
THE NEGLECT OF ALTERNATIVE RESOLUTION PROCESSES IN TITLE IX AND THE NEED FOR CHANGE

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INTRODUCTION

On the fiftieth anniversary of Title IX’s signing, the Biden administration released the unofficial version of its long-anticipated proposed rule, the Notice of Proposed Rulemaking (“NPRM”) to the public, outlining its plan to overhaul how educational institutions implement Title IX.¹ While the NPRM takes several important steps toward a more nuanced approach in addressing sex discrimination in education, it does not go far enough. Specifically, the Department of Education (“Department”) indicates it would provide schools more discretion in handling sex discrimination, but in reality, the NPRM further binds schools and hinders schools’ ability to implement effective alternative resolution processes.²

In arguing for a reimagining of Title IX regulations, I will first discuss the importance of making alternative resolution processes tenable in schools’ responses to sex discrimination. I will then examine the ways in which the NPRM both assists and inhibits effective implementation of alternative resolution processes. Finally, I will explore how the upcoming and other future iterations of Title IX regulations can help establish effective alternative resolution processes.

I. THE IMPORTANCE OF ALTERNATIVE RESOLUTION PROCESSES IN RESPONSE TO SEX DISCRIMINATION

The Department must provide a workable framework within Title IX for schools to employ more robust and effective alternative resolution processes. In

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¹ *Title IX Enacted*, HIST. (June 22, 2021), <https://www.history.com/this-day-in-history/title-ix-enacted#:~:text=On%20June%2023%2C%201972%2C%20Title,or%20employees%20based%20on%20sex> [https://perma.cc/DZ32-ACTA]; Press Release, Dep’t of Educ., The U.S. Department of Education Releases Proposed Changes to Title IX Regulations, Invites Public Comment (June 23, 2022), <https://www.ed.gov/news/press-releases/us-department-education-releases-proposed-changes-title-ix-regulations-invites-public-comment> [https://perma.cc/9KW3-FPND] [hereinafter Dept. of Educ. Releases Proposed Changes].

² Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390, 41393 (July 12, 2022) (to be codified at 34 C.F.R. pt. 106) [hereinafter The Proposed Rule].

its current and proposed forms, Title IX is a predominantly adversarial system,³ and adversarial systems very rarely, if ever, help people heal and rehabilitate from harm caused.⁴ Such adversarial systems also substantially limit the control that complainants (and respondents) have in both the adjudication process and the outcome.⁵ Further, recurrence rates of misconduct are higher in adversarial systems.⁶

Additionally, Title IX's focus on sex discrimination does not account for the identities that can, and often do, intersect with sex when discrimination occurs.⁷ Students differ in socioeconomic backgrounds, races, sexes, gender identities, physical and mental capabilities, and many other ways. Intersectionality allows one to consider, at the same time, the various identities a student holds, rather than delineating each identity into a separate category.⁸ Intersectionality is particularly important in Title IX's context because while Title IX mandates schools to address *sex* discrimination, sexual misconduct is often based in concurrent discrimination against other marginalized identities in addition to sex.⁹ Alternative resolution processes allow schools to work outside of the adversarial Title IX process—providing options that will give students a chance to address and rehabilitate from harm, afford students greater control over the process, help prevent future misconduct, and allow students to exist in all their identities simultaneously.¹⁰

³ Naomi Mann, *Classrooms into Courtrooms*, 59 HOUS. L. REV. 363, 414 (2021). *See also id.* at 414 n.237 (arguing Title IX in its 2020 form is adversarial).

⁴ DANIELLE SERED, *UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR* 65 (2019) (discussing challenges of rehabilitation, particularly within the prison system).

⁵ *Id.* at 91, 96, 141-44; FANIA E. DAVIS, *THE LITTLE BOOK OF RACE AND RESTORATIVE JUSTICE: BLACK LIVES, HEALING, AND US SOCIAL TRANSFORMATION* 29 (2019).

