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What You Need to Know About the Proposed Title IX Regulations

By Sarah Brown and Katherine Mangan NOVEMBER 16, 2018

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Students accused of sexual misconduct would gain greater protections and colleges investigating complaints could face reduced liability under sweeping new regulations proposed on Friday by the U.S. secretary of education, Betsy DeVos.

The long-awaited rules would replace the Obama administration's Title IX guidance, which had called for more-aggressive enforcement of the 1972 law mandating gender equity among colleges that accept federal money.

DeVos rescinded that guidance in 2017 and promised that formal rules would follow. The proposed regulations, released on Friday but not yet officially published in the *Federal Register*, won't take effect until the public is given 60 days to weigh in.

Many of the changes had already been made public in reporting by *The New York Times*, which obtained a draft of the rules.

Here are five things you need to know about the regulations:

1. A person accused of sexual misconduct would be guaranteed the right to cross-examine the accuser. This provision marked the biggest change from the draft that had been leaked in August. The questioning would have to be done in a live hearing by a lawyer or other adviser, but the parties could be in separate rooms, using technology if needed. The Obama-era guidance had discouraged direct cross-examination because of its potential to retraumatize victims.

2. Colleges' responsibilities to investigate would be limited to cases in which there are formal complaints and the alleged incidents happen on campus or within an educational program or activity. Critics point out that many alleged incidents of sexual misconduct happen at apartments that are located just off campus, and it's not clear those would have to be investigated.

3. The definition of sexual harassment colleges are required to act on would be narrower. The new rules would define sexual harassment to include "unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity." The Obama administration defined harassment as "unwelcome conduct of a sexual nature."

4. Colleges would have the option of using a higher standard of proof. When deciding whether sexual misconduct occurred, the Obama-era guidance told colleges to adopt a "preponderance of the evidence" standard, which means that it's more likely than not that the misconduct had occurred. The new rules would allow colleges to apply either that minimal standard or the higher "clear and convincing evidence" threshold. Both are less stringent than the "beyond a reasonable doubt" standard usually needed for criminal convictions.

5. Colleges would have more leeway to use mediation and other informal resolution procedures. Previous guidance had said that mediation — versus a formal investigation and adjudication process — was not appropriate in cases involving an alleged sexual assault. The concern was that alleged victims might feel pressured by their colleges to participate and that the process could be traumatizing. Proponents said it could appeal to students who don't want the person who assaulted them suspended or expelled. The proposed regulations say colleges may opt for an informal resolution at any time, provided that both parties voluntarily agree to it.

The document spells out specific measures colleges should take for students whether or not they file formal complaints. Those could include counseling, deadline extensions, no-contact orders, and changes in class schedules.

The changes proposed in the 149-page document would save an estimated $286 million to $368 million over the next decade, the Education Department contends, and would ensure "fair, reliable procedures that provide adequate due-process protections for those involved in grievance processes."

Under the Obama-era guidance, colleges were not sure whether the guidelines were legally binding, the new regulations say. Some felt that "those guidance documents pressured schools and colleges to forgo robust due-process protections; captured too wide a range of misconduct, resulting in infringement on academic freedom and free speech, and government regulation of consensual, noncriminal sexual activity; and removed reasonable options for how schools should structure their grievance processes to accommodate each school's unique pedagogical mission, resources, and educational community."

Under the previous guidance, the document says, "hundreds of students have filed complaints with OCR [the department's Office for Civil Rights] alleging their school failed to provide a prompt or equitable process in response to a report of sexual harassment, and over 200 students have filed lawsuits against colleges and universities alleging their school disciplined them for sexual misconduct without providing due-process protections."

Reaction to the regulations was swift, with ranking Democrats in the House and Senate condemning the proposals as undermining support for sexual-harassment victims.

Despite the argument that the regulations will simplify matters for colleges, "it opens up all sorts of gray space for campuses," said Peter F. Lake, who leads the Center for Excellence in Higher Education Law and Policy at Stetson University.

