

# Insights

## Proposed Title IX Regulations From the U.S. Department of Education

---

December 2, 2018

By: Deborah J. Daniels

The U.S. Department of Education recently released long-awaited **proposed Title IX regulations**, outlining how the Department of Education's Office of Civil Rights (OCR) intends to regulate schools' investigation and adjudication of sexual misconduct. If enacted, the November 16 proposed regulations will replace the Department of Education's **September 22, 2017 interim guidance**, which had withdrawn the April 4, 2011, "**Dear Colleague Letter: Sexual Violence**", and the April 29, 2014 "**Questions and Answers on Title IX and Sexual Violence**".

According to the Department of Education, the proposed regulations emphasize the Department's focus on providing adequate due process protections and procedural safeguards to reporting and responding parties. U.S. Secretary of Education Betsy DeVos stated in connection with their release that the purposes of the proposed regulations are to make the process more transparent and to ensure that "every survivor of sexual violence [is] taken seriously, and every student accused of sexual misconduct [knows] that guilt is not predetermined."

### **The proposed guidelines, if adopted, will include the following substantive changes:**

- Institutions of higher education will be required to provide a live hearing and to permit a party's advisors to cross-examine the other party or witnesses.
- Both parties will have the ability to appeal an adverse ruling, if the school offers the opportunity for appeal.
- Sexual harassment will be more narrowly defined as requiring participation in unwelcome sexual conduct as a condition of receipt of an aid, benefit or service, or "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."
- Schools will be permitted to use informal resolution processes (if the parties agree) and to apply either the "preponderance of the evidence" or "clear and convincing evidence" standard, with certain limitations, when determining if sexual misconduct occurred.
- Schools with "actual knowledge" of sexual harassment in a school program or activity will be deemed to have acted with "deliberate indifference" to the harassment, thus making them liable under Title IX, only if their response to sexual harassment was clearly unreasonable in light of the known circumstances. Certain specific responses by a school will by definition not constitute "deliberate indifference."
- Schools may not be liable if they fail to investigate allegations of sexual harassment that occurred off-campus and over which the school had no control or sponsorship.



These proposed regulations are subject to a 60-day comment period before they go into effect.

For more information, please contact either of the following members of Krieg DeVault's **Higher Education Industry Group** or **Deborah J. Daniels**, (317) 238-6253 or [ddaniels@kdlegal.com](mailto:ddaniels@kdlegal.com)