⁶ SERED, *supra* note 4, at 133 (2019) (stating restorative justice reduces recidivism rates by up to 44%); Lorraine Stutzman Amstutz, *The Little Book of Victim Offender Conferencing*, in *THE BIG BOOK OF RESTORATIVE JUSTICE* 185 (2015) (comparing the reoffending rates of individuals who participated in restorative justice to those who did not); DAVIS, *supra* note 5, at 49 (indicating students were significantly less likely to drop out of K-12 programs that utilized restorative justice models).

⁷ 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).

⁸ For a deeper discussion on intersectionality, see generally 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, 150-60 (1989); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH (Frank Rudy Cooper & Ann C. McGinley eds., 2012). For a closer look at how intersectionality in Title IX could benefit students, see generally Kelsey Scarlett & Lexi Weyrick, *Transforming the Focus: An Intersectional Lens in School Response to Sex Discrimination*, 57 CAL. W. L. REV. 391 (2021).

⁹ Cantalupo, *supra* note 7, at 19.

¹⁰ Scarlett & Weyrick, *supra* note 8, at 438-39.

II. THE STRENGTHS AND SHORTCOMINGS OF THE NPRM¹¹

The NPRM does take important steps toward allowing schools to implement more practicable alternative resolution processes. The Department states that it aims to “improve the adaptability of the regulations’ grievance procedure requirements,”¹² and in some ways it succeeds. Perhaps most significantly, the proposed rule expands the definition of “based on sex” to cover “sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.”¹³ The NPRM also permits educational institutions to offer alternative resolution processes without first receiving a formal complaint.¹⁴ These changes allow more conduct to be covered by alternative resolution processes, which, in turn, provides more opportunities for schools to respond to sex discrimination in a way that is better tailored to parties and the campus community.¹⁵ Additionally, the NPRM proposes that schools provide examples of outcomes that could be reached through alternative resolution processes, including “measures that would be considered remedies or disciplinary sanctions had the recipient determined that sex discrimination occurred under the recipient’s grievance procedures.”¹⁶

However, the NPRM does not go far enough in establishing a framework for alternative resolution processes. While the definition of “based on sex” will potentially be expanded, it does not require a more comprehensive exploration of why discrimination occurred and to whom, for students’ identities outside of pregnancy, sex, gender identity, or sexual orientation. It is also unclear if the expanded definition allows for consideration of more than one of these identities at a time (for example, being discriminated against for being both a lesbian and a woman, versus only being discriminated against for being a lesbian).¹⁷ Further, the proposed rule refers to these processes as “informal” resolution.¹⁸ Using the

¹¹ This is only a small sample of the advantages and disadvantages of the proposed changes in the NPRM. I use this section to focus on some, not all, of the ways in which the NPRM both bolsters and hinders the implementation of effective alternative resolution processes in Title IX.

¹² Dept. of Educ. Releases Proposed Changes, *supra* note 1.

¹³ The Proposed Rule, *supra* note 2, at 41393. In contrast, the existing regulation, 34 C.F.R. § 106.30(a), defines only “sexual harassment.”

¹⁴ The Proposed Rule, *supra* note 2, at 41454. This contrasts with the current regulations, which require a Formal Complaint prior to offering parties the option to participate in alternative resolution processes. See DEP’T OF EDUC., FACT SHEET: U.S. DEPARTMENT OF EDUCATION’S 2022 PROPOSED AMENDMENTS TO ITS TITLE IX REGULATIONS (2022), <https://www2.ed.gov/about/offices/list/ocr/docs/t9nprm-factsheet.pdf> [<https://perma.cc/F4B2-HB6H>].

¹⁵ Scarlett & Weyrick, *supra* note 8, at 438-39.

¹⁶ The Proposed Rule, *supra* note 2, at 41455-56. While the NPRM proposes providing examples of potential outcomes of alternative resolution processes, the NPRM does not provide additional insight as to what those examples might look like.

