

# Policy Brief: Title IX

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Title IX policy consists of the nondiscrimination statute enacted by Congress in 1972,<sup>1</sup> the new Title IX regulations promulgated by the Education Department in 2020,<sup>2</sup> and judicial opinions by federal appellate courts that adjudicate claims of Title IX and due process violations.

## Congressional Statute

The Congressional statute bans sex discrimination in schools that receive federal funds. The two most common types of Title IX complaint concern 1) single-sex programs for women; and 2) accusations that student sexual misconduct threatens equal educational access.

## New Regulations

The new Title IX rule specifies procedures a school must use when it adjudicates the latter type of Title IX claim. Schools must offer complainants supportive measures and provide those accused of misconduct with due process protections, including the presumption of innocence, the right to see evidence, and, at postsecondary institutions, the right to a live hearing, including cross examination.<sup>3</sup>

## Federal Appellate Court Opinions

Circuit courts of appeal have also upheld Title IX due process rights. In these cases, courts have found that such rights derive not only from federal regulations but also from contractual guarantees of fairness in student or faculty handbooks or from due process protections guaranteed in the Constitution.<sup>4</sup>

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1 Pub.L.No.92-318, 86 Stat. 373 (1972), codified at 20 U.S.C. sec 1681 et seq. at <https://www.govinfo.gov/content/pkg/USCODE-2018-title20/html/USCODE-2018-title20-chap38-sec1681.htm>.

2 Final Rule, "Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving Federal Financial Assistance," 34 C.F.R. Part 106 at <https://www.federalregister.gov/documents/2020/05/19/2020-10512/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>.

3 For "hostile environment"-type sexual misconduct (as opposed to *quid pro quo* actions) the regulation adopts the standard of the U.S. Supreme Court that Title IX applies only where the sexual conduct is so severe, pervasive, and objectively offensive that it denies access to education. See *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999) at <https://www.law.cornell.edu/supct/html/97-843.ZS.html>. See, however, the recommendation below to sever part of rule which loses this focus of denied access.

4 See *Doe v. Baum*, 903 F. 3d 575 (6<sup>th</sup> Cir. 2018), *Doe v. Purdue*, 28 F. 3d 652 (7<sup>th</sup> Cir. 2019), *Doe v. Philadelphia Univ. of the Sciences*, 961 F. 3d 203 (3d Cir. 2020).

## Key Findings, *Dear Colleague: The Weaponization of Title IX*<sup>5</sup>

- **Title IX offices are disproportionately female and lack legal experience.** Most campus Title IX offices have no men on staff, or a small minority, and usually no one with experience in criminal defense work, where due process is of central importance.
- **The focus of the Title IX office is not educational access but student sexual conduct.**
- **In promoting sexual hedonism, Title IX offices increase the likelihood of sexual misunderstandings and allegations of sexual misconduct via Title IX complaints.** Title IX offices distribute condoms as well as sexually explicit publications, thereby promoting behaviors that predictably give rise to misunderstandings and allegations of sexual misconduct.
- **Title IX offices do not focus on preventing Title IX violations and ignore the role of alcohol in sexual misconduct cases.** No Title IX office surveyed addressed the role of alcohol in sexual misconduct, though staff know it is a contributing factor in most cases.

## Policy Recommendations

- **Dissemination — notice of rights, Title IX applies to all.** State and federal education departments should require schools to inform students of their rights and how to file complaints. They should require schools to present this information at student orientation and other student and staff trainings and state that violations of Title IX and of due process affect both sexes.
- **Enforcement — filing complaints with Offices of Civil Rights (“OCR”) and the State Education Department.** Content must include directions on how to file complaints at the school and at the regional or national Offices of Civil Rights. State education departments should appoint an office, or officer, to process complaints of due process violations that offend fairness guarantees in state contract and state common law.
- **Hiring and Qualifications — ensuring balance and relevant legal experience in the Title IX office.** At least one member of a school’s Title IX office should have a J.D. with a minimum of 5 years’ experience practicing criminal defense law. School policy should equalize the female-male staff ratio.
- **Prevention.** Title IX offices must focus more on how to prevent Title IX violations, including a focus on the role of alcohol in cases of sexual misconduct.
- **Educational access is the center of Title IX, not sexual misconduct as such.** The focus of Title IX should be educational access, not sexual misconduct as such. Parts of rules or policies which lose sight of this focus should be severed.<sup>6</sup>
- **Resist return to institutionalized bias.** Policymakers should oppose all attempts by the Education Department or Congress to return to bias for female complainants and the due process railroading of accused male students. For example, they should oppose any so-called “Title IX Restoration Act” that limits students’ due process rights.

5 Teresa R. Manning, *Dear Colleague: The Weaponization of Title IX* (National Association of Scholars, 2020) at <https://www.nas.org/reports/dear-colleague/full-report>.

6 *Amicus Curiae Brief of the National Association of Scholars in Commonwealth of Pennsylvania v. DeVos*, Case No. 1:20-cv-01468-CJN <https://www.nas.org/storage/app/media/New%20Documents/FINAL%20NAS%2028%20Dec%20amicus%20brief%20PA%20v%20DeVos.pdf>.

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