

First Steps and Decision Points: Preparing for the New Title IX Reality

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The Debate is Likely to Continue...

DeVos's Rules Bolster Rights of Students Accused of Sexual Misconduct

Education Secretary Betsy DeVos released final regulations for schools dealing with sexual misconduct, giving them the force of law for the first time and bolstering due-process rights.



U.S. Department of Education Retweeted
Secretary Betsy DeVos @BetsyDeVosED · May 6
Two years ago, I promised to address the scourge of sexual misconduct on our nation's campuses. The new #TitleIX regulation delivers on that promise. It treats all students fairly and holds all schools accountable if they fail to protect their students:

Congresswoman Ayanna Pressley @RepPressley · 2h
Absolutely shameful. @BetsyDeVosEd's decision to rollback #TitleIX protections is a cruel attack on survivors everywhere.

Survivors deserve to feel safe and heard on campus, and I'll keep fighting to make sure they are.



Victim Rights Law @VictimRightsLaw · 2h

Victims of sexual assault need attorneys now more than ever to maintain equal access to their education. The **VRLC** stands with survivors.

#KnowYourTitleIX



The Chronicle of Higher Education @chronicle · 23m

The pandemic was not a reason to delay the new Title IX rules, Education Secretary Betsy DeVos said: "It's actually an ideal time for campus administrators to begin implementing this when students are not on college campuses."

POLITICO

EDUCATION

Biden vows 'quick end' to DeVos' sexual misconduct rule

Biden disavowed Education Secretary Betsy DeVos' Title IX rule.

BREAKING: Education Dept. issues new Title IX regs with crucial campus due process protections, adopts Supreme Court sexual harassment definition

by **FIRE**
May 6, 2020

The Long Road to the New Regulations...

- **September 7, 2017:** Department of Education Secretary Betsy DeVos announces notice and comment process
- **September 22, 2017:** OCR issued:
 - Dear Colleague Letter (“2017 DCL”) withdrawing 2011 DCL and 2014 Q&A
 - Q&A on Campus Sexual Misconduct (“2017 Q&A”)
- **November 16, 2018:** Proposed Regulations Posted
 - Officially published in Federal Register later in November, 2018
 - Fact Sheet and Summary also posted
- **May 6, 2020:** Final Regulations Posted
 - Officially published in Federal Register May 19, 2020
- **August 14, 2020:** Final Regulations Effective

Focus on Conduct

- » Majority of reported incidents and investigations involve cisgender heterosexual women as complainants and cisgender heterosexual men as respondents, but:
 - The gender, gender identity or sexual orientation of any party to an investigation should have no bearing on how a school will investigate
- » Colleges and universities are opposed to sexual misconduct, IPV and stalking; they are not opposed to anyone because of their sex

CDC National Intimate Partner and Sexual Violence Survey, Summary Report (2011)

- » 16,507 survey respondents
- » Found that men and women had similar prevalence of nonconsensual sex in the previous 12 months
- » Estimated 1.270 million women raped and 1.267 million men “made to penetrate”

http://www.cdc.gov/ViolencePrevention/pdf/NISVS_Report2010-a.pdf

Colleges are “Anti-SA, Anti-IPV, Anti-Stalking”

- » Colleges are opposed to prohibited misconduct; they are not opposed to anyone because of their gender
- » *Gomes v. Univ. of Maine Sys.* (D. Me. 2005):
 - “There is not exactly a constituency in favor of sexual assault, and it is difficult to imagine a proper member of the Hearing Committee not firmly against it.
 - It is another matter altogether to assert that, because someone is against sexual assault, she would be unable to be a fair and neutral judge as to whether a sexual assault had happened in the first place.”

So What Does “Title IX” Mean Now?

Significant Substantive Changes

Prohibited Conduct

- Prohibited “sexual harassment” means conduct on the basis of sex that satisfies one or more of the following:
 - An employee conditioning the provision of an aid, benefit, or service on an individual’s participation in unwelcome sexual conduct (i.e., quid pro quo);
 - Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to an education program or activity (i.e., hostile environment); or
 - Sexual assault (as defined by Clery Act), or “dating violence,” “domestic violence,” and “stalking” (as defined by Violence Against Women Act).

Decision Point: Sexual Harassment Definition

- Preamble:
 - “[N]othing in these final regulations prevents a [school] from addressing conduct that is outside the Department’s jurisdiction” because it:
 - does not meet the Title IX definition of sexual harassment, or
 - occurred outside the school’s education program or activity, or
 - occurred against a person outside the United States
 - School can address such misconduct through provisions in its own code of conduct

Decision Point: Sexual Harassment Definition

Institutions must decide:

- Whether to narrow the definition of prohibited sexual behavior to higher threshold of sexual harassment adopted in new regulation
- Whether to investigate only reports that, if established by evidence, would meet this higher threshold, OR
- Whether to continue to prohibit and investigate “unwelcome conduct of a sexual nature” in various contexts, as provided in many current policies

