New Title IX Rules Would Protect Due Process

By **Kimberly Lau**

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Over the last six months, the announcement of the proposed changes to Title IX regulations has raised concerns for colleges and universities across the country. There is significant opposition to the proposed regulations from as many as 22 states.

Attorneys general from 18 states and Washington, D.C., submitted comments in opposition to the proposed regulations in January 2019. They want to eliminate the presumption of innocence in Title IX proceedings, they decried the "narrowed" definition of sexual harassment and "narrowed" scope of jurisdiction to respond to incidents outside "an educational program or activity," and complained that requiring cross-examination would be costly and retraumatize complainants.

Based on my experience as an attorney handling nearly 200 Title IX cases on campuses and in courts all over the country, I believe that while the regulations may be imperfect, they present a fairer system with clear standards that, when taken as a whole and viewed objectively, can benefit all parties and ensure the integrity of the results in Title IX proceedings, regardless of who prevails.

Many critics argue that the regulations have narrowed the definition of sexual harassment by defining it as "severe, pervasive and objectively offensive." Yet, this definition is grounded in U.S. Supreme Court precedent, Davis v. Monroe County Board of Education,[1] and does not represent any change from existing law.

In fact, in 2001, the U.S. Department of Education recognized that the Davis standard is consistent with the department's own guidance that conduct must be sufficiently serious that it adversely affects a student's ability to participate in or benefit from the school's program.

The new requirement of the right to cross-examination — a right that has developed over centuries of British and American jurisprudence — protects both respondents and complainants. Third parties, not the students themselves, will be asking the questions and testimony may take place in separate rooms.

The argument that allowing cross-examination and live hearings will be costly for colleges and universities sends the message that "due process" is too expensive for schools to administer. Cost-effectiveness should not be the only or even a primary factor in protecting the integrity of the Title IX process, where the outcome of the proceeding has far-reaching effects for both parties.

The proposed regulations would also ensure that all students are given a live hearing, doing away with the single-investigator model that was used in the past in which the investigator alone could in effect act as investigator, prosecutor and judge. Live hearings and cross-examination will allow fact-finders to fully and fairly assess credibility.

The proposed rules should not have the effect of discouraging students from coming forward because they give complainants more control over the process than under the current rules. Complainants would now be able to decide what intervention they seek from the school,

whether that is to pursue a formal complaint, request supportive measures, or opt to engage in mediation.

In addition, schools would now have the option to choose which standard of evidence to employ. Colleges and universities will be able to choose whether they want to employ the current standard of "preponderance of the evidence" (i.e. more likely than not) or adopt the higher standard of "clear and convincing evidence" (i.e. highly probable or reasonably certain). Schools will be prohibited from utilizing the lower preponderance of evidence standard for Title IX cases if it uses the higher clear and convincing standard for non-Title IX cases.

That makes sense — why should plagiarism be decided by a higher evidentiary standard than rape? Many people believe that sexual assault is a serious charge with far-reaching consequences to the parties involved in it and therefore deserves to be assessed under a higher standard of proof.

The department also now calls for reasoned decisions, which specify findings of fact and rationale for the decision. Vague, one-line decisions will no longer be allowed. This will give a more reliable basis for appeal and increase the odds that parties will respect the outcome.

Now the notice and comment period has ended, with more than 104,000 comments. It will be interesting to see what, if any, changes are made to the proposed regulations. The Department of Education has a legal obligation to respond to any substantive comments. If any substantial changes are made to the proposed regulations, the department may reopen the notice-and-comment period.

Once the rules are final, there are several ways in which they may be challenged. Pursuant to the Congressional Review Act, Congress could attempt to pass a resolution of disapproval to declare the rules void. But this is highly unlikely because such a resolution requires approval by both houses of Congress and the president.

Instead, legal challenges to the proposed regulations in court are much more likely. To declare the regulations void, litigants would need to show that the rules are arbitrary, in violation of to constitutional rights, in excess of statutory jurisdiction, or without observance of procedures during the rulemaking process.

While the outcome of any changes or challenges to the proposed rules is impossible to predict, any future developments should engender a serious discussion of the role due process should play in these campus tribunals.

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[1] Davis v. Monroe Cty. Bd. Of Educ., 526 U.S. 629 (1999)