

# Title IX Rules

2020 Updates from the Department of Education

## Understanding Title IX

Title IX of the 1972 Education Amendment is a federal civil rights law that prohibits sex discrimination in K–12 and postsecondary educational settings. It was passed to ensure all students were afforded the same rights to learn and participate in educational programming, regardless of gender or sex. The law states, *“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance (Title IX of 20 U.S.C.A §168).”*

While some people may think Title IX is about athletics, they are only partially correct. Title IX prohibits discrimination in all educational programs and activities—athletics, academics, clubs, and other activities and programs.

While the statute clearly states Title IX’s purpose, it speaks very little to the specific steps schools must take to prevent and address sex and gender discrimination. Therefore, since its passage, the U.S. Department of Education’s (DoE) has issued numerous documents to guide the implementation of Title IX. The Office for Civil Rights, under the DoE, is the official body that investigates and enforces schools’ Title IX compliance.

Title IX guidance and enforcement have been influenced by the larger social and political climates spanning close to five decades and nine U.S. presidents. This document provides a summary of the most recent rules associated with Title IX, issued in May 2020 and taking effect in mid-August 2020. There are several legal cases that have been filed—from the American Civil Liberties Union, National Women’s Law Center, and Victim Rights Law Center—challenging the legality of these rules.

This is not an exhaustive analysis. For more information and training, please contact PCAR’s policy and training departments. Victims and survivors of campus sexual assault can obtain legal representation and advice from PCAR’s Sexual Violence Legal Assistance Project.



**Title IX prohibits discrimination in all educational programs and activities, not just athletics.**

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## Summary of 2020 Title IX rules

Department of Education Secretary Betsy DeVos rescinded Obama-era guidance in 2017 that protected transgender students under Title IX. DeVos proposed changes to the broader Title IX rules in September of 2018 and their application to sexual misconduct. The Federal register was open to public comments on those proposed rules. Over 120,000 sets of comments were submitted by interested parties and organizations. The Department issued its final rules in May 2020 with an effective date of August 14, 2020. These rules are legally binding and while there are some areas that remain flexible, the grievance and adjudication process are prescriptive and may interfere with existing state law.

### Conditions of sex discrimination

Under the new rules, a school has committed sex discrimination when three conditions have been met:

- Actionable sexual harassment has occurred, within a new definition of sexual harassment and more narrow parameters; and
- The post-secondary institution, through Title IX Coordinator/other authority, or the K—12 institution, through any employee, has actual knowledge of the harassment; and
- The school is deliberately indifferent, intentionally unresponsive to what is actually known, and responds unreasonably to facts.

### Sexual harassment definition

The new definition of sexual harassment is three-pronged and...

- Specifies quid pro quo harassment is a form of misconduct. Quid pro quo, or “this for that” harassment happens when a school employee conditions a student’s access to educational programs or activities on the victim’s compliance with sexual acts;
- Adds federal definitions—found in the Clery Act and Violence Against Women Act—of sexual assault, domestic violence, dating violence, and stalking to forms of Title IX misconduct;
- Includes other conduct that is so “severe, pervasive, and objectively offensive” that it effectually denies a victim their equal access to educational programs or activities as forms of Title IX misconduct.

**Schools can choose to investigate off-campus assaults, but are no longer required to do so and will not be out of compliance.**

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### Narrow parameters and dismissals of reports/cases

#### Off-campus assaults

The 2020 rules require schools only to address incidents that occur within its control or under its auspices or sponsorship. While a school may choose to investigate off-campus assaults, or assaults that occur outside of its purview, it is not required to do so, nor will the school be out of compliance with Title IX if it chooses not to. This means that assaults that occur in off-campus housing, bars and restaurants, at other schools, during break, or within fraternities and sororities not officially recognized by the school will potentially go unaddressed.

## Dismissals of reports/cases

Schools may now dismiss complaints involving students/employees who are no longer enrolled or actively seeking participation in educational programs or activities. This means that even if a person named in a report is still enrolled in the school, if the victim is no longer enrolled, the campus can choose to dismiss the report. Or, if the person named in the report transfers to another school or drops out, even with a pending case, the school can choose to dismiss the report—even if the victim is still enrolled.

## Actual knowledge

Actual knowledge is a term used once a school is officially considered “on notice” that Title IX misconduct has occurred. The new rules consider schools to be on notice when they have actual knowledge of such misconduct. Actual knowledge is obtained through:

### Post-secondary:

A written report from a victim to and signed by a Title IX Coordinator or other authority with Title IX responsibilities in post-secondary institutions;

### Elementary and secondary:

Any employee who witnesses, hears, or receives information about misconduct within K–12 institutions.

