

The 2020 Title IX Regulations and the Lawsuits Against Them: An Analysis and Comparison

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Table of Contents

Background on Title IX	2
The New Title IX Regulations	2
<i>The Definition of Sexual Harassment</i>	3
<i>Location of the Sexual Harassment</i>	4
<i>Reports of Harassment and Formal Complaint Process</i>	4
<i>Standard of Evidence</i>	5
<i>Investigation Proceedings</i>	5
<i>Hearing Process</i>	6
<i>Appeal Process</i>	6
<i>Informal Resolutions</i>	7
Overview of the Plaintiffs and Defendants	7
Location of the Lawsuits	8
Preliminary Injunction Process	8
Overview of the Main Argument of Each Lawsuit	9
<i>The States' Lawsuit by 18 Attorneys General</i>	9
<i>The New York Lawsuit</i>	9
<i>The ACLU Lawsuit</i>	9
<i>The National Women's Law Center Lawsuit</i>	10
Grievances with the New Regulations	10
Claims of Harm.....	12
<i>Similarities</i>	12
<i>Differences</i>	13
Causes of Action.....	14
<i>Overview of the Administrative Procedure Act</i>	14

Similarities.....	14
Differences	16
What They Are Asking For.....	17
Similarities.....	17
Differences	18
Conclusion.....	18
Bibliography	19

Background on Title IX

On May 6, 2020 U.S. Secretary of Education Betsy DeVos released her new rules and regulations for how organizations which receive federal education funding must comply with Title IX. Title IX is a federal law which protects those participating in educational programs from discrimination on the basis of sex.

Specifically, Title IX mandates that:

“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 education program or activity receiving Federal financial assistance.”¹

The law has been widely utilized to ensure educational institutions take steps to prevent sexual harassment and assault, as well as assist survivors of sexual harassment in continuing their education and achieving justice. The new rules regarding Title IX specifically regulate how educational institutions must respond to allegations of sexual assault and harassment on their campuses.

The new regulations, crafted under Secretary DeVos, will go into effect on August 14 unless blocked in court and are the result of a more than 2 year process by DeVos’s department to change the previous guidelines created under President Obama. Under the Obama administration, a number of “Dear Colleague” letters had been released instructing institutions receiving federal educational funds on how to comply with Title IX. These instructions were only suggestive, and did not maintain the force of law. However, they were generally adopted by a large number of educational institutions. The letters reinforced and refined policies concerning the implementation of Title IX which had been in place since Title IX’s adoption in 1972.

The New Title IX Regulations

Since President Trump’s election in 2016 and Secretary DeVos’s appointment to her position as Secretary of Education, both have routinely criticized the Obama administration’s regulations, arguing that they do not protect the rights of those accused of violating Title IX. Therefore, once both assumed

¹ “Title IX and Sex Discrimination.” Policy Guidance. US Department of Education (ED), January 10, 2020. https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html.

office, the Department of Education began working to draft new regulations for Title IX compliance. This work culminated in the release of the new Title IX regulations in May 2020.

The Department of Education claims that the new rules focus on creating a grievance process which “restores due process” protections for all students, including those accused of violating Title IX.² However, many have criticized the new regulations, arguing that they will drastically reduce protections for victims of sexual harassment and assault, as well as reduce the amount of responsibility educational institutions have to prevent sexual harassment and assault. On February 14, 2020 every Democratic member of the Committee on Oversight and Reform wrote to Secretary DeVos, criticizing the new rules and stating that they would “deprive survivors of equal access to education under the law.”³ When the new rules were released to the public for a legally-mandated comment period before they were finalized, the Department received an overwhelming number of comments, the majority of which were negative. However, the Department continued to pursue and refine the new rules, eventually releasing them only a few months ago.

The new rules make a number of changes to existing Title IX policy, including changing the definition of sexual harassment, limiting the types of harassment an educational organization is required to respond to, and mandating that educational institutions follow a highly-prescriptive grievance procedure once an allegation of sexual harassment or assault has been brought to their attention. While the regulations do not apply to any ongoing Title IX investigations regarding conduct that occurred before August 14, 2020, they do apply to all relevant conduct concerning Title IX that occurs after this date. In response, four lawsuits were filed by a variety of organizations and states attempting to block the regulations from being upheld and going into effect.

Below is a description of many of the changes the new regulations make to existing Title IX policy:

The Definition of Sexual Harassment

Under the Obama administration, part of the definition of sexual harassment protected under Title IX was “unwelcome conduct so serious, pervasive, **or** objectively offensive that it effectively denies a person equal access” to educational opportunities.⁴ This included conduct that may have not been physical, such as sexual jokes or comments, as well as conduct which may have only occurred once but which was particularly severe and offensive. Many in the Trump administration criticized this definition for being too broad and for policing students when they were practicing their right to free speech. In the new rules, the Department of Education explicitly addressed this worry, stating that “severity **and**

² “Secretary DeVos Takes Historic Action to Strengthen Title IX Protections for All Students | U.S. Department of Education,” May 6, 2020. <https://www.ed.gov/news/press-releases/secretary-devos-takes-historic-action-strengthen-title-ix-protections-all-students>.

³ “Murray, Democratic Senators Urge DeVos to Rescind Harmful Title IX Rule and Focus on Student Safety | The U.S. Senate Committee on Health, Education, Labor & Pensions,” June 4, 2020. <https://www.help.senate.gov/ranking/newsroom/press/murray-democratic-senators-urge-devos-to-rescind-harmful-title-ix-rule-and-focus-on-student-safety>.

