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U.S. Department of Education Releases Proposed Title IX Regulations

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On November 16, 2018, U.S. Secretary of Education Betsy DeVos released sweeping new regulations that could substantially alter how colleges and universities handle allegations of sexual misconduct. This action comes in the wake of DeVos' 2017 revocation of Title IX guidance issued under the Obama administration, which had called for greater enforcement of Title IX, the federal law which prohibits sex discrimination in education programs or activities that receive federal funding. In introducing the proposed rules, DeVos said that they are designed to both "punish sexual violence and ensure due process for those accused of it."

The proposed rules encompass several prominent changes. Perhaps the most noteworthy of these changes is the potential shift in the evidentiary standard concerning claims of sexual assault and harassment. Under the new rule, school officials could elect to use a "clear and convincing" evidentiary standard or a "preponderance of evidence" standard in determining whether an alleged act of sexual misconduct took place. This is in contrast to the previous Obama guidance which called for a preponderance of the evidence standard to be used, a definitively lower burden. Now, while a school can still choose to abide by the lower standard, it can only do so if it also applies that standard in other student disciplinary matters. It is important to note, however, that institutions must also use the same standard of evidence in cases against student respondents that it uses in cases against employee respondents. Proponents of this change to the evidentiary standard argue that it provides for more due process and greater fairness, while critics claim that it will cause alleged victims to be less likely to come forward.

Also notable under the proposed rules is the altered definition prescribed for what constitutes sexual harassment. Under the new rule, sexual harassment is defined as "unwelcome conduct on the basis of sex that is so severe, pervasive and objectively offensive that it denies a person access to the school's education program or activity." This definition represents a narrower one that had been used under the previous Obama guidance, which had defined sexual harassment more broadly as "unwelcome conduct of a sexual nature."

Another distinction pertains to the responsibility of schools in policing sexual misconduct. The new rule would make schools responsible for intervening only in regard to misconduct that takes place on campus or within the school's own education programs or activities. The significance of this language is that it appears to exclude misconduct that occurs off-campus, though the Department has indicated that where an incident occurs will not be solely dispositive in determining whether a given act of misconduct is subject to Title IX.

The proposed rules would also restrict the circumstances requiring school intervention in another way, in that a school would only be required to act where it has "actual knowledge" of allegations of sexual misconduct. This would be a significant departure from the previous standard which required intervention where a school "knew or reasonably should have known" about the alleged misconduct. The new standard offers colleges and universities a more lenient approach, particularly in cases where misconduct has not been directly reported to school officials. The proposal also specifies that a school will be reprimanded by the federal government only in instances where its response is clearly unreasonable given the circumstances. It also offers a safe harbor provision to schools that provide supportive measures to an alleged victim who chooses not to file a formal complaint. Institutions also have more discretion to utilize mediation and other informal procedures to address complaints of sexual misconduct under the proposed rules. Under Obama guidance, mediation was considered inappropriate for complaints of sexual violence. Alternatively, under the proposed regulations, institutions may opt for an informal resolution of any complaint of sexual misconduct (including sexual violence) as long as both parties voluntarily agree in writing.

The proposed rules further address the manner in which schools must conduct investigations into allegations of misconduct. In keeping with the theme of greater due process, the proposed rules would require schools to operate under a presumption of innocence, afford parties the opportunity to present witnesses and evidence, and to allow the parties to be counseled by advisors (or attorneys) at each step. Unlike the Obama guidance, which discouraged cross-examination, cross-examination is permitted under the new rule, although it cannot be performed by the parties themselves but rather only by advisors or attorneys in a live hearing. Questions regarding the alleged victim's sexual history are prohibited. The alleged victim is permitted to request that the accused watch the live cross-examination from a separate room which allegedly prohibits "any unnecessary trauma that could arise from personal confrontation." Furthermore, the final decision on the matter would need to be made by someone who did not also conduct the investigation. In other words, the "single-investigator model" or "investigator-only model", both of which are used by many institutions, would no longer be permitted under the new DeVos rules.

The proposed regulations come at a time when an exceptional number of colleges and universities have been accused of mishandling complaints of sexual misconduct. The proposed regulations will not take effect until the public is given 60 days to comment and weigh in after publication in the Federal Register. The final regulations, however, will likely mirror the proposed rules and according to the Department, will substantially decrease the number of investigations into complaints of sexual misconduct.

Despite the administration's plan to rewrite the rules on Title IX, many institutions are bound by state laws. To be clear, the potential rollback of the Obama-era guidance and release of the proposed rules do not change or in any way affect an institution's obligation under state law, particularly New York State's Article 129-B ("Enough is Enough" law), to respond to, investigate and prevent sexual misconduct.

At this time, institutions are advised to review their sexual misconduct policies and update them if necessary to ensure compliance with all federal and state laws. We also encourage institutions to provide regular training to students, educators and all members of the school community on how to properly recognize, prevent and respond to allegations of sexual misconduct. 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.

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