

Department of Education Proposes Sweeping Changes to Title IX Regulations

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On November 16, 2018, the U.S. Education Secretary Betsy DeVos released proposed regulations designed to overhaul how colleges address allegations of sexual misconduct. The long-awaited rules—leaked drafts of which have been circulating since August—include major changes, such as a more limited definition of sexual harassment, live hearings during which parties are permitted to cross-examine each other through an advisor of their choice, and a prohibition on single-investigator models of adjudication. The regulations are currently open for a 60-day public comment period, after which they will be considered for final adoption.

The new rules are the next step in the department's efforts to replace several sub-regulatory guidance documents issued by the Obama administration, which articulated how the Office for Civil Rights (OCR) would interpret and enforce Title IX as it applied to sexual harassment. In September 2017, DeVos rescinded two of the most significant guidance documents, arguing that they had "led to the deprivation of rights for many students."

The new regulations represent a radically different approach to sexual harassment allegations, the most significant of which affect the investigation and complaint resolution process. These changes include:

- Live hearings and mandated cross-examination, which the Obama administration strongly discouraged.
- A new, narrower regulatory definition of sexual harassment.
- A new administrative enforcement standard. Previously OCR reviewed whether schools responded promptly and effectively to sexual harassment. Under the new rules, "deliberate indifference" would be required for a school to be found in violation, and only if the school has "actual knowledge" of sexual harassment.
- New record-keeping and training requirements.
- Increased discretion for schools, including what evidentiary standard to apply, preponderance of the evidence or the more stringent clear and convincing evidence, which had previously not been allowed.

If finalized, the new regulations will result in significant changes to a school's Title IX compliance programs and will require care in implementing.

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