⁴ Gersen, Jeannie Suk. “The Rights and Wrongs of Federal Guidelines on Sexual Assault | The New Yorker.” The New Yorker, February 1, 2019. <https://www.newyorker.com/news/our-columnists/assessing-betsy-devos-proposed-rules-on-title-ix-and-sexual-assault>.

pervasiveness are needed elements to ensure that Title IX's non-discrimination mandate does not punish verbal conduct in a manner that chills and restricts speech and academic freedom, and that recipients are not held responsible for controlling every stray, offensive remark that passes between members of the recipient's community."⁵

As such, in the new rules, a 3-pronged definition of sexual harassment is created. The first portion of the definition protects students from any quid pro quo harassment, meaning a person employed by the educational institution can not offer access to or advancement in an educational program in exchange for sexual favors. The second portion of the definition states that sexual assault, dating and domestic violence, and stalking are all forms of sexual harassment that students are protected from under Title IX. The third portion of the definition is the most controversial. In it, the rules change the former Obama-era definition to instead mandate that students are only protected under Title IX from a hostile environment of sexual harassment when the unwelcome conduct which creates this environment is so "severe, pervasive **and** objectively offensive that it effectively denies a person equal access to" their education. The choice to switch from the word "or" (as used by the Obama administration) to the word "and" drastically limits the type of sexual harassment students are protected from under Title IX. This change is included in every lawsuit against the new rules, which all argue that the change will severely limit the protections students have from sexual harassment under Title IX.

Location of the Sexual Harassment

Under the new regulations, the location of the sexual harassment determines whether or not educational institutions are required to protect students from it under Title IX. According to the new regulations, if the sexual harassment occurred outside of an educational program or activity, educational institutions do not have to conduct a Title IX investigation regarding the conduct. This means that all harassment that occurs at the postsecondary level at off-campus parties or houses, spaces which are not officially recognized by the institution, will no longer be protected under Title IX. Additionally, if the harassment occurred outside of the United States, such as during a study abroad program, the institution no longer has to address the conduct under Title IX. Furthermore, if the complainant (the person who alleges they were harassed) is no longer participating or attempting to participate in the programming offered by the educational institution, the institution cannot under Title IX investigate the conduct that the complainant alleges occurred. Finally, although not required to do so, organizations have the option to dismiss all Title IX complaints filed against those who no longer are participating in or attempting to participate in their educational programming. Many of the lawsuits cite worries that these location-based limitations on the scope of Title IX will drastically decrease the amount of conduct educational institutions are allowed to protect their students from.

Reports of Harassment and Formal Complaint Process

Under the new regulations, different standards are created for postsecondary and K-12 institutions as to who must be notified in order for a Title IX investigation to be initiated. Under the new rules, all those

⁵ Melnick, R. Shep. "Analyzing the Department of Education's Final Title IX Rules on Sexual Misconduct." Brookings (blog), June 11, 2020. <https://www.brookings.edu/research/analyzing-the-department-of-educations-final-title-ix-rules-on-sexual-misconduct/>

who work in a K-12 educational space, including bus drivers, janitors, and other staff, are required to report to the Title IX coordinator any allegations of sexual harassment they are made aware of. After this point, the school becomes responsible for initiating a Title IX investigation.

While this greatly expands the number of staff responsible for reporting Title IX complaints to the school at the K-12 level, at the postsecondary level the number of responsible staff is reduced. Under the new regulations, only formal complaints submitted in writing to the Title IX coordinator are required to be investigated by the postsecondary institution. Previously, postsecondary institutions were required to investigate any sexual harassment allegations if a responsible employee knew or should have known that the harassment occurred, with a responsible employee being defined as anyone whom the student could believe had the authority to address the issue. However, under the new rule, postsecondary institutions only have to begin a Title IX investigation if a limited number of officials - those with the authority to institute corrective measures or those who have actual knowledge of the incident – are made aware of the conduct. Many of the lawsuits argue that this will drastically limit the number of Title IX violations that are reported at the postsecondary level, and will cause victims to undergo a number of onerous procedural steps before their educational institution is forced to investigate their allegation.

Standard of Evidence

Under the new regulations, schools can choose to utilize one of two standards of evidence when determining whether a person accused of violating Title IX is guilty of doing so. The rules stipulate that the educational institution can either use the **preponderance of the evidence standard** or the **clear and convincing evidence standard** when making determinations in Title IX cases. Previous regulations regarding Title IX had only necessitated that the preponderance of the evidence standard be utilized in investigations. This standard of proof is easier to meet than the clear and convincing evidence standard, and only necessitates that there is a greater than 50% chance that the person accused of violating Title IX (the respondent) is guilty of doing so.⁶ In contrast, the new clear and convincing evidence standard requires that decision-makers in Title IX cases be convinced that it is much more likely than not that the respondent is guilty of violating Title IX.⁷ The new regulations further stipulate that the same standard of evidence has to be utilized in both Title IX cases involving students and faculty members and Title IX cases which only involve students. Although this would seem to give educational institutions some power over how they choose to comply with Title IX, some of the lawsuits argue that this is not the case. As many educational institutions have union agreements with their staff to utilize the clear and convincing evidence standard in all Title IX investigations involving staff members, many of the lawsuits argue that the regulations will force educational institutions to utilize a harsher burden of proof in Title IX investigations than previous regulations regarding Title IX did.

Investigation Proceedings

Once a Title IX complaint has been filed, the new rules lay out very prescriptive grievance procedures for how schools must conduct a Title IX investigation. All evidence gathered during the course of the

⁶ LII / Legal Information Institute. "Preponderance of the Evidence." Accessed July 28, 2020. https://www.law.cornell.edu/wex/preponderance_of_the_evidence.

⁷ LII / Legal Information Institute. "Clear and Convincing Evidence." Accessed July 28, 2020. https://www.law.cornell.edu/wex/clear_and_convincing_evidence.

investigation must be given to both parties, no matter the nature of the documents. This has raised concerns about the level of privacy afforded to complainants and is cited in a number of the lawsuits as being in violation of FERPA, the federal law which protects the confidentiality of student information. During the course of the investigation, measures cannot be taken to help the complainant if they harm or impeded the respondent in any way. This may mean that steps which could help the complainant remain in school, such as making the respondent move out of the dorm that they share with the complainant, or changing the respondent's course schedule so that they do not share classes with the complainant, may no longer be allowed because they could place an undue burden on the respondent.