Scope of Institutional Responsibility

- Institution must respond when it has:
 - “Actual knowledge”
 - When “an official of the recipient who has authority to institute corrective measures” has notice, e.g., Title IX Coordinator
 - of “sexual harassment” (as newly defined)
 - that occurred within the school’s “education program or activity”
 - “includes locations, events, or circumstances over which the recipient exercised substantial control” over the respondent and the context in which the sexual harassment occurred
 - Fact specific inquiry focused on control, sponsorship, applicable rules, etc.
 - against a “person in the United States” (so, not in study abroad context)

Decision Point: “Actual Knowledge”

- Given the narrowing of responsibility to respond to reports to officials with “authority to institute corrective measures”
- Schools **will have to decide** whether to:
 - Adopt narrower definition as threshold for encouraging reporting and taking action, OR
 - Continue to
 - define “responsible employees” broadly (e.g., to include faculty)
 - encourage reporting broadly, and
 - take action based on reports to faculty and others

New Regulation: School's "education program or activity"

- School's "education program or activity":
 - "includes locations, events, or circumstances over which the recipient exercised substantial control" over the respondent and the context in which the sexual harassment occurred.
 - Not a simple artificial bright-line on/off campus distinction
 - Does not simply depend on geographic location of activity
- Examples: Did conduct occur in location/context where school:
 - Owned premises (or officially recognized student organization that owned or controlled the premises): including fraternities
 - Exercised oversight, supervision or discipline, or
 - Funded, sponsored, promoted or endorsed event

Decision Point: School's "education program or activity"

- "[N]othing in the final regulations prevents recipients from initiating a student conduct proceeding or offering supportive measures to students affected by sexual harassment that occurs outside the recipient's education program or activity."
- Given this change, schools **will have to decide** whether to prohibit and investigate sexual misconduct that occurs outside more narrowly-defined "education program or activity"

New Regulation: “person in the United States”

- New regulation limits Title IX to discrimination occurring “against a person in the United States”
- While the Department acknowledged “the impact that this jurisdictional limitation might have on the safety of students participating in study abroad programs . . . by its plain text, the Title IX statute does not have extraterritorial application.”

Decision Point: “person in the United States”

- “We emphasize that nothing in these final regulations prevents recipients from initiating a student conduct proceeding or offering supportive measures to address sexual misconduct against a person outside the United States [such as a student participating in a study abroad program] . . . [through its] own code of conduct.”
- Given this change, schools **will have to decide** whether to prohibit and investigate sexual misconduct that occurs outside the U.S.

“Supportive Measures”

- Supportive measures “are designed to”:
 - Restore or preserve access to school’s education program or activity without unreasonably burdening the other party
 - Protect the safety of all parties and the school’s educational environment, and
 - Deter sexual harassment

“Supportive Measures”

- May include counseling; extensions of deadlines or other course-related adjustments; modifications of work or class schedules; campus escort services; mutual restrictions on contact between the parties; changes in work or housing locations; leaves of absence; increased security and monitoring of certain areas of the campus, etc.
- Should be “non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge” to the complainant or the respondent
 - Before or after the filing of a formal complaint or
 - Where no formal complaint has been filed

Training

- Schools “must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on the definition of sexual harassment [], the scope of the [] education program or activity, how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, . . . and how to serve impartially”
- “Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of sexual harassment.”

Training

- Training materials must be posted on website and should include:
 - Definitions of sexual harassment
 - Scope of “education program or activity”
 - How to conduct formal and informal processes
 - How to determine what is/isn’t “relevant”
 - Including how to apply “rape shield” concepts
 - How to serve impartially, by avoiding prejudgment, conflicts of interest and bias

Regulations Confirm Appropriateness of Fair, Trauma-Informed Practices



NACUA NOTES

- **J. Nolan, “Promoting Fairness in Trauma-Informed Investigation Training”**
 - National Association of College and University Attorneys (“NACUA”) NACUANOTE, February 8, 2018, Vol. 16 No. 5
- Updated H&K white paper version available at:
<https://www.hklaw.com/en/insights/publications/2019/07/fair-equitable-trauma-informed-investigation-training>

When a Report is Made, What Happens Next?

Significant Procedural Changes

Summary of Procedural Changes

- **First response:** If report of sexual harassment is received from anyone, Title IX Coordinator must:
 - Promptly contact complainant to discuss the availability of supportive measures
 - Consider complainant's wishes with respect to supportive measures
 - Inform complainant of availability of supportive measures with or without filing a complaint, and
 - Explain to complainant the process for filing a formal complaint

Summary of Procedural Changes

- **First response:**
 - Department prefers that school defers to complainant's wishes as to whether to pursue an investigation, but if school determines that not pursuing an investigation would be deliberately indifferent (or that pursuing an investigation is necessary for community safety or similar reasons), Title IX Coordinator may sign complaint
 - Doing so will not be viewed as adversarial toward respondent
 - However, respondent must receive all process required by section 106.45, so:
 - Will be difficult (but not impossible, e.g., if third party witnesses participate) to adjudicate matter if complainant declines to be cross-examined at hearing as discussed below
 - Complainants must receive investigation information as parties even if they do not wish to