## Deliberate indifference

A school has committed sex discrimination only when it demonstrates “deliberate indifference” to reports. Deliberate indifference occurs when a school’s actions are clearly unreasonable, or when a school intentionally discriminates against a student or permits discrimination that is actually known. The rules discuss steps that schools must take to avoid deliberate indifference.



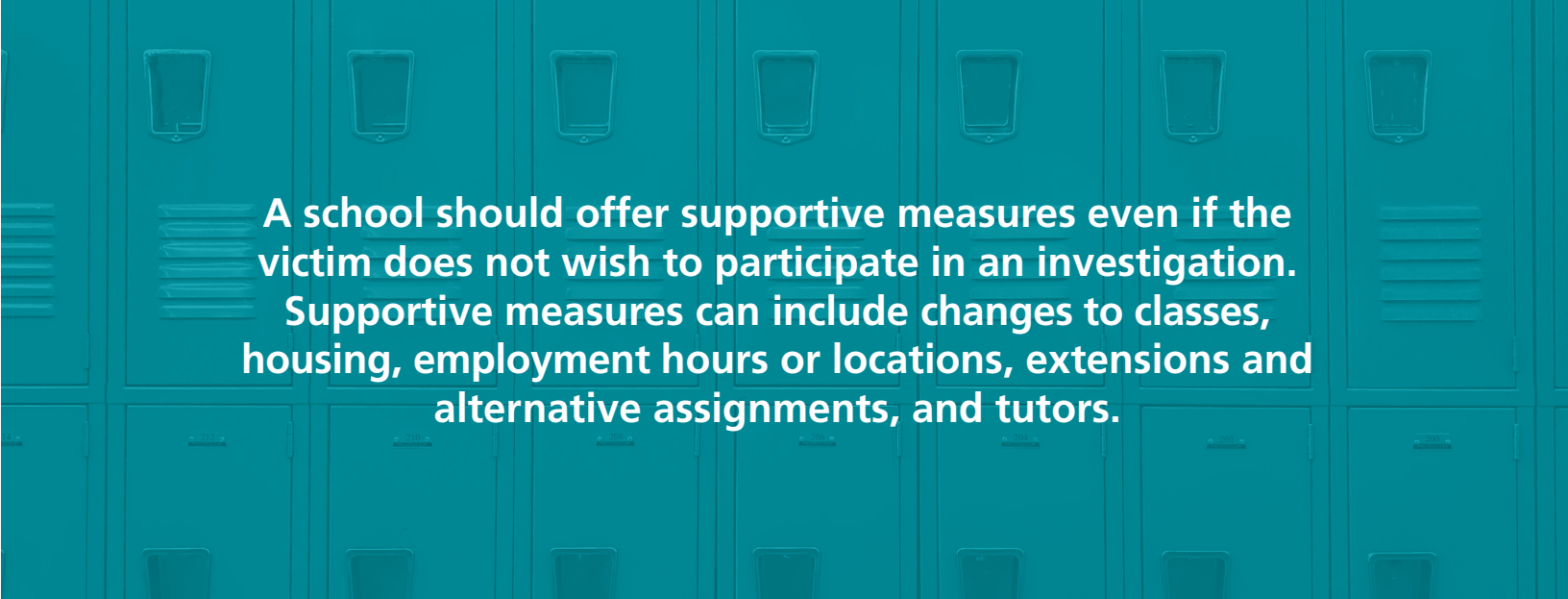
**Deliberate indifference occurs when a school’s actions are clearly unreasonable, a student is intentionally discriminated against, or known discrimination is permitted.**

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To avoid deliberate indifference, schools are to:

- Promptly respond to known misconduct;
- Offer supportive measures;
- Contact complainants<sup>1</sup>;
- Consider complainant’s wishes when issuing supportive measures;
- Inform complainant of support available with or without a formal complaint;
- Explain the process of filing a formal complaint to the complainant;
- Treat parties equitably—schools must offer support to the complainant and protect the due process rights of the respondent ;
- Issue remedies that restore a victim’s equal access to educational programs and activities if the report results in an investigation that produces a finding of responsibility, or that sexual misconduct occurred.

<sup>1</sup>Title IX rules specify that a “complainant” is the reporting party, who reports a form of misconduct has been committed against them. The “respondent” is the person named in a report as having committed a form of misconduct.