Hearing Process

Once an investigation has been completed by the educational institution, the new regulations mandate that a formal hearing process take place at the postsecondary level for all Title IX cases. The regulations specify that these hearings must include a cross-examination of all those involved in the case, including the complainant, as well as all those who presented evidence during the investigation, such as nurses or law enforcement officials. The new regulations bar specific evidence from being included in the decision regarding the investigation's outcome if the provider of that evidence cannot be cross-examined. As an educational institution does not have the power to subpoena, this means that all those who do not wish to be cross-examined can have the evidence they provided excluded from the decision regarding the investigation's outcome, no matter how crucial or relevant that evidence is.

The regulations further specify that both parties in the investigation must be cross-examined by an advisor of the other party's choosing. This advisor can be an attorney, but does not have to be. The advisors are allowed to ask whatever questions they wish of the parties, as long as they do not relate explicitly to either party's sexual history. A third party, separate from the Title IX coordinator who conducts the investigation, is charged with presiding over the hearing and deciding the final outcome of the investigation. That third party must make decisions in real time about whether each question asked by the advisors is permissible, and must give an explanation for their decision. While the complainant can request that the hearing take place via video-conference, this is the only accommodation given to the complainant in the hearing process. Many of the lawsuits point out that this new protocol will be extremely damaging to the complainant, who will be asked possibly re-traumatizing questions by their alleged harasser's advisor. Even being in the same room with their alleged harasser can be traumatizing for victims and the thought of this procedure, many of the lawsuits argue, may deter victims from reporting Title IX complaints in the first place.

While these procedures only apply to postsecondary institutions, the regulations specify that K-12 schools can choose to utilize live hearings if they wish. The regulations also do not provide exceptions for minors who attend postsecondary institutions or K-12 schools that are affiliated with or are located on land owned by postsecondary institutions. This means that minors who attend these types of institutions will have to undergo the hearing process if they are involved in a Title IX investigation.

Appeal Process

The new regulations specify that either party involved in a Title IX investigation can request an appeal after a final decision regarding the investigation has been reached. The regulations specifically state that

an appeal can be requested if one party believes that the investigation was not conducted in accordance with federal regulations. Appeals can also be granted if one of the parties believes that newly-discovered evidence may change the outcome of the investigation, or if they believe one of the people involved in the investigation or final decision-making process was biased and had a conflict of interest. Many of the lawsuits argue that this will unnecessarily draw out the Title IX investigative process, potentially stopping victims from receiving justice and deterring more from reporting Title IX violations in the first place. Other lawsuits argue that this portion of the regulations gives rights to those involved in Title IX investigations that have nothing to do with furthering the purpose of Title IX itself.

Informal Resolutions

The new regulations also allow for the use of an informal resolution process instead of a formalized grievance process if both parties agree to it. Previous Title IX policies had discouraged the utilization of such resolution strategies, worrying that subtle manipulation could occur during the course of the process. However, the Department of Education argues that the inclusion of the process in the new regulations will give complainants more options in how they choose to proceed with their Title IX complaint. With the strict formal grievance processes enacted by the new regulations, some of the lawsuits cite the concern that students may choose to follow an informal resolution process, even if they want a more formal process in which the respondent could face harsher punishment, because they do not want to undergo the trauma of a live hearing.

Overview of the Plaintiffs and Defendants

In response to the new rules, four groups have filed lawsuits against Secretary DeVos and the Department of Education in an attempt to stop the regulations from going into effect. While all four lawsuits argue that the new rules are illegal, their arguments for why, as well as their claims about the harms the new rules will cause, vary.

The first lawsuit to be filed was by the **American Civil Liberties Union (ACLU)** on behalf of 4 organizations which support survivors of sexual harassment and assault – Know Your IX, Council of Parent Attorneys and Advocates Inc., Girls for Gender Equity, and Stop Sexual Assault in Schools. A month later two more lawsuits were filed by Attorneys General on behalf of their states. One lawsuit, the largest of all those filed, was filed jointly by the **Attorneys General of 17 states and the District of Columbia**. The states involved in the lawsuit are – Pennsylvania, New Jersey, California, Colorado, Delaware, Illinois, Massachusetts, Michigan, Minnesota, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, Virginia, Washington, and Wisconsin. The Attorneys General for the state of **New York** has also filed her own lawsuit on behalf of the state. A few days later the latest lawsuit was filed against the regulations by the **National Women’s Law Center (NWLC)** on behalf of four more organizations supporting survivors of sexual assault and harassment – Equal Rights Advocates, the Victims Rights Law Center, Legal Voice, and the Chicago Alliance Against Sexual Exploitation. The lawsuit was also filed on behalf of a number of victims who have filed Title IX complaints with their individual educational institutions.

All of the lawsuits name both **Secretary of Education Elizabeth DeVos** in her official capacity and the **U.S. Department of Education** as defendants. However, a few of the lawsuits go beyond this to include

other defendants as well. The ACLU and National Women's Law Center lawsuits are the only ones to include **Kenneth Marcus, the Assistant Secretary for Civil Rights at the Department of Education**, as a defendant in the lawsuit. Marcus' department within the Department of Education is the one which will enforce the Title IX rules once they are implemented and Marcus played a large role in creating the new regulations. The lawsuit brought by the 18 Attorneys General is the only one which goes beyond the Department of Education to also name the **United States** itself as a defendant. While the inclusion of these two defendants is not likely to have a large impact on judges' rulings regarding the lawsuits, they show important differences in who the four lawsuits charge with harming the plaintiffs through enacting the new regulations.

