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New U.S. Sexual Misconduct Rules Bolster Rights of Accused and Protect Colleges

By Erica L. Green Aug. 29, 2018

WASHINGTON — Education Secretary Betsy DeVos is preparing new policies on campus sexual misconduct that would bolster the rights of students accused of assault, harassment or rape, reduce liability for institutions of higher education and encourage schools to provide more support for victims.

The proposed rules, obtained by The New York Times, narrow the definition of sexual harassment, holding schools accountable only for formal complaints filed through proper authorities and for conduct said to have occurred on their campuses. They would also establish a higher legal standard to determine whether schools improperly addressed complaints.

The new rules would come at a particularly sensitive time, as major institutions such as Ohio State University, the University of Southern California and Michigan State University deal with explosive charges that members of their faculty and staff have perpetrated serious sexual misconduct. But for several years, higher education administrators have maintained that sexual misconduct rules pressed by the Obama administration unnecessarily burdened them with bureaucratic mandates that had little to do with assault or harassment, and men's rights groups have said the accused have had little recourse.

Unlike the Obama administration's guidance documents, the Trump administration's new rules will have the force of law and can go into force without an act of Congress, after a public comment period.

Liz Hill, an Education Department spokeswoman, said on Wednesday that the department was "in the midst of a deliberative process." She added that any information obtained by The Times "is premature and speculative, and therefore, we have no comment."

Last fall, Ms. DeVos rescinded a 2011 letter prepared by the Obama administration that outlined the responsibilities of schools and colleges that receive federal funding to address episodes of sexual misconduct. Victims' rights groups praised the Obama-era guidelines for aggressively holding schools accountable for complaints of sexual harassment, assault and rape that they said had often been played down or ignored. But critics contended that too often they trampled due-process rights for accused students.

In announcing the rescission of the letter, Ms. DeVos assailed the guidelines as federal overreach that coerced schools into setting up quasi-judicial systems fraught with inconsistencies.

"The truth is that the system established by the prior administration has failed too many students," Ms. DeVos said in September 2017. "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."

Ms. DeVos has also criticized the Obama administration for imposing rules without following the legal processes, which would allow for a public comment period.

The department's proposal would preserve much of the law that protects against sex discrimination, called Title IX, which for the past two decades has extended beyond gender-specific discrimination to include sexual misconduct as a form of denying students access to an education. But for what appears to be the first time, the federal government would go beyond guidance and recommendations to codify how it defines sexual harassment in the nation's schools and the steps institutions are legally required to take to address it. They could also be revised before they are formally published.

There is still dissension among employees in the Education and Justice Departments about whether more of the standards from guidance issued in 2001 should be codified in the new regulations, and whether some of the provisions should apply only to higher education, according to people familiar with the administration's deliberations.

While the issue has centered on allegations against students on college campuses, it also applies to elementary and secondary schools and allegations against teachers, professors and other employees.

"The department recognizes that despite well-intentioned efforts by school districts, colleges and universities, advocacy organizations and the department itself, sexual harassment and assault continue to present serious problems across the nation's campuses," the department wrote in the draft rule. "The lack of clear regulatory standards has contributed to processes that have not been fair to all parties involved, that have lacked appropriate procedural protections and that have undermined confidence in the reliability of the outcomes of investigations of sexual harassment allegations."

Advocates of victims' rights condemned the proposals. They are "a tacit endorsement of making campuses a safer place to commit sexual assault, rather than a safer place to learn free from violence," said Jess Davidson, the executive director of End Rape on Campus.

But groups that have long challenged the sexual assault policies under the Obama administration praised the proposed rules.

"Going solely by what has so far been reported, it sounds as though the proposed rules will go a long way towards restoring meaningful due process protections to the campus justice system, which will benefit both accusers and the accused," said Robert L. Shibley, the executive director of the Foundation for Individual Rights in Education.

After the department rescinded the Obama letter and a subsequent question-and-answer document, it reinstated temporary guidelines, which drew from guidance issued in 2001 and a subsequent letter issued in 2006. The Obama administration built upon that guidance but had notable differences.

The new regulations cement some of the most debated policy positions in the interim guidance, such as allowing schools to choose the evidentiary standard — "preponderance of evidence" or "clear and convincing" evidence — to apply in determining whether accused students are responsible for alleged misconduct. They also leave it to schools to decide whether to have an appeals process.

The most protested part of the Obama administration guidance was the mandate that schools use the preponderance-of-evidence standard, the lower standard of the two, in determining whether those accused should be disciplined or expelled. The Trump administration rules propose that a school's choice of evidentiary standard must apply to any investigation of civil rights violations.

The rules also maintain Ms. DeVos's year-old policy of using mediation to reach informal resolutions, and would add the ability for victims and their accused perpetrators to request evidence from each other and to cross-examine each other. The rules also allow the complainant and the accused to have access to any evidence obtained during the investigation, even if there are no plans to use it to prove the conduct occurred.

The Obama administration held that mediation was not appropriate, even if voluntary. It also strongly discouraged parties from personally questioning each other during hearings, believing it would be “traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment.” The previous administration also recommended that schools provide an appeals process.

The new rules would adopt a new Supreme Court definition of “sexual harassment” that appears to be reserved for repeated complaints or the most egregious allegations. The new rules would define sexual harassment to mean “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.”

In its guidance, the Obama administration defined the act more broadly as “unwelcome conduct of a sexual nature,” that includes “unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature.”

The proposed regulations do not define what constitutes a “hostile environment” for victims as previous guidance did, but does allow a school to remove an accused person from campus after conducting a safety and risk assessment.

The new rules would require that institutions only be held legally responsible for investigating formal complaints and responding to reports that school officials have “actual knowledge” of happening. A formal complaint is one made to “an official who has the authority to institute corrective measures,” not, for instance, a residential adviser in a dormitory.

The regulation contrasts with the standard, dating to 2001, that a “school knows, or reasonably should know, about possible harassment.” College leaders have long complained that was too broad and held them accountable for allegations of which they were not aware.

Under the new rules, schools would be held to a new standard for determining whether they took the proper steps to address the allegations. That standard, called “deliberately indifferent,” means that an institution is found in violation of the law “only if its response to the sexual harassment is clearly unreasonable in light of known circumstances.”

The new rules would also hold schools responsible only for investigating episodes reported to have taken place within their own programs, or on their campuses, not, for instance, in off-campus parties. The Obama administration required that schools investigate a complaint regardless of where the conduct initially took place.

The rules also say that the government will not penalize schools if they provide “supportive measures” to victims who choose to forgo filing a written complaint. The regulations encourage measures that are “nondisciplinary individualized services” and “nonpunitive, time-limited and narrowly tailored” to keep students in school. The rules provide an extensive list of options, such as counseling, deadline extensions, changes in class schedules, campus escort services, mutual restrictions on contact between the parties, changes in housing, leaves of absences or increased security and monitoring.

The regulations go to great lengths to require impartiality in investigations. They call on schools to conduct objective investigations and provide “prompt and equitable” resolutions. And, for the first time, the administration explicitly says that just as an institution’s treatment of a complainant could constitute sex discrimination, so would the treatment of the accused.

The regulations require that schools approach all investigations under the presumption that the accused is innocent until proved guilty.