¹⁷ Crenshaw, *supra* note 8.

¹⁸ The Proposed Rule, *supra* note 2, at 41453.

term “informal” to describe these resolution processes does a disservice to what can be accomplished using them, as the word “informal” implies that underlying misconduct will not be properly addressed. The term may also give the false impression that the conduct that initiated the process is not serious or legitimate, further discouraging individuals from utilizing alternative resolution processes.

Finally, the NPRM proposes an even more robust one-size-fits-all grievance process than the 2020 Title IX regulation (“2020 Rule”), in that the NPRM reaches more conduct than the previous rule and imposes additional procedural requirements, depending on the category of conduct at issue.¹⁹ The NPRM introduces a required grievance process for all complaints of sex discrimination, whereas the 2020 Rule only addresses complaints of sexual harassment.²⁰ Though schools previously had discretion to investigate sex discrimination complaints that fell outside of the purview of the 2020 Rule under alternative policies, the NPRM creates a new process that schools will now be required to follow.²¹ This new requirement will limit schools’ discretion in determining what their students and campuses need to meaningfully address misconduct.²² It will not only be more expensive for schools that will need to funnel additional resources to comply with the specific processes, but it will also make investigating complaints under Title IX more complicated. Schools will need to determine which conduct constitutes “sex-based harassment” and which sex discrimination is not sex-based harassment, and then follow the corresponding grievance process.²³ As a result, alternative resolution processes will be theoretically available to students, but they will not be treated with the same attention and resources as the more formal grievance processes.

III. ESTABLISHING EFFECTIVE ALTERNATIVE RESOLUTION PROCESSES UNDER TITLE IX MOVING FORWARD

While the NPRM expands schools’ ability to respond to sex discrimination in a more nuanced way, the Department needs to provide more discretion, guidance, and funding for schools to set up tenable alternative resolution processes.

Going forward, the Department should lessen the stringent procedural requirements in place for addressing all sex-based discrimination.²⁴ Reducing procedural requirements would assuage the economic burden on educational institutions, allowing them to funnel more resources into developing well

¹⁹ *Compare* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026 (May 19, 2020) [hereinafter “The 2020 Rule”], *with* The Proposed Rule, *supra* note 2, at 41391, 41458-59.

²⁰ The 2020 Rule, *supra* note 19, at 30026; The Proposed Rule, *supra* note 2, at 41458-59.

²¹ The 2020 Rule, *supra* note 19, at 30065; The Proposed Rule, *supra* note 2, at 41458-59.

²² The Proposed Rule, *supra* note 2, at 41458-59.

²³ *Id.*

²⁴ *Id.*

thought-out alternative resolution processes.²⁵ It would also give schools more discretion in determining how to address sex-based misconduct. The Supreme Court in *Goss v. Lopez* indicated that educational institutions are best situated to determine their own disciplinary processes.²⁶ As Professor Naomi Mann stated in *Taming Title IX Tensions*, “[d]iscipline and adherence to community standards are part of the educational process, and therefore educational institutions are well-suited to implement these goals.”²⁷ Having more discretion would allow educational institutions to be more mindful of students’ various identities and needs in addressing sexual misconduct on campus.

Second, the Department needs to provide a framework for facilitating effective alternative resolution processes. Many educational institutions utilize mediation as an alternative resolution option; however, mediation can be problematic in situations of alleged sexual misconduct as it is intended to resolve disputes among parties, who are “assumed to be on a level moral playing field.”²⁸ Sex discrimination either did or did not occur, and if it did occur, the parties would not be on a “level moral playing field.”²⁹ Further, while many schools offer restorative justice as an alternative resolution option, they often do not follow, or know how to follow, proper restorative justice principles.³⁰ Outlining how schools should implement alternative resolution processes is necessary to ensure schools can properly address misconduct through these channels.³¹ However, the NPRM should leave a certain amount of discretion to schools in how they set up alternative resolution processes. For example, restorative justice can dissuade participation for its inclusion of an institutional actor in the process.³² The Department should leave regulatory language open to allow schools to bring in neutral, third-party facilitators, incorporating transformative justice tenets of community healing instead.³³ In providing an elevated floor, rather than walls and a ceiling, the Department can establish more

²⁵ The 2020 Rule, *supra* note 19, at 30560 (discussing the cost associated with the 2020 Title IX rule).

