

Education Secretary Signals Shift in Title IX Policy for Dealing with Sexual Misconduct Allegations

Tuesday, October 17, 2017

On September 7, 2017, Secretary of Education, Betsy DeVos announced a marked policy shift in how the Department of Education will approach Title IX enforcement with regard to sexual misconduct. DeVos indicated that the Department plans to withdraw the controversial Dear Colleague Letters issued during the Obama administration. Instead, the Department will issue formal regulations that will establish a new Title IX framework for educational institutions investigating and responding to sexual misconduct allegations. The full text of Secretary DeVos's speech can be found [here](#).

Title IX has been a dominant topic in higher education since 2011, when the Obama Administration issued the "Dear Colleague Letter" explaining that a failure to adequately address sexual misconduct on campus constituted discrimination on the basis of sex in education programs under Title IX.^[1] Among other things, the Dear Colleague Letter set forth how schools should respond to sexual misconduct, dictated specific procedures schools must follow to investigate and adjudicate such misconduct, and established various other requirements such as climate surveys, standards of proof, and survivor sensitivity. The Letter made clear that a failure to meet these expectations, and the expanded guidance issued by the Department in 2014, could result in a loss of federal funding, and thus had a swift and substantial impact on the way educational institutions responded to reports of sexual assault or harassment.

In a speech at the George Mason University School of Law on September 7, 2017, Secretary DeVos said that schools will still be required to address sexual misconduct. However, she announced the Department would be rescinding the Dear Colleague Letters and instead regulate through actual regulations, subject to notice and comment. Secretary DeVos lamented that "for too long, rather than engage the public on controversial issues, the Department's Office for Civil Rights has issued letters from the desks of un-elected and un-accountable political appointees." She made it clear that "the era of 'rule by letter' is over." DeVos emphasized the Department's ongoing commitment to protecting victims of sexual violence. But she also clearly signaled that the Department will pay more attention to the due process rights of the accused, including questioning the "preponderance of the evidence" standard that the Department required all schools to use in adjudicating sexual misconduct cases. DeVos promised to work more closely with educational institutions, rather than operating "through intimidation and coercion." And she said the Department would be open to exploring alternative methods of enforcing Title IX, including the possibility of voluntary regional centers where outside professionals would be available to handle Title IX investigations and adjudications.

DeVos did not indicate exactly what the new Department rules might entail, or when they will come into effect, nor has there been an official withdrawal of the Dear Colleague Letter yet. DeVos did indicate, however, that the Department will base the new rules on public feedback and will take into account the views of educational institutions, professionals, and individual students. In her closing remarks, DeVos noted that the Department of Education's "interest is in exploring all alternatives that would help schools meet their Title IX obligations and protect all students. [The Department] welcome[s] input and look[s] forward to hearing more ideas."^[2]

Schools should take advantage of the Secretary's call for comments, as the Department moves towards the



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development and implementation of a different and hopefully clearer set of rules governing the enforcement of Title IX. However, schools should also anticipate a period of uncertainty until final rules are issued. Moreover, schools should be aware of the continuing (and possibly conflicting) state law obligations that have been put into place following the Dear Colleague Letter. For example, many states including Connecticut and New York have passed legislation mandating use of the preponderance of the evidence standard in evaluating sexual misconduct on college campuses. We anticipate further, more detailed guidance in the next few weeks as the Department of Education works to implement Secretary DeVos's policy announcements.

[1] 20 U.S.C. §§ 1681 *et seq.*; 34 C.F.R. Part 106.

[2] Secretary DeVos Prepared Remarks on Title IX Enforcement, available [here](#).

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