Procedural Changes

- Must investigate “formal complaints”
- Must satisfy certain notice and ongoing notice requirements
- Must produce investigation report with certain elements
- Must give parties and advisors opportunity to review all information “directly related to allegations”
 - Broader than:
 - “all relevant evidence” as otherwise used in Title IX regulations, and
 - “any information that will be used during informal and formal disciplinary meetings and hearings” as used in Clery Act

Procedural Changes

- New procedures require that schools:
 - Ensure that burden of proof and burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the school and not on the parties
 - Provide equal opportunity for parties to present witnesses and other inculpatory and exculpatory evidence;
 - Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence

Procedural Changes

- New procedures require that schools:
 - Give the parties equal opportunity to select an advisor of the party's choice (who may be, but does not need to be, an attorney)
 - Provide written notice when a party's participation is invited or expected for an interview, meeting, or hearing;
 - Provide both parties equal opportunity to review and respond to the evidence gathered during the investigation; and
 - Send both parties the recipient's investigative report summarizing the relevant evidence, prior to reaching a determination regarding responsibility

“Live Hearings”

- “At the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker and parties to simultaneously see and hear the party or the witness answering questions.” (Requirements based on those in Doe v. Baum, 903 F.3d 575, 581 (6th Cir. Sept. 7, 2018))
- “At the live hearing, the decision-maker(s) must permit each party’s advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.”
- “If a party or witness does not submit to cross-examination at the hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility”
- The Single investigator model is dead: “The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility.”

“Live Hearings”

- “If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge . . . an advisor of the recipient’s choice, who may be, . . . an attorney, to conduct cross-examination on behalf of that party.”
- “Questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence . . . are offered to prove:
 - that someone other than the respondent committed the conduct alleged by the complainant, or
 - if the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent.”
- Privileged information (e.g., medical records, attorney-client privileged information) is not “relevant” or admissible without consent of party

“Live Hearings”

- “At the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker and parties to simultaneously see and hear the party or the witness answering questions.”
 - Rationale taken from Doe v. Baum (6th Cir. 2018)
- “Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.”

Standard of Evidence

- Schools may use either:
 - preponderance of the evidence standard or
 - clear and convincing evidence standard
- Must apply same standard of evidence in Title IX sexual harassment process for formal complaints against students as it does for formal complaints against employees, including faculty
- But, can choose to use clear and convincing for sexual harassment only (for all people), even if use preponderance for other types of misconduct

Decision Point: Standard of Evidence

- Schools **will have to decide** whether to use the clear and convincing evidence or preponderance of the evidence standard
- Schools **will have to decide** whether to use clear and convincing standard for sexual harassment only, even if it uses preponderance for other types of misconduct

Employment Issues

- New regulation states that: “A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part.” 34 CFR 106.8(b) (emphasis added)
- Section 106.8(c) clarifies that the school’s policy and grievance procedures apply to all student and employee complaints
- Impact of live hearing/cross examination requirements to existing employee procedures could be very significant

Informal Resolution

- School may facilitate informal resolution of formal complaints of all forms of sexual harassment if it:
 - Provides parties with written notice of:
 - The allegations
 - The requirements of the informal resolution process, including the circumstances that preclude parties from resuming formal complaint process arising from the same allegations, provided, that any party has the right to withdraw from the informal process and resume the grievance process of the formal complaint any time prior to agreeing to a resolution
 - Any consequences from participating, including records that will be maintained or could be shared

Informal Resolution

- School may facilitate informal resolution of formal complaints of all forms of sexual harassment if it:
 - Obtains parties' voluntary, written consent to informal resolution process; and
 - Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student

Appeals

- Schools must offer both parties an appeal from a determination regarding responsibility, and from a recipient's dismissal of a formal complaint based on grounds that:
 - Procedural irregularity that affected the outcome of the matter
 - New evidence that was not reasonably available at the time the determination was made that could affect the outcome of the matter; and/or
 - The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against one of the parties that affected the outcome of the matter.
- Schools may offer an appeal equally to both parties on additional bases (e.g., re sanctions)

Remedies

- An equitable resolution for a complainant must include remedies where a finding of responsibility for sexual harassment has been made against the respondent
 - “Remedies must be designed to restore or preserve equal access to the recipient’s education program or activity” and “may include . . . ‘supportive measures.’”
- Schools must simultaneously follow “a grievance process that complies” with the regulations before “before the imposition of any disciplinary sanctions or other actions that are not supportive measures”

Preliminary Thoughts on Navigating New Regulatory Environment

- New regulations are effective August 14, 2020.
- Schools will need to determine their position on **decision points** now
- Recognize that substantial policy and process revisions will be necessary
- Recognize that regulations leave substantial discretion to schools in many areas
- Most importantly:
 - Recognize that notwithstanding procedural changes, we must strive to continue to address prohibited conduct effectively and fairly for all parties

Questions?

Thank You!



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