²⁶ *Goss v. Lopez*, 419 U.S. 565, 578 (1975); *see also* Naomi Mann, *Taming Title IX Tensions*, 20 U. PA. J. CONST. L. 631, 650 (2018) [hereinafter Mann, *Taming Title IX Tensions*].

²⁷ Mann, *Taming Title IX Tensions*, *supra* note 26, at 650.

²⁸ *See* HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 12 (2d ed. 2014).

²⁹ *See id.*

³⁰ Tim Walker, *Restorative Practices in Schools Work... But They Can Work Better*, NAT’L EDUC. ASS’N NEWS (Jan. 30, 2020), <https://www.nea.org/advocating-for-change/new-from-nea/restorative-practices-schools-work-they-can-work-better> [https://perma.cc/CH4B-V6YE]; ZEHR, *supra* note 28 (“Restorative justice requires, at minimum, that we address victims’ harms and needs, hold offenders accountable to put right those harms, and involve victims, offenders, and communities in this process.”).

³¹ *Id.*

³² Johonna Turner, *Creating Safety for Ourselves*, in *COLORIZING RESTORATIVE JUSTICE: VOICING OUR REALITIES* 326 (Edward C. Valandra & Waṅbli Wap̓háha Hokšíla eds., 2020).

³³ The Proposed Rule, *supra* note 2, at 41453; Turner, *supra* note 32, at 326. *See also* Scarlett & Weyrick, *supra* note 8, at 437.

effective alternative resolution processes in educational institutions without sacrificing the necessary discretion for schools to cater processes to their students' needs.

Finally, the Department should consider either providing funding to schools specifically earmarked for alternative resolution processes or directing schools to channel a certain portion of their Title IX budget to alternative resolution processes. In doing so, educational institutions would have guaranteed funding for the development and growth of effective alternative resolution processes, resulting in more flexible and intersectional options for students to address sex discrimination.³⁴ This list of possible actions the Department can take is not exhaustive, and more basic measures can also be effective. By changing “informal resolution”³⁵ to “alternative resolution,” for example, or ensuring language in its Title IX regulations does not preclude schools from utilizing an intersectional approach in addressing sex discrimination, the Department can help ease the path toward a more healing and rehabilitative system within the construct of Title IX.

CONCLUSION

Title IX already provides the framework to create a better system in addressing sex discrimination in education—we simply need to utilize it. The current and proposed regulations limit how schools can address certain misconduct and confine sex discrimination to an axis (discrimination based only on sex), rather than making it part of a spectrum of conduct (discrimination based on more than one identity at a time).³⁶ This confinement not only denies individuals a way to properly heal from and address harm, but it also denies individuals a chance to learn from the harm they have caused and to avoid repeating that harm in the future.³⁷ As a grievance process, Title IX fosters a charged environment that leaves very little room for unification. Alternative resolution processes enable schools and students to address harm, heal from harm, and prevent future harm from reoccurring, in a way that recognizes the humanity and various identities of everyone involved in the process.³⁸

³⁴ Turner, *supra* note 32, at 316; Scarlett & Weyrick, *supra* note 8, at 438-39.

³⁵ The Proposed Rule, *supra* note 2, at 41453.

³⁶ See *supra* note 8 and accompanying text.

³⁷ ZEHR, *supra* note 28, at 40-43; Turner, *supra* note 32, at 320-21.

³⁸ ZEHR, *supra* note 28, at 40-43; Turner, *supra* note 32, at 320-21; Scarlett & Weyrick, *supra* note 8, at 438-39.