**A school should offer supportive measures even if the victim does not wish to participate in an investigation. Supportive measures can include changes to classes, housing, employment hours or locations, extensions and alternative assignments, and tutors.**

## Distinction between response and investigation

The new rules distinguish the difference between the school's responsibilities as they pertain to a "response" versus an "investigation" in cases of Title IX misconduct.

**Response:** A response is considered a broad protective effort that is triggered when sexual misconduct is reported, but does not result in a formal investigation or adjudication process. For example, a student may come forward and disclose an assault, but only wish to obtain services and support. In these cases, a school must respond by offering a range of supportive measures (discussed below) and information about the student's other rights (see deliberate indifference section).

**Investigation:** A formal investigation is initiated in post-secondary institutions through two paths: 1.) the victim submits a written report to be signed by a Title IX Coordinator or other authority; or 2.) the Title IX Coordinator determines that an investigation is necessary due to facts that are known. In K—12 institutions, because they are action in loco parentis (in place of parents), an investigation is initiated when any employee receives a report or witnesses a form of Title IX misconduct.

## Supportive measures

Supportive measures include a range of possible services and flexibilities that the school must offer to students after a disclosure of misconduct. This disclosure can come in the form of either an informal or a formal report. For example, a school should offer supportive measures even if the victim does not wish to participate in an investigation or adjudication process. Such measures can include changes to classes, housing, employment hours/locations, extensions and alternative assignments, tutors, and other options. The new rules do not require all schools to offer the same set of measures, but they do specify that such measures:

- Are to be offered before, during, and after an investigation and even when there is no formal complaint or investigation underway;
- Are intended to restore or preserve students' equal access to education, protect the safety of students/campus and deter future harassment; and
- **Cannot be punitive, disciplinary, or create an unreasonable burden without a finding of responsibility—based on facts and circumstances. Without a finding of responsibility based on facts and circumstances, supportive measures cannot be punitive, disciplinary, or create an unreasonable burden.**

## Ten required grievance procedures

There are 10 required, legally binding Title IX reporting, grievance, and resolution provisions. Even if conflicting state laws, schools must follow the federal rules that are prescribed. A brief summary of those requirements follows:

- 1 Treatment of both the complainant and respondent can constitute sex discrimination. If a respondent is denied equal access to educational programs and activities during a Title IX procedure, but misconduct is not found to have occurred, that denial by the school now constitute sex discrimination.
- 2 Equitable treatment of parties:
  - a. Remedies are only to be implemented after a finding of responsibility, which must be determined after a “fair” process.
  - b. The grievance process must include inculpatory (pointing toward finding of responsibility) and exculpatory (pointing toward finding of not responsible) evidence and an objective review by individuals without conflict of interest or bias.
  - c. The grievance process presumes innocence of the respondent from the start.
  - d. The grievance process should be reasonably prompt (delays are allowed due to criminal proceedings); all parties are to be informed. Privilege is to be protected during process, including confidentiality of treatment records.
- 3 Written notice is provided to all parties, including the right to an advisor of choice—the advisor of choice is responsible for cross-examining the other party during a live hearing.
- 4 Schools must provide notice of when an investigation is required, describe dismissals of complaints, and provide notice of parties’ rights and resources.
- 5 Schools must investigate formal complaints once they have actual knowledge that a form of misconduct has occurred, within the specific parameters. The burden of proof is on the school. Parties must have equal opportunity to present witnesses and facts. There are no restrictions placed on the parties from talking about the case or gathering evidence outside of the confines of investigation. Parties may have an advisor of their choosing. Written notice is to be provided to parties throughout the process. Schools must specify how they will review and respond to evidence and share the investigative report with the parties prior to reaching a finding.
- 6 Post-secondary schools must conduct live hearings with cross-examination. Cross-examination is conducted by parties’ advisors. Live hearings are not required of K—12 institutions.
- 7 A decision-maker determines finding. This decision-maker cannot be the Title IX Coordinator or an investigator. The finding is based on the school’s standard of evidence: either there is a preponderance of the evidence or the evidence is clear and convincing. Written notice of outcome is provided to parties.
- 8 A school must describe the appeal process to all parties.
- 9 Informal resolution (such as mediation) processes may be applied to Title IX misconduct, including sexual misconduct, if all parties agree to participate. However mediation or informal resolutions cannot be applied in cases of employee against student misconduct.
- 10 Schools must maintain records, provide training, issue reports, and make certain materials available to the campus community and general public.