Location of the Lawsuits

Each of the lawsuits has been filed in a different court, meaning the judge who will preside over each of the cases will differ. The lawsuit filed by the states' Attorneys General was filed in the U.S. District Court for the District of Columbia, whereas the lawsuit filed by the New York Attorney General was filed in the U.S. District Court for the Southern District of New York. The ACLU's lawsuit was filed in the U.S. District Court for the District of Maryland, where one of the organizations the ACLU is representing in the lawsuit – the Council of Parent Attorneys and Advocates – is located. Finally, the lawsuit filed by the National Women's Law Center (NWLC) was filed in the U.S. District Court for the District of Massachusetts, the state in which the Victim Rights Law Center - one of the organizations the NWLC sued on behalf of – is located. Once a judge has been appointed to each of the cases and the Department of Education has responded to the lawsuits, a formal hearing process will begin. However, without a preliminary injunction being granted, this is not required to occur until early August.

Preliminary Injunction Process

New York's Attorney General took the step of filing for a preliminary injunction last month, hoping to immediately block the new Title IX rules from being implemented while the court case is being decided. However, a judge ruled that the New York Attorney General did not have a substantive enough argument to warrant granting a preliminary injunction and therefore denied her request to do so. The states' Attorneys General also filed a preliminary injunction along with their lawsuit in an attempt to immediately stop the regulations from being implemented. However, only a few days after the New York Attorney General was denied a preliminary injunction in her case, a judge similarly ruled that the states' Attorneys General did not have enough of a case to warrant a preliminary injunction being granted. In both of the above instances, the judges in their decisions stated that the arguments brought on behalf of the plaintiffs are likely not strong enough to prove that the new regulations are illegal and will cause irreparable harm. Although the cases will still go to trial, these initial decisions do not bode well for the plaintiffs. While the National Women's Law Center has also requested a preliminary injunction, a ruling on whether or not one will be granted will not occur until after the new regulations have already been implemented.

Overview of the Main Argument of Each Lawsuit

Although all of the lawsuits rest on a number of similar arguments surrounding the validity of the new rules and the harm that they will cause to victims, each of the lawsuits has a different main theme or argument. Below is an overview of the distinguishing theme of each lawsuit.

The States' Lawsuit by 18 Attorneys General

The [lawsuit](#) brought by the 18 Attorneys General focuses on the argument that under the new regulations educational institutions will be forced to create two different sets of grievance procedures when handling allegations of sexual harassment. The lawsuit argues that educational institutions will be forced to create one procedure as required under Title IX, and another procedure for those incidents which do not fall under the definition of sexual harassment utilized in the new Title IX regulations, but which educational institutions nevertheless want to address and protect students from. The states argue that this will create a large amount of administrative confusion within educational institutions. They further believe that this could lead to a decrease in the number of reports of sexual harassment on campuses, as students and staff will be confused as to which procedure a report falls under and how it will be addressed. The lawsuit argues that the creation of these two procedures will require a large amount of work on the part of administration officials who will have to not only craft the new regulations, but also train staff and students on the distinctions between the procedures.

The New York Lawsuit

The New York [lawsuit](#) rests on two main arguments: that the new regulations are designed to protect students accused of sexual harassment, rather than to prevent and address acts of sex discrimination, and that the regulations will stop New York from being able to enforce its Enough is Enough Law, which provides more protections for victims of sexual harassment than those included in the new regulations. The lawsuit argues that under the new regulations, stronger rights are given to accused students than complainants. This is because accused students can file sex discrimination complaints against schools based on the argument that the school violated the procedures required in the new regulations, even if the violation itself is not based on the sex of the accused student. The New York lawsuit argues that the creation of this new right for accused students proves that the regulations were crafted to protect accused students from what the Department of Education has criticized as unfair Title IX investigations, rather than created in an effort to protect survivors of sexual harassment. The state of New York argues that the purpose of Title IX is to protect students from sex-based discrimination, including sexual harassment, not to protect students who are accused of discriminating against others based on sex. The lawsuit further argues that by blocking New York's Enough is Enough law, which requires schools to adopt a number of procedures designed to discourage sexual harassment and provide protections for survivors of it, the regulations further stop states from being able to act in accordance with the purpose of Title IX in a way that best fits the needs of their state. Taken together, these arguments allow the New York lawsuit to make the larger claim that the new rules violate the very purpose of Title IX, a conclusion that a number of other lawsuits brought against the new regulations also come to.

The ACLU Lawsuit

The ACLU [lawsuit](#) focuses on the large differences between how the new Title IX regulations require schools to address claims of sex-based discrimination and how schools are legally-required to address

claims of discrimination based on other characteristics such as race, disability status, and ethnicity. The lawsuit argues that Title IX was modeled off of a number of other anti-discrimination laws such as the Civil Rights Act of 1964, and that it was created with the intent of providing protections for those experiencing sex-based discrimination that are similar to those provided for individuals experiencing other forms of discrimination. As the new regulations stray from the protections and procedures required for those experiencing other forms of discrimination, the ACLU argues in their lawsuit that a “double standard” has been created. They argue that the differences between how schools must address sex-based discrimination versus other forms of discrimination will lead to cases in which students experiencing sex-based discrimination are treated differently than those experiencing other forms of discrimination for no clear reason or purpose. The resulting double standard, the ACLU argues, goes against the intent of senators when they were creating Title IX.

