

LEGAL BRIEFS

— VITAL LEGAL INFORMATION YOU NEED TO KNOW —

A Preview of the Department of Education's Draft Title IX Regulations

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The Department of Education (DOE) reportedly has drafted proposed Title IX regulations on sexual misconduct on college and university campuses. Although the DOE has yet to officially publish the proposed regulations, on August 29, 2018, The New York Times reported on the unofficial draft. The draft, which subsequently began to circulate on the internet, provides a preview of what the official proposed regulations may include.

Enacted in 1972, Title IX of the Education Amendments prohibits discrimination based on sex at any educational institution that is a recipient of federal funds. This includes protection from sexual harassment.

Colleges and universities have been in limbo since September 2017, when the DOE rescinded Obama-era guidance that outlined responsibilities under Title IX for handling allegations of sexual misconduct on college campuses. At the same time, the DOE issued interim guidance as a placeholder until the DOE could engage in a formal rulemaking process, including promulgating proposed regulations and completing a notice-and-comment period. Once adopted, these would be the first regulations issued under Title IX since 1975.

Highlights

Many provisions in the interim guidance issued in 2017 are included in the draft regulations. For example, institutions would be able to choose the applicable evidentiary standard (either “preponderance of the evidence” or “clear and convincing” evidence) in determining responsibility. The draft regulations also preserve the interim guidance’s use of informal resolution processes to resolve sexual misconduct cases if the parties agree. Further, they continue to allow institutions to decide whether to have an appeals process and, if so, whether to limit appeals to the responding party only.

Other more notable provisions of the draft



proposed regulations include the following:

- “Sexual harassment” is defined 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.” Sexual harassment also would include sexual assault and quid pro quo harassment.
- For purposes of administrative enforcement, colleges and universities would be held to a “deliberately indifferent” standard, which is the same standard used by the U.S. Supreme Court in *Gebser v. Lago Vista Independent Sch. Dist.*, 524 U.S. 274 (1998), and *Davis v. Monroe County Board of Educ.*, 526 U.S. 629 (1999). Thus, a college or university with “actual knowledge” of sexual harassment in an educational program or activity must respond in a manner that is not “deliberately indifferent.” An institution would be found deliberately indifferent “only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.”
- “Actual knowledge” is defined in the draft regulations as notice of sexual harassment or allegations of sexual harassment provided to an official of the institution “who has the authority to institute corrective measures on behalf of the [institution].”

- Institutions would be required to respond only to allegations of sexual harassment reported to have taken place on their campuses or within institutional programs or activities.
- In institutions of higher education, if grievance procedures provide for a hearing, the institution must permit cross-examination of any party or witness. If an institution’s grievance procedures do not provide for a hearing, the institution must permit each party to submit written questions for the investigator to ask the other party and witnesses.

The draft proposed regulations may not be a final draft and may be revised before formal publication. Once the final version has been published, the public will be asked to submit comments before the regulations can go into effect.

The DOE’s regulations will apply only to enforcement of federal law requirements. Colleges and universities must continue to comply with all applicable state laws regarding sexual misconduct and sexual misconduct investigations.

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