## Areas that are left to schools to determine

The rules clearly state that certain proceedings are prescriptive, required, and legally binding, rather than strongly encouraged as a best practice. However, there are certain areas where the rules leave schools with room to interpret and apply their own best practices within their Title IX policies and procedures.

Schools can determine:

- With whom they consult and collaborate in developing policies, procedures, and resources—such as victim service organizations, attorneys, and other services.
- If and how they will address harmful behaviors that fall outside of the Title IX compliance, for example discrimination based on gender identity or sexual orientation, incidents that fall outside of the three-pronged definition of Title IX, and other harmful conduct.
- Which employees may, must, or must with a victim's consent, carry a report of Title IX misconduct forward to the Title IX Coordinator. However, the rules are clear in stating that the school is not officially on notice until it possesses "actual knowledge" that a form of misconduct has occurred. That actual knowledge must be obtained through a direct report from a victim to the Title IX Coordinator, in writing in higher educational settings.
- The range of supportive measures that are appropriate to offer parties based on each case.
- The process the school will use to assess and issue supportive measures.
- How it will define consent within its policies, procedures, and programs.
- Timeframes for resolving investigations, with a 60-day ideal no longer applying.
- The standard of evidence to use in Title IX cases, although now schools are allowed to choose between preponderance of the evidence OR clear and convincing evidence. Clear and convincing—a higher standard—may be applied to Title IX adjudication even if it is not used in other forms of student misconduct.
- Training content for employees and students.
- Whether to investigate off-campus assaults.
- When to allow for parties to testify remotely during live hearings as opposed to in person

## Comparison with past guidance

### Actual vs. constructive knowledge

Past guidance held schools to a "constructive knowledge" standard—if a school knew or should have known that sexual harassment was occurring, they were responsible for addressing it. To this end, most campus employees and some student workers were considered "responsible employees"—with responsibility for carrying forward disclosures of sexual harassment, abuse, and assault for appropriate investigation and action. This guidance grew out of many students' public reports, indicating they had "put their schools on notice" after telling a trusted employee, only to find no formal action taken. Additionally, the constructive knowledge standard aligned with best practices in the prevention of sexual harassment, abuse, and assault which requires community-wide engagement and effort. However, it should be noted that changing the reporting process in this way may benefit some victims who wish to talk to trusted faculty, staff, and student workers without the information they share automatically being reported to the Title IX office.

### Deliberate indifference vs. reasonableness

Past guidance held schools to a "reasonableness" standard of responsibility when addressing Title IX misconduct. If the school failed to take reasonable and timely action, it could face a potential investigation and penalty. The new deliberate indifference standard is a higher bar and may be more difficult to prove.

## Definition

Past guidance defined sexual harassment more broadly, as, “unwelcome conduct of a sexual nature” (DoE, 2011). In 2011, guidance explained that sexual harassment can be severe and/or pervasive: severe enough for a one-time incident to create a hostile environment or repetitive and pervasive enough to create such an environment. This same guidance described sexual violence as a form of sexual harassment, including forced vaginal, anal, or oral penetration; sexual assault; sexual coercion; or other acts. The guidance clarified that both a single act of sexual violence and a series of acts could constitute sexual harassment. The addition of “severe, pervasive, and objectively offensive” to the definition may pose challenges to victims in seeking remedies. For example, the rules discuss the standard applying to a “reasonable person,” however, due to pervasive myths and misperceptions about sexual harassment, abuse, and assault among campus administrators, faculty, and staff, it remains uncertain how this standard will actually apply.

## Off-campus assaults and dismissals

Sexual harassment was prohibited in all educational activities—whether that was in the classroom, on the field, in a dorm, off campus, or on a field trip. Past guidance acknowledged that a person who is harmed by sexual harassment may experience negative consequences that can undermine their education regardless of where the incident occurred. Therefore, a school was obligated to receive, investigate, and address all reports of sexual violence, regardless of whether or not the parties were enrolled or actively seeking participation.

The new definition of sexual harassment may omit acts of sexual violence that do not fall within the new framework of “severe, pervasive, and objectively offensive.” Yet these acts create a climate where harassment and abuse are tolerated. These acts can negatively impact students and the larger campus community and lead to other types of sexual harassment, abuse, and assault. For example, there is concern that certain acts won’t be encompassed in this new and more narrow definition, such as administering date rape drugs to facilitate sexual assault, touch that is not for sexual gratification (such as butt slaps), coerced consent, gender-based harassment, harassment based on sexual orientation, and online harassment that does not occur during class or with a school-issued device.