The National Women’s Law Center Lawsuit

The last [lawsuit](#), brought by the National Women’s Law Center, has the most unique argument against the new regulations. The NWLC lawsuit focuses on the argument that the regulations themselves were crafted with, and are based off of, discriminatory sex-based stereotypes that violate Title IX and the Equal Protection Clause. The lawsuit argues that the new regulations are based off of the sex-based stereotype that those who report that they have been sexually-harassed are less credible than those who report that they have experienced other forms of harassment or discrimination based on characteristics such as race or ethnicity. As the majority of those who report sex-based discrimination identify as female, the NWLC lawsuit argues that this stereotype is inherently sexist, because it assumes that women and girls are less credible than those who report other forms of discrimination, who are more likely to be spread across all genders. The NWLC lawsuit includes a number of quotes from Secretary of Education Betsy DeVos, as well as others in the Trump administration, in which they question the legitimacy of sexual harassment claims, including allegations of sexual assault. The lawsuit utilizes these quotes to make the larger argument that the regulations themselves were crafted with this stereotype in mind, leading the creators of the new regulations to decrease protections for survivors of sex-based discrimination and focus on ensuring due process protections were implemented for all those involved in investigations surrounding sex-based harassment. Thus, the lawsuit argues that the rules were created based on sex-based stereotypes instead of the desire to further limit sex-based discrimination, and therefore violate Title IX itself as well as the Equal Protection under the law afforded to everyone by the Constitution.

Grievances with the New Regulations

Although each lawsuit has a distinguishing argument, many of them have similar grievances with the new regulations that they cite as justification for their claims.

One of the main grievances discussed by all of the lawsuits is the redefinition of sexual harassment included in the new regulations. All of the lawsuits argue that this definition will end up hurting students and will stop Title IX from protecting students from a number of different forms of harassment that they may face while receiving an education. The new definition is taken from a Supreme Court ruling which outlined a definition of sexual harassment that should be utilized for Title IX cases brought against universities by students seeking monetary damages due to a lack of response to their harassment on the

part of their university. At the time of the court ruling, the Department of Education reaffirmed that the definition only applied to cases in which the plaintiff was seeking monetary damages and should not be utilized by universities when conducting internal Title IX investigations. However, this affirmation was not codified into an official Department rule, a fact that has been utilized by the current administration to defend the standard's sudden inclusion in the new regulations. Three out of the four lawsuits, all but that brought by the ACLU, argue that the standard was never meant to be utilized by educational institutions in internal Title IX investigations and that therefore its inclusion in the new rules is improper and goes against the very wishes of the Supreme Court. The lawsuits go on to argue that these changes make the new regulations contrary to the purpose of Title IX, which they argue is to protect students from any form of sex-based discrimination that they may face while trying to receive an education, even if that discrimination is not "severe, pervasive, **and** objectively offensive."

Many of the lawsuits also target the new grievance procedures for Title IX investigations outlined in the new regulations as a source of further harm. Every lawsuit except the ACLU lawsuit criticizes the new procedures as harmful to survivors and as a possible source of further trauma. The National Women's Law Center argues that the Department of Education, when creating the regulations, mistakenly conflated procedures necessitated by the criminal justice system's due process protections with the proceedings utilized in school disciplinary hearings for civil rights cases. As Title IX cases at the school-level are not part of the criminal justice system, but are separate civil rights proceedings that are included as part of school administrative practices, the NWLC argues that the same protections afforded to both parties in a criminal justice investigation are not necessary or required in the case of Title IX proceedings, making many of the new proceedings outlined in the rules unnecessary. One of the protections the NWLC cites as unnecessary is what they call an "unfair presumption of non-responsibility by the respondent," meaning that those accused of a Title IX violation are assumed to be innocent until proven guilty. The NWLC argues that Title IX itself requires that an equitable resolution of all complaints be arrived at, and ensures that the credibility of both parties is not determined based on their status. They argue that the presumption of non-responsibility conflicts with these requirements by automatically assigning a status to the respondent before the investigation has even begun. Furthermore, they argue that many of the protections afforded to those in the criminal justice system, such as procedural protections on the types of questions that can be asked, are not afforded to those undergoing the new procedures. The lawsuit points out that the new regulations' requirement that all evidence in investigations be dismissed if the person who provided it is not available to be cross-examined goes far beyond even the regulations surrounding a criminal investigation. Overall, although many of the lawsuits discuss the new grievance procedures, the NWLC lawsuit is the lawsuit which most extensively focuses on them and argues that they go beyond the mandate of Title IX as well as are unnecessary and burdensome to survivors.

Many of the lawsuits also challenge the reporting requirements for postsecondary institutions included in the new regulations. Specifically, the lawsuits criticize the limitations placed on who within the postsecondary institution must be notified in order for a mandated Title IX investigation to be started; limitations which, they argue, will chill reporting of sexual harassment on campuses. Furthermore, some of the lawsuits criticize the new regulation's mandate that only those postsecondary institutions which

show “deliberate indifference” when responding to sexual harassment reports will be charged with violating Title IX. The ACLU lawsuit specifically cites this grievance, arguing that schools are required to take prompt and effective steps to limit other forms of harassment on their campuses and that the new rules would lower these requirements only for harassment which is sex-based.

The lawsuits filed by the New York Attorney General as well as the states’ Attorneys General, focus on a specific portion of the new regulations called the preemption clause. This portion of the regulations requires that all laws enacted by states which conflict with the new regulations be immediately invalidated, and orders that the new regulations supersede them. The lawsuits argue that this regulation stops schools and states from enacting policies and laws which best fit their circumstances. Additionally, these lawsuits argue that the preemption clause would stop states and schools from enacting policies which operate under the guise of Title IX but provide more protections for survivors than the new regulations do. Due to the fact that all of the lawsuits argue that the new rules drastically limit both the protections afforded to survivors and the types of conduct schools are required to address and protect students from, this argument is critical. In effect, the lawsuits allege that the new regulations strip protections for survivors and then stop states and schools from enacting protections for survivors that go beyond what are provided in the new regulations. Instead, both the 18 Attorneys General and the New York Attorney General argue that schools and states should be given more discretion in deciding how to handle Title IX policy.