"The big winner here is for lawyers suing schools," he said. "It could easily lead to a flood of litigation."

A number of higher-education lawyers, weighing in on Twitter, said they found it ironic that an administration that has insisted it is trying to reduce regulatory burdens would impose such highly prescriptive requirements on both public and private colleges. The live-hearing requirement, for instance, would push colleges into a quasi-judicial approach many would like to avoid in dealing with sexual-misconduct cases.

Others, including the Foundation for Individual Rights in Education, a free-speech advocacy group, said the rules would make the adjudication process fairer for everyone involved.

Allowing Cross-Examination

To some, the most controversial part of the new regulations is the requirement that accused students be allowed, through a third party, to cross-examine their accusers at a live hearing.

The rules would stipulate when it is appropriate to ask about a person's sexual history and generally forbid questions that are harassing or irrelevant.

Given a recent federal-court ruling, college officials were already on notice that they needed to consider how to incorporate meaningful cross-examination into their processes, said Courtney Bullard, a former general counsel at the University of Tennessee at Chattanooga who now works in private practice.

At many institutions, especially small colleges where there is a limited pool of hearing panelists, cases are handled by a single investigator — usually an administrator or an outside lawyer — who conducts the interviews, writes a report, and issues a finding about whether campus policies were violated. The current regulations would not allow that.

There are pros and cons to cross-examination, she said. She's concerned about cases in which one student has a lawyer as an adviser and the other does not.

"Having a student cross-examined by an attorney is just difficult to watch," she said. "It doesn't feel right in an educational setting. It doesn't feel appropriate."

Jeffrey J. Nolan, a lawyer who advises colleges on Title IX issues, said that requiring cross-examination "could affect the willingness of people to report sexual assault, if they picture themselves in a courtroom being yelled at about their sexual history the way you see on TV shows."

Allowing an accused person to cross-examine the accuser, even through a lawyer, is "a horrible idea," said Colby Bruno, senior legal counsel for the Victim Rights Law Center.

"Rape is about power and control and not about sexual desire," she said. "Therefore, it is a bad idea to give the person with the power even more power to intimidate and hurt the victim."

Carly N. Mee, senior staff attorney for the advocacy group SurvJustice, sees potential problems in trying to put the accused and accusers in different rooms in order to avoid face-to-face questioning. She has represented accusers who were required to dial in on Skype while the accused was in the hearing room, only to be frustrated when videos failed and sound quality was poor.

She sees the proposed changes as part of a larger, troubling pattern in the new regulations. "These changes are designed to flip Title IX on its head and give rights to accused students when Title IX was supposed to be protecting those experiencing sexual discrimination," Mee said.

But advocates for accused students say the deck is stacked against them when they can't question their accusers. Cynthia Garrett, a lawyer and leader of an advocacy group called Families Advocating for Campus Equality, said cross-examination is critical because it allows parties and decision makers the chance to observe responses in real time, observing inconsistencies in testimony and assessing a witness's demeanor.

When questions are funneled through a hearing-panel member or investigator, "sometimes very few of the questions are actually asked, those that are asked are rephrased in a manner that undermines the effectiveness of the question, and almost never are follow-up questions asked," she said.

For some students, a hearing of any kind would have been welcome. Joseph C. Roberts, a former Savannah State University student who says he was falsely accused of sexual harassment five years ago, was among those whose stories influenced the new regulations. In an interview on Friday, he said he had been suspended several weeks before graduation and expelled without a hearing or opportunity to defend himself. He said he had tried to kill himself a week before he was to graduate.

He later finished his degree online and is now enrolled in law school. If he had had a hearing or mediation, his life might not have taken a downward spiral, said Roberts, who speaks on behalf of groups that represent accused students.

Although the proposed changes come too late for him, "today has restored my faith in the system," he said. Savannah State officials said they can't comment on a specific case but are committed to ensuring a safe campus and providing due process.