**The new rules specify that supportive measures offered to one party cannot discipline, punish, or place an unreasonable burden on another party.**

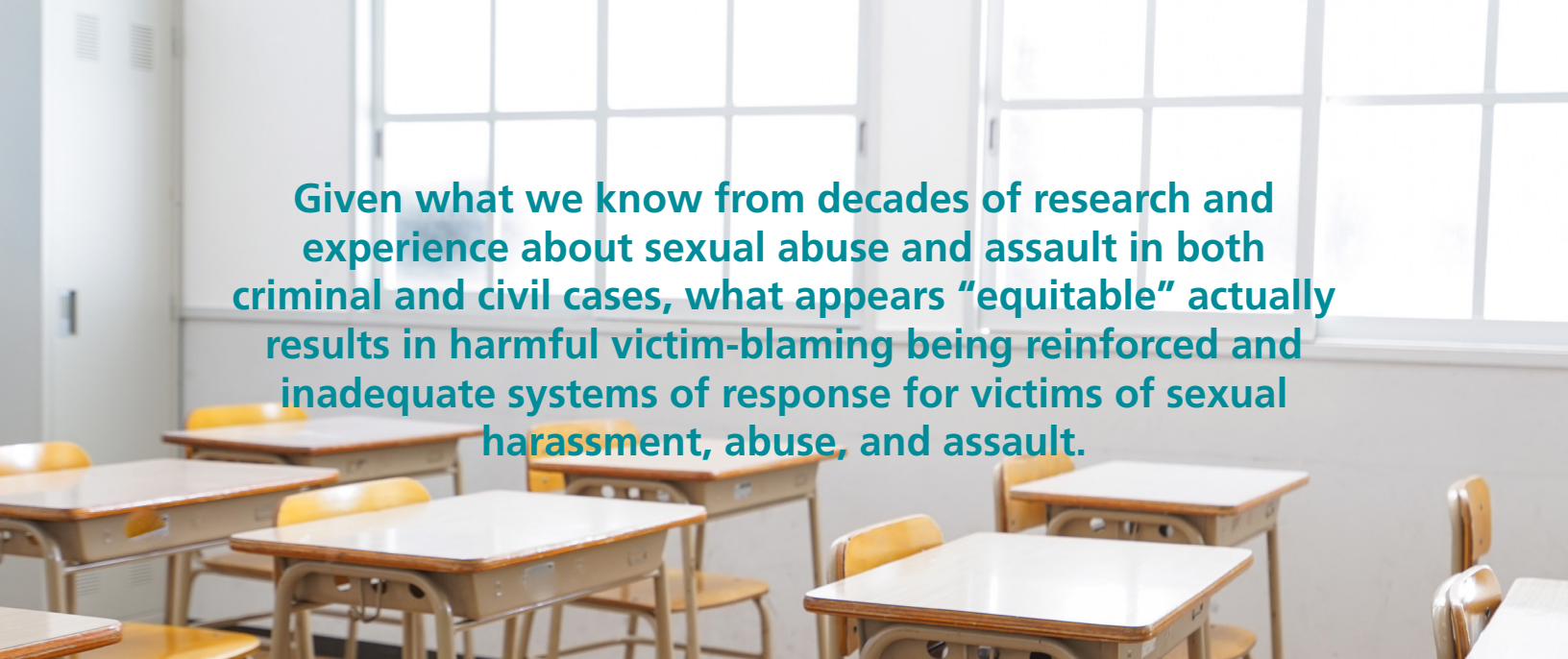
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## Response vs. investigation

Past guidance did not distinguish fully between different levels of disclosures, reports, and investigations. When a student reported any form of Title IX misconduct to any employee, the school was considered “on notice” and was responsible for taking action—even if the reporting student did not wish to talk to a Title IX Coordinator or other authority about the facts of the case.

## Supportive measures

Past guidance referred to supportive measures as “interim measures,” or “accommodations.” Such measures were similar in intent—to preserve equal access to education, however, past guidance clearly stated that the reporting party should not shoulder an undue burden in the implementation of such measures. The new rules specify such measures are to be offered not only on an “interim” basis, while an investigation



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is underway, but should be offered whenever a school is responding to or investigating a report. However, the new rules specify that supportive measures offered to one party cannot discipline, punish, or place an unreasonable burden on any other party. Arguably, any supportive measure offered to one party could be burdensome or punitive to the other—whether that is a change in class schedules or housing or the implementation of a no-contact order. This could result in victims having to be relocated out of classes and housing instead of the offender.

