

U.S. Secretary of Education Betsy DeVos Makes Major Announcement on Future of Title IX Policy

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Yesterday, U.S. Secretary of Education Betsy DeVos delivered a major policy address on Title IX enforcement at George Mason University's Law School in Arlington, Virginia at an event described as "centered around equal opportunity and equal protection of all."

Background

Title IX of the Education Amendments of 1972 ("Title IX") is a federal law that prohibits discrimination on the basis of sex in federally funded education programs and activities. While Title IX is historically known for mandating equal treatment of athletics programs, Title IX also prohibits sexual harassment and sexual violence.

On April 4, 2011, the U.S. Department of Education's Office for Civil Rights ("OCR") issued guidance under President Obama detailing what is required of institutions under Title IX in preventing, investigating, and responding to sexual harassment, including sexual violence, on campus. This guidance, commonly referred to as the [2011 Dear Colleague Letter](#) ("DCL"), is neither a law nor a federal regulation, but instead, a letter that advises institutions how to address, investigate, adjudicate, and prevent sexual misconduct complaints. OCR described the DCL as an explanation of institutions' preexisting responsibilities under Title IX, "providing additional guidance and practical examples regarding the Title IX requirements as they relate to sexual violence." For example, the DCL includes time frames as to how long a campus sexual misconduct investigation should take (60 days) and an outright requirement on institutions to investigate complaints regardless of whether there is an ongoing criminal investigation. A controversial part of the DCL mandates college officials to use a "preponderance of the evidence" standard in adjudicating Title IX complaints, as opposed to a "clear and convincing" evidence standard that some institutions had previously been using.

In the years that followed, OCR released additional guidance, including [Questions and Answers about Title IX and Sexual Violence](#) in 2014 and [Guidance on Obligation of Schools to Designate a Title IX Coordinator](#) in 2015. At the same time, OCR launched hundreds of investigations into the institutional handling of sexual misconduct cases. In 2014, the U.S. Department of Education published a list of 55 schools that were under investigation by OCR for allegedly mishandling complaints of sexual assault and sexual harassment in violation of Title IX. Today, that [list](#) is comprised of more than 200 institutions across the country.

Advocates of victims of sexual assault have applauded the Obama administration's guidelines, and believe that these efforts have protected many students and forced colleges and universities to confront problems that were

long silenced. However, critics believe that the Obama-era guidelines represent an example of executive overreach that has swung the pendulum too far and pressured colleges to take aggressive action against students accused of misconduct without due process protections.

As a result of the guidance, over the last few years, colleges and universities adopted new policies, implemented new procedures for responding to sexual harassment and sexual violence, and hired Title IX coordinators and administrators to oversee these monumental efforts. The stakes were high all around, as institutions that failed to comply with these OCR documents were at risk of losing millions of dollars in federal funding.

DeVos's Proposed Action

Yesterday, DeVos announced that “the era of ‘rule by letter’ is over” and announced plans for the U.S. Department of Education to review the “failed” Obama-era guidance on campus sexual assault. A copy of DeVos’s prepared remarks is available here: <https://www.ed.gov/news/speeches/secretary-devos-prepared-remarks-title-ix-enforcement>.

DeVos thanked the Obama administration for helping to “elevate this issue in American public life. They listened to survivors, who have brought this issue out from the backrooms of student life offices and into the light of day.” However, while praising her predecessors for bringing the issue of campus sexual assault into the national spotlight, “good intentions alone are not enough,” said DeVos. “The truth is that the system established by the prior administration has failed too many students. Survivors, victims of a lack of due process, and campus administrators have all told me that the current approach does a disservice to everyone involved,” said DeVos. She also chastised the prior administration, stating that, “[i]nstead of working with schools on behalf of students, the prior administration weaponized the Office for Civil Rights to work against schools and against students.”

In an effort to provide all sides with an opportunity to offer opinions on how best to proceed with regard to a replacement approach and issuing new federal regulations, DeVos described plans for a public comment period. “In order to ensure that America's schools employ clear, equitable, just and fair procedures that inspire trust and confidence, we will launch a transparent notice-and-comment process to incorporate the insights of all parties in developing a better way,” DeVos said.

