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Proposed Title IX Regulations to Provide More Protections for Educational Institutions and for the Accused

by Corey S. D. Norcross and Ashley E. Shapiro

On November 16, 2018, the U.S. Department of Education issued its long-anticipated proposed regulations advising colleges and universities on the treatment of allegations of sexual assault on their campuses. Whether prompted by criticisms that colleges and universities are over-regulated or by the concern that guidance provided by the Department of Education’s Office for Civil Rights had strayed far beyond the “deliberate indifference” test set forth by the U.S. Supreme Court in *Davis v. Monroe County Board of Education*, the Department of Education determined that the “current regulations and guidance do not provide appropriate standards for how recipients must respond to incidents of sexual harassment.”

In explaining the purpose of the revised Title IX guidelines, Secretary of Education Betsy DeVos noted that the changes balance the way schools handle sexual misconduct allegations for complainants and the accused, stating “[e]very survivor of sexual violence must be taken seriously, and every student accused of sexual misconduct must know that guilt is not predetermined.” Title IX, the federal civil rights law that prohibits discrimination on the basis of sex in education programs or activities, applies to all schools that receive federal funding.

Overall, the proposed regulations seek to ease college liability while also ensuring the due process rights of the accused are protected. Below are the key provisions that could have a substantial impact on how reports of sexual misconduct are handled in higher education settings.

1. Narrower Definition of Sexual Harassment

The proposed guidelines redefine sexual harassment 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.” An “education program or activity” is defined as “all of the operations of a school including anything that has any academic, extracurricular, research, [or] occupational training.” This is a significant departure from the meaning utilized by the Obama administration, which instead defined sexual harassment as “unwelcome conduct of a sexual nature.”

2. Schools Are Responsible for Responding to On-Campus Assaults

Under the proposed guidelines, a school would be obligated to respond to formal complaints when it has “actual knowledge” of the alleged sexual harassment or assault and if the conduct “occurs within its education program or activity.” One of the many issues that is unclear from the proposed guidelines is whether they capture incidents at off-campus

fraternities and sororities. The answer may well be fact-based, depending on the specific college or university and the extent of its affiliation with, involvement in and supervision of Greek life.

3. Reporting Requirements

The proposal would require schools to respond meaningfully to every known report of sexual harassment and to investigate every formal complaint. Under the proposed regulations, a formal complaint is raised only if the complainant reports the assault to a particular school official. While mandatory reporting laws would still apply, reports to a professor or resident adviser would not necessarily trigger the Title IX rights and protections it would have under prior guidance.

4. Supportive Measures

The proposed guidelines highlight the importance of “supportive measures designed to preserve or restore [a student’s] access to the school’s education program or activity, with or without a formal complaint.” Included in these measures are: “counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between parties, dorm room reassignments, leaves of absence, and other similar measures.”

5. Due Process Protections

The proposed regulations require that the school provide live hearings during which the accused has the right to cross-examination – a practice that was discouraged in prior advisories. This right, however, is subject to certain safeguards. The three strongest protections would 1) require any cross-

examination to be conducted through a third party, not the accused, 2) permit the complainant to request the accused watch the examination from a separate room and 3) prohibit questions about a complainant’s sexual history (this is known as a “rape shield” protection).

Moreover, the accused is given a presumption of innocence, and the guidance permits schools to choose a higher evidentiary standard when determining whether the accused student is responsible for alleged misconduct: “preponderance of evidence” or the more stringent “clear and convincing evidence” standard. The purpose of these proposed regulations is to provide an opportunity to test the credibility of all parties and witnesses while protecting the complainant from any additional potential trauma. The parties will also have equal access to all of the evidence and equal opportunity to appeal, where schools offer appeals.

While there may be varying opinions as to the positive and negative aspects of the proposed Title IX guidelines, the Department of Education contends it is seeking to achieve fairness and reliable outcomes for both the complainant and the accused while also providing clarity to schools to ensure they understand the legal obligations in handling instances of sexual misconduct.

As the regulations are not yet final, colleges and universities should take a wait-and-see approach. The proposed guidelines have garnered immediate criticism from lawmakers and anti-sexual violence organizations alike and are subject to sixty days of public comments once they are officially published. Schools should therefore continue their efforts to comply with the current Title IX guidance until the Department’s rules are finalized.



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