### **Due process**

Past guidance centered the needs of victims of sexual harassment, abuse, and assault and sent a strong message to schools that they must swiftly ameliorate the harm caused by these forms of misconduct—harm that had been swept under the carpet and ignored for too long, in schools reporting “zero” sexual assaults year after year. The new rules seem to also center the needs of respondents and their rights to due process. In an ideal world, where ample evidence is available to campuses and rampant rape myths no longer exist among administrators and decision-makers—this equitable treatment could work. However, given what we know from decades of research and experience about sexual abuse and assault in both criminal and civil cases, what appears “equitable” actually results in harmful victim-blaming being reinforced and inadequate systems of response for victims of sexual harassment, abuse, and assault. This centering of respondents’ due process rights—from a **presumption of innocence**, to potentially relocating victims from their classes and housing, to scrutinizing victim testimony during a live hearing—could tip the balance in favor of those who cause harm. This will make our campuses less safe for all.

### **Sex discrimination occurring against a respondent**

Past guidance required schools to be timely, fair, and impartial in investigating and resolving sexual misconduct. However, past guidance was also clear in reminding schools about the purpose of Title IX—to prohibit and swiftly address sex discrimination, without creating an undue burden on a complainant, or victim during the process. The new rules establish sex discrimination as being possible against a respondent within a Title IX process. This is a stark departure from past guidance and arguably, from the purpose of Title IX—which is to prohibit institutions receiving federal funds from discriminating against students based on sex and to swiftly ameliorate the hostile environment caused by sexual harassment, abuse, and assault. The rules seem to establish respondents as a protected class among the campus community.



## **Reasonably prompt grievance procedure**

Past guidance instructed schools to resolve complaints of sexual harassment in a timely manner, or within approximately 60 days. Past guidance clearly stated that schools' grievance procedures should not be delayed due to criminal justice proceedings, since their legal and ethical obligations under Title IX were different in purpose and scope than a criminal justice proceeding. The new rules require schools to establish "reasonable" promptness and allow for delays such as criminal proceedings. Criminal proceedings often take much longer than campus adjudication processes. Each day without a resolution can feel like a lifetime to victims of sexual harassment, abuse, and assault. The effects of trauma can leave victims barely hanging on as they try to stay on track in classes, social connections, and other obligations and activities. Allowing schools to pause their investigations while awaiting criminal justice outcomes leaves victims without school-based remedies for an indefinite period of time and ultimately the larger campus less safe.

## **Live hearings with cross-examination**

Past guidance required schools to conduct proceedings in a trauma-informed manner. They were strongly encouraged to collaborate with subject matter experts, such as rape crisis centers when developing policies and ensuring victims could access services. Furthermore, guidance and federal law under the Violence Against Women Act, required schools to adequately train Title IX coordinators, investigators, and decision-makers in the dynamics of sexual violence. The new rules require post-secondary schools to conduct live hearings with cross-examination, conducted by parties' advisors of choice—despite the re-traumatizing effects this format is likely to have on victims. This rule change was proposed to better scrutinize testimony and the credibility of parties. Given what is known about the counterintuitive aspects of trauma and its effects on victims, coupled with the pervasiveness of rape myths and victim-blaming—it is likely that this rule change will result in a dangerous chilling effects in sexual assault reporting. It will be imperative that victims have access to attorneys who can advocate on their behalf in this realm.

## **Standard of evidence**

Past guidance strongly encouraged schools to use the preponderance of evidence standard for investigating and resolving Title IX misconduct. This standard is generally understood as "50% and a feather," meaning, it is more likely than not to have occurred. This is the standard upheld by the U.S. Supreme Court in civil matters and is widely used to adjudicate other forms of student misconduct on campuses throughout the country. The new rules encourage schools to choose between preponderance OR a clear and convincing standard of evidence. The latter is a much higher standard that resembles a "beyond a reasonable doubt" standard used in criminal proceedings. Furthermore, schools may use clear and convincing only in adjudicating Title IX cases, which could create a discriminatory effect against victims of sexual harassment, abuse, and assault on college campuses.

## **Informal resolution**

Past guidance prohibited schools from applying informal mediation to sexual misconduct cases. The past guidance saw this as problematic given power differentials that may exist between a victim and perpetrator. The new rules allow for voluntary mediation, if all parties agree. It will be important to ensure victims are not pressured—by schools or offenders—to participate in such formats and that they have the right to pursue a formal investigation and resolution.