

Office of Information and Regulatory Affairs meeting talking points

Schools face a contradictory legal landscape between new regs and state laws:

- [Oregon House Bill 3077](#) amending ORS 342.704 (2019) all complaints must be investigated, including off-campus harassment
 - [Sexual harassment is defined as] (B) Unwelcome conduct of a sexual nature that is physical, verbal or nonverbal and that [has the purpose or effect of unreasonably interfering] interferes with a student's [educational performance] educational program or activity or that creates an intimidating, offensive or hostile educational environment;
 - (d) When a staff member becomes aware of behavior that may violate the policy, the staff member shall report to a district official so that the district official and the staff member may coordinate efforts to take any action necessary to ensure the student is protected and to promote a nonhostile learning environment
 - The policies apply to persons who:
 - (A) Are on or immediately adjacent to school grounds or district property;
 - (B) Are at any school-sponsored or district-sponsored activity or program; or
 - (C) Are off school or district property, if a student or staff member acts toward the person in a manner that creates a hostile environment for the person while at school or a school-sponsored or district-sponsored activity or program.
- Washington [RCW 28A.640.020](#):
 - "Sexual harassment" as used in this section means unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact, or other verbal or physical conduct or communication of a sexual nature if:
 - (iii) That conduct or communication has the purpose or effect of substantially interfering with an individual's educational or work performance, or of creating an intimidating, hostile, or offensive educational or work environment.

How NPRM affect K-12 students:

- Reduces without justification protections against off-campus sexual harassment because schools must dismiss off-campus harassment that's outside a school program or activity, including most online harassment (and contradicts state law)
- Reduces without justification on-campus sexual harassment because under the NPRM only the most severe cases can be investigated, without considering what constitutes severe harassment for different developmental levels
- Incentivizes schools to downplay or devalue severity of harassment so that they are not accountable for investigating
- Reduces without justification schools' obligations to respond to reported sexual harassment because schools must ignore those reports that are not made to certain staff

Impact on families:

- Families turn to us in frustration when their schools delay or do nothing in response to their complaints and appeals to remedy the sexual harassment that hampers their children's education. When schools ignore or mishandle these situations, families who cannot afford attorneys have few recourses for holding schools accountable other than filing a complaint with the Department of Education Office for Civil Rights. The proposed regulations would close even this avenue for parents: schools would justify ignoring sexual harassment complaints because the harassment wasn't "severe, pervasive, and objectively offensive," or the proper school official didn't receive "actual notice," or the harassment occurred "off-campus." As a result, fewer families would bother reporting sexual harassment and harassers would feel emboldened.

Sexual harassment definition:

- The proposed rule defines sexual harassment as "unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the [school's] education program or activity" and requires that schools dismiss complaints of harassment that do not meet this standard. Schools would be required to ignore the student's Title IX complaint if the harassment has not yet advanced to a point that it is actively harming a student's education, even if it involved harassment of a minor student by a teacher or other school employee. Moreover, the proposed rules offer no guidance as to what "severe" and "objectively offensive" harassment looks like in elementary, middle, or high school.
- The proposed definition limits schools' responsibility to only the most extreme forms of in-person, physical, and ongoing sexual harassment. It does not encompass the breadth of experiences that K-12 students face: dating violence, stalking, cyber harassment, bullying, and hazing, all of which can deny a student equal educational opportunity on the basis of sex.
- Schools must untangle competing definitions of sexual harassment under federal and state laws

Actual knowledge:

- Under the proposed rules, schools would be responsible for addressing sexual harassment only when certain school employees have “actual knowledge.” The Department currently requires schools to address student-on-student sexual harassment if almost any school employee either knows about it or should reasonably have known about it. Many students disclose sexual abuse to the adults they trust the most and not to those who have the authority to take corrective measures because students are not informed which employees have authority to address the harassment.
- It’s especially impractical to require young students, who see all adults as authority figures, to distinguish responsible employees from other school staff. If a K-12 student told a non-faculty school employee they trust—such as a guidance counselor, teacher aide, or athletics coach—that they had been sexually assaulted by another student, the school would have no obligation to help that student, and the reporting student would be discouraged from making a second attempt.
- Additionally, the proposed “actual notice” rule creates potential complications in jurisdictions where all K-12 school staff are mandatory reporters. In these cases, the coach or nurse must notify either law enforcement or child welfare agency of possible child abuse, creating scenarios where the school does not officially recognize that sexual assault occurred, even while public safety organizations are put on notice of possible child endangerment.

Harassment outside of school activities

- Cyber sexual harassment among K-12 students is pervasive, both on-and off-campus, and its harmful effects have motivated some states to enact anti-cyberbullying statutes, such as Grace’s Law in Maryland.
- The proposed rules would require schools to ignore all complaints of off-campus or online sexual harassment that happen outside of a school-sponsored program—even if the student is forced to see their harasser at school every day and the harassment creates a hostile educational environment. The Department’s proposed rules even contradict its own findings in the recent case of Chicago Public Schools that sexual harassment that happens off campus and outside of a school activity is no less traumatic than on-campus harassment.

Investigation time frame

- Many K-12 students and parents who contact SSAIS complain that when they inform school officials about sexual harassment or assault, there’s no immediate response or action taken. Whereas the Department’s previous guidance recommended that schools complete their Title IX investigations within 60 days, the proposed rules mandate only that such investigations be “reasonably prompt” and permit schools to postpone investigations until completion of “law enforcement activity,” which might extend for months. Meanwhile, as schools take no action, students reporting sexual harassment continue to experience retaliation and other forms of re-victimization that prevent them from keeping up academically, participating in school activities, or attending school at all.

Proposed rules put extra burden on districts to manage complaints

- The Department notes that if conduct does not meet the proposed rule's definition of harassment or occurs off-campus, schools may still process the complaint under a different conduct code, but not Title IX. This "solution" to its required dismissals for Title IX investigations is confusing and impractical. The proposed regulations offer no guidance for schools to offer parallel sexual harassment proceedings that do not comply with the detailed and burdensome procedural requirements set out in the proposed rules. Schools that did so would no doubt be forced to contend with respondents' complaints that the school had failed to comply with the requirements set out in the NPRM and thus violated respondents' rights.
- It's not clear at all how much the proposed rules would result in cost savings for K-12 schools. Even if the new regulations deter families from seeking monetary relief through a Title IX private right of action, schools would still have liability risk under state non-discrimination statutes and tort laws. In fact, when that legal avenue is closed, reporting parties would more likely pursue recourse through state and local laws, resulting in increased litigation costs for school districts.
- Moreover, were the Department to approve the proposed rules, schools would face additional real costs in staff training, professional development, and legal consultation on policy changes. Money-strapped school districts simply do not have financial resources to implement the proposed rules.

Education not regulation

- SSAIS hears regularly from families across the county who express shock, dismay, and frustration that their elementary or secondary schools have failed to respond promptly, equitably, and compassionately to reported sexual harassment that prevents their students from enjoying the same academic and extracurricular activities other students enjoy. They feel bewildered and betrayed by the institution to whom they have entrusted their children's safety, well-being, and academic growth.
- By proposing the regulations in the NPRM, the Department is taking precisely the wrong approach. The solution to K-12 schools mishandling sexual harassment complaints isn't regulatory, but educational.
- We strongly urge the Department to withdraw the NPRM and instead offer school districts training and technical assistance, amplifying its 2001 guidance, which addressed due process, freedom of speech, confidentiality, and proactive measures as they apply to Title IX. It's imperative that all school staff have fair and effective Title IX guidance so we can stop the cycle of sexual harassment and assault in K-12 schools, colleges, the workplace and beyond.