Claims of Harm

In addition to the grievances expressed in the lawsuits, each lawsuit also includes a list of the harms the new regulations will cause to the plaintiffs. While some of these harms are similar, others are specific to the type of plaintiff involved in the lawsuit.

Similarities

One of the largest claims of harm cited by all of the lawsuits is the direct cost imposed on the plaintiffs by having to understand and create policies which comply with the new regulations, which will necessitate a diversion of resources away from other portions of the plaintiffs’ work. The states’ lawsuit highlights this point the most, as the main argument of the lawsuit is that the regulations necessitate the creation of two separate grievance processes which will require a large amount of resources and time to create. Many of the lawsuits also cite the claim that the timeframe for the implementation of the new rules was too short, especially due to the fact that schools have had to adapt to COVID-19. The Department of Education only gave educational institutions 3 months to comply with the lengthy new regulations, which are almost 2,000 pages and which were released during the middle of the COVID-19 pandemic. A group of education institutions has already sent a letter to Secretary DeVos, asking her to delay the implementation date of the new regulations due to the ongoing pandemic. However, the Department has so far refused to do so. Many of the lawsuits argue that due to the ongoing struggles associated with adapting educational institutions to deal with the pandemic, the plaintiffs do not have the resource capacity to create guidelines in compliance with the new regulations at this time.

The lawsuits filed by both the 18 Attorneys General and the state of New York list a number of claims of harm surrounding their sovereign and quasi-sovereign interests. These lawsuits argue that the new

regulations harm the plaintiffs' sovereign interests by interfering with the laws individual states enforce surrounding sex discrimination. These lawsuits cite the preemption clause included in the new regulations as the cause of this harm, and argue that the regulations hurt states by stopping them from being able to enforce laws aimed at eliminating sex-based discrimination. The lawsuits also argue that the regulations hurt the states' quasi-sovereign interests by harming students who the states are responsible for protecting. The lawsuits explain that the regulations do this by stopping students from gaining the protections that they need following instances of sex-based harassment.

Due to the nature of the plaintiffs, instead of focusing on sovereignty, the lawsuits filed on behalf of advocacy groups by the ACLU and the NWLC instead focus on the harm the new rules would cause to the missions and operations of the plaintiff organizations. These lawsuits argue that the plans many of the plaintiffs had for Fall 2020 have had to be put on hold due to the need to understand and comply with the new regulations, and that a number of resources have had to be diverted to this cause. Similarly, the lawsuits argue that those plaintiffs who specifically work to help survivors of sexual harassment through the legal system will now have to focus on fewer cases of sex-based harassment. This is because, the lawsuits argue, these cases will take longer to resolve due to the new regulations and will likely have to be taken to court because of the lack of protections given to survivors during Title IX investigations at their educational institutions.

Differences

Despite many of the claims of harm made by the lawsuits being similar, a few of the lawsuits cite unique claims of harm not utilized in other lawsuits.

While both of the lawsuits brought by states cite the need to protect those residing in their states from the harmful effects of the new regulations, only the New York lawsuit cites the specific need to protect the civil rights of the people residing in the state. The New York lawsuit specifically argues that the new regulations will disproportionately harm women, LGBTQ+ students, students of color, and disabled students. This is because those people who identify as such are more likely to experience sex-based discrimination and, the lawsuit alleges, will find it harder to seek redress for their discrimination under the new regulations. The New York lawsuit argues that the state has a duty to protect the civil rights of these students, and that the new regulations will harm their ability to do so.

The National Women's Law Center's unique claim of harm stems from their argument that the Department of Education had a discriminatory intent when creating the regulations because they were motivated by the sexist stereotype that those who report sex-based discrimination, women and girls, are inherently less credible than those who report other types of discrimination. The lawsuit argues that those affected by the new regulations, namely women and girls who are supported by the plaintiff organizations, will be harmed by them. This is because, the NWLC argues, under the new regulations, these victims will have a harder time seeking and gaining justice for the discrimination that they face.

Causes of Action

After describing both the problems that will occur as a result the new regulations and the direct harms the regulations will cause to the plaintiffs, the lawsuits go on to discuss the reasons why the new regulations violate the law.

Overview of the Administrative Procedure Act

All four lawsuits cite two main claims for their causes of action. The first claim is that the regulations violate the law because the procedure that was used to produce them was illegal. The second claim is that the regulations violate the law because their content itself is illegal. All of the lawsuits utilize the **Administrative Procedure Act** to make both of the above points. The Administrative Procedure Act (APA) is a law passed in 1946 which dictates how government organizations, such as the Department of Education, must issue new regulations. The APA requires that government organizations publish a notice of proposed rulemaking, which outlines what the organization expects the new regulation to include, before the final rule is implemented. The organization must also allow time for a comment period in which the public can respond to the proposed regulations. The organization then has to read through those comments and utilize them when crafting the final rule, which cannot include any new material that the public was not given time to comment on. These procedural requirements are necessary for a government agency to undertake before the new regulation they are creating can have the force of law behind it.

Additionally, the APA includes limitations on the content that can be included the regulations government organizations seek to create. The APA dictates that the new regulations cannot include prescriptions of action that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”⁸ If a court finds that the content of the new regulations has violated this portion of the APA, the court is required to strike down those portions of the regulations and invalidate them. Usually, regulations are found to be in violation of this portion of the APA if the court determines that the government agency which created the regulation utilized a rational or provided a factual basis for the new regulations that was unreasonable. Additionally, a regulation can be found to be in violation of the APA if the governmental organization that enacted it went beyond the statutory authority it was given by Congress in order to do so, meaning that the organization sought to regulate the actions of the American public in a way that went beyond the authority given to them by Congress.

