provide feedback, and schools will be required to consider that feedback to remedy barriers to reporting discrimination.

Although the Proposed Rule does not address whether the results from these reporting measures must be sent to the Department of Education ("DOE"), failure to monitor or remedy barriers could result in a violation of Title IX, which the Office of Civil Rights ("OCR") could investigate and enforce. This form of data collection could help ensure schools are held accountable and are required to actively evaluate how they can improve their reporting practices.

²⁸ *Id.*

²⁹ *Id.* at 41454.

³⁰ *Id.* at 41397.

³¹ *Id.* at 41454.

³² *Id.* at 41435.

³³ *Id.* at 41436.

³⁴ *Id.*

C. *Proactive Measures Including Training and Involving Disability-Related School Staff*

Third, the Proposed Rule requires other proactive measures. For instance, the Proposed Rule requires additional training for school employees and involves disability-related school staff in the Title IX process for students with disabilities.³⁵

Under the Proposed Rule, *all* employees will receive training on obligations to address sex-based discrimination without relying on sex stereotypes. This differs from the current regulations, which only require individuals involved in the Title IX investigation and resolution process, like investigators and decision-makers, to receive training.³⁶ Additionally, informal resolution facilitators will not only be required to receive similar training to all other employees, but they will also be required to receive training on the rules and practices associated with their school's informal resolution process and on how to serve impartially.³⁷

Finally, the Proposed Rule requires that if a complainant or respondent is an elementary or secondary school student with a disability and receives services under the Individuals with Disabilities Act or Section 504 of the Rehabilitation Act of 1973, the Title IX coordinator must consult with that student's Individualized Education Program team or persons knowledgeable about the student's Section 504 plan to ensure the school complies with the student's disability needs.³⁸ In the postsecondary context, when a student with a disability is either the complainant or respondent, the Title IX coordinator *may* consult with the individual or office that the school has designated to provide the student with services.³⁹

All of these new changes help to incorporate an intersectional framework into Title IX. The Proposed Rule's new definition of sex-based discrimination broadens the scope of conduct addressed in the Title IX grievance process and actively protects more marginalized identities. The changes surrounding supportive measures, informal resolutions, and barrier-monitoring can help counteract the systemic underreporting often found in intersectional student bodies. Finally, the proactive measures outlined in the Proposed Rule help ensure that all students and staff are educated about their rights and responsibilities under Title IX, and that the Title IX coordinator connects with the proper staff members at the onset of the Title IX grievance process.

II. TAKING TITLE IX TO THE NEXT LEVEL

Although the Administration has proposed various changes that highlight its commitment to intersectionality and actively incorporate intersectionality into

³⁵ *Id.* at 41428-29.

³⁶ 34 C.F.R. § 106.45(b)(1)(iii).

³⁷ The Proposed Rule, *supra* note 12, at 41429.

³⁸ *Id.* at 41430.

³⁹ *Id.*

the Title IX process, these steps are not enough. To begin, the Administration needs to include education on intersectionality within Title IX training. Its proposed changes to Title IX training create a captive audience, all employees of the school. This advantage must be effectively leveraged by emphasizing the importance of intersectionality in these trainings. As stated, intersectionality is an essential component to ensure not only that the school successfully monitors barriers to reporting, but to also ensure that employees—particularly investigators and decision-makers—are aware of the different ways that different communities experience sex-based discrimination. By not fully embracing intersectionality, the Proposed Rule does not fully protect marginalized and intersectional communities and fails to comprehensively address their problems.

Additionally, the Administration's proposed regulation should bolster Title IX's informal resolution process. While the Proposed Rule provides that students can access informal resolutions without filing a formal complaint, the Proposed Rule does not provide much guidance about what the informal resolution process should look like.⁴⁰ The grievance procedures in the Proposed Rule are similar to the Trump administration's Title IX grievance procedures, which have been criticized for being overly methodical and often severely restrictive.⁴¹ Informal resolutions will be helpful processes to allow those complainants not wanting to pursue a formal complaint to still engage in a resolution process. When both parties voluntarily agree to participate in an informal resolution process, informal resolutions will also provide schools with the discretion to utilize a process not as formal or time-consuming as the current grievance process. Schools should retain discretion in developing informal resolution processes that meet the needs of their communities, but the Administration must provide schools proper guidance on how schools can create and implement these alternative processes.⁴² To be clear, I am not encouraging the Administration to create additional procedural requirements for conducting informal resolution processes, but instead I am urging the Administration to provide clear guidance that includes potential frameworks for informal resolution processes to help educate school administrators on their options.⁴³

⁴⁰ See generally Weyrick, *supra* note 4.

⁴¹ See Mann, *supra* note 2, at 414.

⁴² See generally Weyrick, *supra* note 4.

⁴³ *Id.*