



# Title IX: The Federal Perspective

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# Agenda

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- Overview
- Higher Education Community Comments
- What's Next?
- NAICU Resources

# How Did We Get Here?

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- Obama Administration
  - Issued Title IX guidance in 2011 and 2014
- Trump Administration
  - Rescinded Obama guidance in 2017
  - Published final rules in 2020
- Biden Administration
  - Issued notice of proposed rulemaking (NPRM) in 2022

# Behind the Scenes

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NAICU deeply involved as the Department of Education drafted the NPRM

*“The Department recognizes that schools vary in size, student populations, and administrative structure. The proposed regulations would enable all schools to meet their obligations to comply fully with Title IX while providing them appropriate discretion and flexibility to account for these variations.”*

—Department of Education, Title IX NPRM

# Overview of NPRM

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- Significantly expands scope of Title IX coverage
- Adds flexibility for institutions and streamlines some of the most burdensome procedural requirements
- Eliminates barriers preventing victims from filing complaints
- Maintains most protections for accused students

# Higher Ed Community Comments

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- 24-page comment letter that consists of three parts:
  - Provisions that help institutions prevent sex discrimination by providing better flexibility and clarity
  - Provisions that pose implementation challenges
  - Provisions that need additional flexibility or clarity

# Provisions That Help

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- Removes mandate for live hearing with cross
- Allows use of single investigator model
- More flexibility for sharing evidence with the parties
- More flexibility to define the role of advisors in proceedings
- Continues to allow informal resolution
- Maintains requirements for an equitable process

# Provisions That Help, Continued

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- Revises provisions that have had a chilling effect on victims
- Allows institutions to place an employee on leave during a pending grievance proceeding
- Eliminates the requirement that an institution “must dismiss” a formal Title IX complaint in certain circumstances
- Clarifies that the Office for Civil Rights won’t find an institution violated Title IX solely because it would have reached a different decision based on its own weighing of the evidence
- Religious exemption maintained

# **Implementation Challenges**

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- Applicability of the final rule to pending complaints
- Effective date of final rule

# Provisions That Need Flexibility or Clarity

- Conduct “subject to the institution’s disciplinary authority”
- Definition of a “student”
- When non-harassment sex-based discrimination triggers grievance procedures.
- Sex-separated programs and the *de minimis* harm standard

# Flexibility or Clarity, Continued

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- Confidential employees and protections against disclosures
- Employee reporting obligations
- Expansion of the Title IX Coordinator role and responsibilities
- Allegations of harassment involving employee respondents

# **Flexibility or Clarity, Continued**

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- Institutional obligations regarding students experiencing pregnancy or a related condition
- Distinguishing supportive measures from other actions schools can take against students
- Posting employee training materials
- Prohibition on disclosure of treatment records

# What Comes Next?

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- ED received over 240,000 comments
- Final rule not likely for at least a year
- ED staff stretched incredibly thin