Similarities

All of the lawsuits argue that the new regulations violate the procedural requirements of the APA. The lawsuits focus specifically on the cost-benefit analysis utilized by the Department of Education to calculate the proposed cost of the final regulations. They argue that the Department of Education did not provide a methodology for their cost-benefit analysis and did not provide a sufficient justification for why they included certain benefits and costs in their analysis but excluded others. One of the costs the lawsuits cite as being excluded from the Department of Education’s cost-benefit analysis is the cost that will likely be imposed on victims of sexual harassment due to the fact that educational institutions will

⁸“Arbitrary-or-Capricious Test | Center for Effective Government.” Accessed July 28, 2020. <https://www.foreffectivegov.org/node/2625>.

no longer be required to investigate as many forms of sexual harassment, even though this harassment itself will not cease.

Many of the lawsuits also argue that the new regulations violate the procedural requirements of the APA because multiple portions of the final regulations were not included in the initial proposed regulations when they were presented to the public for comment. This means that the public was not given a chance to comment on the harmful effects these portions of the new regulations would have. The states', New York, and NWLC lawsuits all cite the fact that the preemption provision was not included in the original proposed regulations. While these lawsuits also individually cite other portions of the regulations which they argue were not included in the original proposal, overall these lawsuits share the main argument that a number of portions of the regulations were not subject to public comment as required under the APA, and therefore that the Department of Education has violated the law by enacting them.

In addition to arguments that the new regulations violate the procedural requirements of the APA, a number of the lawsuits also argue that the regulations violate the portions of the APA that place limitations on the type of content allowed in new regulations. All of the lawsuits argue that the regulations are "arbitrary and capricious," and therefore under the APA should not be enforced. The lawsuit brought by 18 Attorneys General lists a number of reasons why the regulations are arbitrary and capricious, including the fact that the regulations were released and will take effect during the middle of COVID-19, an argument the NWLC also cites. The states' lawsuit similarly argues that the new regulations are arbitrary and capricious because they include standards of procedure that must be utilized for cases of sexual harassment, but which educational institutions do not have to utilize when responding to other types of discrimination. The lawsuit goes on to argue that the fact that the new regulations greatly narrow the types of sex-based discrimination protected under Title IX further violates the content permitted in regulations under the APA.

The New York and NWLC lawsuits instead argue that the regulations are arbitrary and capricious because they run counter to evidence which indicates the continued rise of sex-based discrimination in education institutions. They further argue that the new regulations rely on factors that Congress did not intend for the Department of Education to utilize when creating regulations surrounding Title IX, such as Supreme Court cases which apply to private Title IX lawsuits. The New York lawsuit continues this argument to make the larger claim that the Department of Education cites no justification for their decision to move away from long-established Title IX policy published under a number of previous administrations. Finally, the ACLU utilizes the arbitrary and capricious section of the APA to argue that portions of the new regulations should not be enforced because they give victims of sexual harassment fewer protections than victims of other forms of discrimination.

All of the lawsuits also argue that the content of the new regulations violates the APA because it goes against the purpose of Title IX, the law the rules are intended to help enforce. The lawsuits brought by both the 18 states and New York argue that, by narrowing the locations where an act of sexual harassment must occur for it to be protected under Title IX, the new regulations violate the purpose of Title IX in its aim to limit sex-based discrimination overall. The states' lawsuit as well as the ACLU lawsuit

further build on this claim to argue that the new definition of sexual harassment under the regulations goes against the purpose of Title IX by limiting the types of sex-based discrimination Title IX works to prevent. Finally, the National Women's Law Center lawsuit argues that the new regulations will undermine Title IX's purpose by eliminating protections for victims, imposing procedural requirements that discourage victims from reporting incidents of sexual harassment, and allowing schools to re-traumatize victims.

Lastly, three of the lawsuits argue that much of the content in the new regulations goes beyond the statutory authority given to the Department of Education by Congress when it charged the Department with crafting laws to enforce Title IX. The states' lawsuit argues that Congress only gave the Department of Education the authority to institute laws that help Title IX operate. It argues that the new regulations do not help enforce Title IX because they mandate that schools dismiss complaints if they don't fit a specific definition of sexual harassment or if they didn't occur in specific places within the US. The states argue that this goes against the goal of Title IX to limit sex-based discrimination no matter its specific location or the severity of the conduct. Similarly, the New York lawsuit argues that the regulations' new definitions and requirements stop schools from enforcing Title IX and ensuring no one is discriminated against based on sex. Specifically, the lawsuit discusses the new grievance procedures for Title IX investigations, which it argues both undermine the autonomy of New York schools to adopt their own procedures and regulate conduct unnecessarily in order to achieve Title IX's purpose. The New York lawsuit also takes issue with the fact that the regulations cast schools' noncompliance with the Department of Education's procedures as a form of sex discrimination and use this to allow students to appeal the final decision of a Title IX investigation without evidence that they have been wronged because of their sex. Finally, the National Women's Law Center argues that the regulations exceed Title IX's purpose of preventing sex-based discrimination because the Department of Education, by issuing the new regulations, is forcing schools to not protect students from discrimination. The lawsuit argues that the Department is doing this through limiting the types of conduct schools are allowed to regulate and stopping schools from enacting harsher regulations than those outlined by the Department of Education.

Differences

Despite all of the lawsuits utilizing the APA as the basis for their arguments that the new regulations are illegal, two of the lawsuits utilize laws besides the APA in order to claim that the new regulations are illegal and should not be enforced.