DeVos further stressed that any new policy on investigating sexual assault on college campuses must balance the rights of victims and accused students. “Every survivor of sexual misconduct must be taken seriously. Every student accused of sexual misconduct must know that guilt is not predetermined. These are non-negotiable principles,” said DeVos. She also criticized the standard of proof used in the prosecution of campus sexual assault cases and listed several reasons why university investigations and the corresponding “quasi-legal structures [used] to address sexual misconduct” are commonly referred to as “kangaroo courts.” While she condemned acts of sexual misconduct as “reprehensible, disgusting and unacceptable” DeVos also indicated that the Obama administration’s definition of sexual assault is too broad. “Too many cases involve students and faculty who have faced investigation and punishment simply for speaking their minds or teaching their classes,” said DeVos. “Any perceived offense can be turned into a full-blown Title IX investigation. But if everything is harassment than nothing is,” said DeVos.

DeVos also announced that the Department is exploring a regional reporting center model as an approach to the campus sexual violence reporting process. The model would allow institutions to opt-in to a local reporting center where professionally-trained experts would handle Title IX investigations and adjudications. "It looks something like this: in partnership among states and their Attorneys General, participating schools refer to the Center any Title IX incident which rises to a criminal level. The Center cooperates with local law enforcement and has access to resources to collect and preserve forensic evidence, facilitate—but never require—criminal prosecutions, and apply fair investigative techniques to gather and evaluate all relevant evidence to determine whether sexual misconduct occurred. This ensures that students are not charged by school-based tribunals on the basis of hearsay or incomplete evidence. This model allows educators to focus on what they do best: educate."

Soon after the event at George Mason, in an exclusive interview with CBS News' Jan Crawford, DeVos stated that she intends to revoke former President Obama's 2011 guidelines for schools investigating campus sexual misconduct. Crawford asked DeVos, "Are you today rescinding the Obama administration guidelines?" "Well, that's the intention, and we've begun the process to do so," DeVos responded. "The process is an extended one," she added, "but it is the intention to revoke or rescind the previous guidance around this."

A department spokeswoman stated that, as an interim measure, OCR will issue temporary Title IX guidelines as it works on a permanent replacement for Obama-era guidelines. "The 2011 guidance will be replaced, and in the interim, the Department will make clear to schools how to fulfill their current obligations under Title IX," said the department spokeswoman. This interim information is expected this month.

The decision to scale back the Obama-era directives was long expected. DeVos signaled changes were imminent in July 2017 when she met with three groups to discuss sexual violence on college campuses in separate 90-minute roundtable discussions. The groups included survivors and advocates, university representatives and college administrators, and accused students. A few weeks later, 20 state attorneys general sent a co-signed letter to DeVos urging her to maintain Title IX guidelines.

Impact on Colleges and Universities

How university and college administrators have addressed and responded to campus sexual misconduct has become one of the most explosive and well-publicized issues in higher education.

Despite the new administration's plan, several experts predict that many of the changes the Obama administration pushed through are likely to remain in place regardless of whether DeVos rewrites the rules on investigating campus sexual assault. In this regard, many institutions are of the opinion that, just because DeVos intends to revoke or rescind the Obama-era guidance, they are not going to cease their current practices or change policies that they spent the last six years drafting and implementing and disrupt the cultural shift. "No school is going to go back to doing what they were doing before the 2011 guidance," said Terry Hartle, senior vice president at the American Council on Education. "Until the department informs institutions differently, the conservative legal choice is to assume the Obama administration guidelines remain in effect," he said.

Most critically, despite DeVos's attempt to unwind the focus on campus sexual misconduct, many institutions are bound by federal and state laws apart from the DCL. To be clear, the potential rollback of the Obama-era guidance does not change or in any way affect an institution's obligation under state law, particularly New York State Education Law Article 129-B (also referred to as the "Enough is Enough" law), to recognize, investigate, and prevent sexual misconduct on campus.

The extent to which the Obama-era guidance will be revoked or rescinded by Secretary DeVos remains to be seen. Until the new administration weighs in on this very complex issue with interim guidelines, it behooves colleges and universities too, once again, review their existing policies and procedures in order to confirm that they are in compliance with the current law and guidance and/or make any necessary changes as soon as practical. Thereafter, institutions should continue to provide regular, current Title IX training to students, educators, and all members of the school community as to how to properly recognize, prevent, and respond to allegations of sexual misconduct. College officials should also consider reassuring students that they remain committed to rape prevention and training and protecting the rights of all students. Institutions are advised to pay close attention to this area of the law, as it has the potential to have significant practical as well as legal implications.

For more information on how to develop, implement, and maintain legally compliant policies, procedures, and training programs, please contact any of the following attorneys in our Higher Education Practice Group:

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