Raising the Bar for Investigations

Other aspects of the proposed regulations — such as the narrower sexual-harassment definition, the choice of which standard of evidence to use, and the language about "formal complaints" — remain similar to the draft document that was leaked in August to the *Times.*

The new rules could raise the bar for when a college is required to open an investigation, said Taylor Sinclair, director of Title IX for the Nebraska State College System. That doesn't mean that colleges won't deal with complaints that no longer meet the threshold.

Under the new rules, Title IX officers would probably spend more time educating people about navigating relationships and establishing boundaries, instead of investigating, she said. More might turn to the kinds of informal remedies that are already used in many cases.

"It changes the lens through which we look at misconduct and how the college decides who's a victim and who's not," she said.

She worries, though, that when some victims are told that their complaint doesn't meet the threshold, they'll disappear. Some might not come forward at all.

"We're going to miss opportunities to help students, to solve problems, if we overlook these claims," she said. She'd like to see a definition that's somewhere in between the Obama-era "unwelcome conduct of a sexual nature" standard and the newly proposed one.

Even though colleges may be allowed to use a higher standard to determine whether a person has been a victim of sexual misconduct, many that use the preponderance-of-evidence standard are likely to stick to it because of the backlash they could face, several Title IX lawyers interviewed said.

Kimberly C. Lau, another Title IX lawyer, agrees with the decision to allow colleges to use a higher standard of proof. "Schools should be required to determine it was 'highly probable' that a student committed sexual assault before that student is expelled," she said.

Changes in Mandatory Reporting

Another change that has already generated a lot of debate is that colleges would be legally responsible for handling only those formal complaints that are made by an official who has the ability to remedy the situation. That doesn't include reports from professors, resident advisers, and others.

Over the last few years, many colleges have adopted policies that designated nearly every campus employee as a mandatory reporter of sexual misconduct who must alert the Title IX office whenever they hear about a possible incident.

Some faculty members have criticized the policies because they felt they were forced to disclose confidential conversations with students.

But if colleges respond by designating fewer people as mandatory reporters or limiting when they're required to contact the Title IX office, that would shrink the pool of people combating sexual violence, some worry.

Mandatory-reporting policies often help Title IX coordinators identify patterns of misconduct, supporters say. If three people tell three different professors about incidents involving the same student, and the faculty members fulfill their obligation to report to the Title IX office, administrators can spot the trend and react.

From a legal-liability standpoint, campuses would be better off if there were fewer mandatory reporters, said Bullard, the former general counsel at Chattanooga. Colleges would no longer be liable if someone told a faculty member about an incident and that faculty member didn't report it to the Title IX office.

Nowadays, however, many students have expectations about what's going to happen when they disclose an alleged assault, Bullard said. A culture of mandatory reporting has taken hold on many campuses. "It's tough to untrain people," she said.

"When a student tells a campus administrator something, they ultimately think that person has the ability to fix their problem," she added. "And then later, they're upset about it because they feel like they told someone who has the ability to fix the issue."

A 'Good Faith' Approach

The colleges that Bullard works with are always "hungry for guidance," she said. They say: "Give me something solid to rest my decisions on." Ultimately, she said, that's what these regulations might provide, which colleges would welcome.

The proposed regulations, she said, appear to take more of a good-faith approach, in which if campus administrators follow their policies and act in good faith, they won't face a serious reprimand from the federal government.

"The end game is, it should take some of the pressure off of institutions," she said. "But in the middle of all that, it's going to be yet another re-evaluation. This is what they've been doing since 2011."

Bisi Okubadejo, a lawyer who worked for the Department of Education's Office for Civil Rights during both the Bush and Obama administrations, isn't convinced that the new regulations would reduce colleges' liability.

Okubadejo, who now advises colleges about their obligations under Title IX, said more accused students might sue if the protections the new rules call for aren't provided by their campuses.