The National Women's Law Center lawsuit is the only lawsuit that invokes the **5th Amendment**, claiming that the new regulations violate the portion of the 5th Amendment that Supreme Court justices have ruled guarantees equal protection under the law. The lawsuit argues that the new regulations violate the 5th Amendment because they are based on the sexist stereotype that those who report instances of sex-based discrimination are less credible. Only the 14th Amendment, which applies to states not the Federal Government, includes an Equal Protection Clause requiring that people cannot be discriminated against under the law. However, the Supreme Court has consistently ruled that the spirit of the Equal Protection Clause is also included in the 5th Amendment, which applies to the Federal Government, and that that the Federal Government can not therefore discriminate against people under the law based on

a number of personal characteristics, including sex. The NWLC argues that by passing the new regulations, the Department of Education does just this - it discriminates against women and girls, who are disproportionately more likely to file complaints of sex-based discrimination. The lawsuit argues that the regulations are discriminatory because they create much stricter standards for sexual harassment complaints compared to other types of harassment. Thus, the NWLC argues, the Department of Education's decision to single-out sexual harassment as the only type of harassment that necessitates the burdensome requirements outlined in the new regulations is evidence of its desire to discriminate based on sex in violation of the 5th Amendment. The NWLC further argues that the circumstances in which the regulations were issued, during a time when sex-based discrimination complaints are still rampant in educational institutions, as well as statements made by Secretary DeVos and President Trump questioning the validity of sexual harassment, prove this discriminatory intent on the part of the Federal Government.

The lawsuit brought by the 18 Attorneys General also has its own unique cause of action. It is the only one to argue that the new regulations violate the **Family Educational Rights and Privacy Act (FERPA)**. FERPA ensures students' educational records remain private by prohibiting them from being shared with most parties without the consent of a student or, if the student is a minor, their guardian. The states' lawsuit argues that the new regulations violate FERPA by making schools provide all evidence that is part of an ongoing Title IX investigation to both parties involved in the complaint. The states argue that a student's educational record is likely to be part of any Title IX investigation, and thus that the rules would require this information be shared with both parties involved in the investigation. As the new regulations do not specify that a student or their parent must consent before schools are required to share these educational records, the lawsuit argues that the new regulations violate FERPA and a student's right to privacy. It further argues that the Department of Education seems to assume that the new regulations would supersede FERPA, even though this is not constitutionally permissible. While the New York lawsuit also acknowledges that the regulations conflict with FERPA, it cites this fact as part of the larger claim that the regulations are not in accordance with the law under the APA, instead of making this claim a separate grievance.

What They Are Asking For

After making their arguments for the harms that the new regulations would cause and why they should not be legally permissible, all of the lawsuits then ask the court to take specific actionable steps in response to the release of the regulations.

Similarities

Three out of the four lawsuits, all but the lawsuit filed by 18 Attorneys General, urge the court to rule that the regulations are arbitrary, capricious, and an abuse of discretion in violation of the APA. Two of the lawsuits, the New York lawsuit and the NWLC lawsuit, further argue that the regulations should be declared in excess of the Department of Education's statutory authority under the APA. They also urge the court to rule that the Department of Education did not follow proper procedure, as required under the APA, when crafting and implementing the new regulations. If the court were to side with the plaintiffs in any of these requests, it is likely that portions if not all of the new regulations would be declared illegal and stopped from being implemented permanently.

Differences

While all of the other lawsuits urge the court to rule that the entirety of the new regulations are invalid and to stop the regulations from being implemented permanently, the ACLU lawsuit focuses on only a few portions of the regulations which it wants to be declared contrary to law, arbitrary and capricious, and an abuse of discretion under the APA. If the court were to rule in the ACLU's favor on this point, the result would be that those specific portions of the regulations found to be in violation of the APA would be stopped from being implemented, while the rest of the regulations would remain in effect. The specific portions of the regulations which the ACLU wishes the court to declare invalid are: the new limited definition of sexual harassment, the portion of the regulations which allow a Title IX complaint to be dismissed by an educational institution if it does not meet the new definition of harassment or does not occur within the institution's programs and activities, the stipulation that an educational institution is only required to respond to a Title IX complaint if it had "actual knowledge" of the event occurring, the Department of Education's declaration that they will only punish schools if their response to a complaint shows "deliberate indifference", and the fact that the regulations allow, and in some cases require, schools to use the "clear and convincing evidence" standard when ruling on Title IX complaints. All other portions of the regulations, including the new grievance procedures, would remain in effect in this case if the court were to side with the ACLU.

Additionally, due to the differences in causes of action between the lawsuits, it is no surprise that the NWLC lawsuit is the only lawsuit which urges the court to find that the new regulations violate the 5th Amendment. This is tied to the NWLC lawsuit's overall argument that the rule was created based off of a sexist stereotype. Were the court to agree with the NWLC in this argument, it would likely invalidate all of the regulations, stopping them from being enforced.

Conclusion

Overall, the lawsuits outline a variety of similar points surrounding the harms the plaintiffs believe the new Title IX regulations would cause to both victims of sex-based harassment and the plaintiffs themselves. The new regulations are a drastic departure from decades of departmental guidance on how to enforce Title IX and are much more prescriptive than previous administration regulations regarding Title IX. While proponents of the new regulations cite their emphasis on due process as a positive step forward for educational institutions as they conduct Title IX investigations, critics argue that this new emphasis will cause harm to complainants by deterring many from reporting incidents of sex-based harassment and stopping educational institutions from helping those who do. The lawsuits all argue that these harms outweigh any potential benefits that could come from the new regulations. As such, they seek to stop all or portions of the new regulations from taking effect. While each lawsuit cites similar portions of the regulations as especially harmful, and all four cite the APA as the source of the new regulations' illegality, they all also have unique overarching arguments for why the regulations will cause harm and should be declared illegal. Unfortunately, with the failure of the New York Attorney General and the states' Attorneys General to secure a preliminary injunction, educational institutions will be forced to implement the regulations until each of the plaintiffs have their day in court. Until then, it is up to the individual schools to implement protections for their students that go beyond those

outlined in the new regulations in order to counteract some of the negative impact the regulations will have on those attending educational institutions across the country.

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