



Written by [Raven Clabough](#) on August 14, 2020

## Judge Allows New Title IX Rule to Go Into Effect, Marking Major Victory for WH and for Civil Rights

Judge Carl J. Nichols in Washington, D.C., has denied an effort by 17 attorneys general and the District of Columbia to delay implementation of the U.S. Department of Education's Final Rule addressing Title IX obligations, which includes provisions requiring K-12 and post-secondary schools to provide students accused of sexual misconduct with basic due process rights, thereby allowing the rules to go into effect today.



The [new Title IX guidelines](#), issued by the Department of Education under the leadership of Education Secretary Betsy DeVos, are intended to protect “students and faculty by prohibiting schools from using Title IX in a manner that deprives students and faculty of rights guaranteed by the First Amendment,” the Department of Education wrote on its website. The guidelines seek to do this through a number of notable provisions. Colleges and universities must provide students accused of sexual assault the right to question their accusers, and allows for a neutral third party so that the accuser and the accused do not have to face each other. The rules also narrow the definition of sexual assault that schools are required to adjudicate and restricts eligible cases to those that occur on campus. However, the new rules clarify that conduct that may not fall under the definition of “sexual harassment” under the rules may still be addressed and disciplined through the schools’ own codes of conduct. The provisions require schools to select standards of evidence to apply evenly to proceedings for all students and employees and requires schools to offer both parties an equal right to appeal.

The rules are intended to reverse policies implemented by the Obama administration that compelled schools to conduct sexual-misconduct inquiries and deprived accused students of the rights they would be afforded if they were adjudicated by the proper authorities, instead of by schools, which are not equipped to conduct criminal investigations or fair trials.

Seventeen states and the District of Columbia asked for an injunction from U.S. District Judge Carl Nichols, but Nichols denied the request on Wednesday in a 31-page [opinion](#), asserting a preliminary injunction should be reserved only for cases in which the parties can prove they will be irreparably harmed in the absence of an injunction, which Judge Nichols asserts the plaintiffs did not do.

In their lawsuit, plaintiffs argued the Department had exceeded its authority and exercised “broad reach” by redefining what qualifies as “hostile environment harassment” and claimed the rules are “arbitrary, capricious, and otherwise an abuse of discretion.” But Judge Nichols ruled the Department provided adequate justification for the change, namely to maintain consistency with the standard set by the U.S. Supreme Court in 1999 in *Davis v. Monroe County Board of Education*, which held schools liable for peer-to-peer harassment when said harassment is so “severe, pervasive, and objectively offensive” that it “undermines and detracts from the victims’ educational experience.” That definition was not only consistent with the Department of Education’s 1997 Guidance on Sexual Harassment, but



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was reiterated in the Department's 2001 guidance.

Judge Nichols went on to explain that in its redefinition of hostile environment, the Department meticulously balanced Title IX and free speech considerations by "adding a separate sexual violence prong" so as to address key differences between behavior by school employees and behavior by students. According to the Department, the definition should "allow for the social and development growth of young students learning how to interact with peers in the elementary and secondary school context [and] foster robust exchange of speech, ideas, and beliefs in a college setting." Simply because the plaintiffs disagreed with those considerations does not render the new rules to be "arbitrary and capricious," Nichols wrote.

Plaintiffs also challenged the Department's language that limited harassment to on-campus, asserting the narrower definition fails to consider off-campus harassment, but Judge Nichols dismissed these claims.

"The operative inquiry is not *where* the sexual harassment occurred, but rather, whether it occurred at an operation 'over which the recipient exercises substantial control over both the respondent and the context in which the sexual harassment occurs,'" Nichols wrote. [Emphasis in original.] "Here, the Final Rule is rooted in the text of Title IX itself and the Court cannot supplant the Department's view of its own authority with Plaintiffs' preference for a broader one."

Plaintiffs also challenged the rules' requirements regarding the grievance process, claiming the formal procedures intrude into schools' disciplinary procedures and create a costly and arduous suspension process that will destroy its effectiveness. But the Department argued the Rule still allows schools to promptly remove students deemed to be immediate threats and exercise other disciplinary measures such as sending students to the principal without first requiring the formal complaint process. However, the rules draw the line at "inherently punitive or disciplinary sanctions" without the benefit of a formal grievance process.

And while Judge Nichols wrote that he does believe the rules could do a better job of granting more flexibility to the plaintiffs, he acknowledged it was not the court's job to "substitute judgement for that of the agency" or to ask "whether a regulatory decision is the best one possible." Judge Nichols determined the rules were not "arbitrary and capricious" in that regard, particularly since the Department considered and adopted separate rules for K-12 institutes and post-secondary institutions.

The states also argued against a Friday start date for implementation of the rules and claimed to need more time, citing the COVID-19 pandemic, but Judge Nichols determined that the Department had already taken the pandemic into consideration. The rules were issued in May and would typically have a 60-day window for implementation, but the effective date was extended to August 14 to account for the reduced resources resulting from the pandemic.

Judge Nichols did note that the attorneys general raised "serious arguments" regarding the rules, such as whether the Department has the authority to penalize recipients for taking a broader view of harassment than that which is outlined in the new rules.

"That grant of authority surely permits the Department to set a floor for conduct that a recipient must investigate and punish or risk losing Title IX funding, but it is not obvious that the Department can set a ceiling above which a recipient cannot punish misconduct without risking its Title IX funding," he wrote.

But he added, the plaintiffs "have not established a likelihood of success on their claims, nor have they



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established that they are likely to suffer substantial irreparable harm pending further litigation.”

Ultimately, Judge Nichols dismissed claims by the plaintiffs that the new rules would result in more incidents of sexual harassment, observing the Department considered “countervailing interests, including the fair treatment of respondents and the protection of various constitutional rights implicated in sexual harassment investigations, in accordance with its longstanding guidance that “Title IX rights must be interpreted consistent with due process guarantees.””

And since the plaintiffs are still free to punish violations of their codes of conduct that do not meet the Final Rule’s definition of harassment so long as they do not label the behavior to be Title IX violations, Judge Nichols determined it was difficult to see how the rules would result in more incidents of misconduct.

DeVos called the ruling a “victory for students.”

“With yet another failed attempt to block our historic Title IX Rule, we can now look forward to it taking effect this Friday, requiring schools to act in meaningful ways to support survivors of sexual misconduct without sacrificing important safeguards to protect free speech and provide all students with a transparent, reliable process,” DeVos said in a press release.

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