



## Education Department's Final Title IX Rule

*The Department of Education finalized a rule to revise standards for schools' responsibility under the Title IX to respond to campus sexual assault and harassment.*

### What is Title IX?

Under Title IX of the Educational Amendments Act of 1972, schools have a responsibility to provide equal access to education for all students. The law specifically prohibits discrimination on the basis of sex, including sexual harassment and violence. As part of Title IX's requirements, schools receiving federal funding—including institutions of higher education and K-12 schools—must take certain steps to address sexual misconduct that may inhibit students' safety or access to education.

### Title IX Under Secretary DeVos

In September 2017, Secretary DeVos rescinded the Obama-era guidance that had pushed schools to do more to protect students' safety. In November 2018, the Department of Education [proposed a rule](#) to revise standards for schools' responsibility to respond to campus sexual assault and harassment under Title IX. The Department received more than 120,000 public comments in response to its proposal. The rule was finalized May 6, 2020.

Secretary DeVos's rule makes significant changes to how schools are required to comply with Title IX. It has been harshly criticized by civil rights and women's rights groups for making it harder for survivors to get justice and weakening accountability for institutions that fail to prioritize the safety of their students.

Instead of focusing on helping students, educators, and institutions cope with this unprecedented crisis, the Department wasted valuable time finalizing a rule that will erode protections for students' safety on campus.

### Key Changes to Title IX Under the New DeVos Rule

Under the DeVos Title IX rule, survivors will be less likely to report incidents of sexual misconduct and less likely to get justice, while schools will have license to ignore sexual misconduct that they previously would have been required to address.

**Under the DeVos rule, survivors of sexual misconduct will be less likely to get justice.**

***The DeVos rule institutes a higher burden of proof for survivors that is inconsistent with other civil rights laws.***

The final rule provides schools the choice of using either the preponderance of the evidence standard or the higher "clear and convincing" standard. Not only is this provision a reversal of longstanding policy, but the Department fails to explain how this policy will improve reporting or resolution—thus undermining the safety of students and the ability of survivors to receive justice.

### ***The DeVos rule requires survivors of sexual assault to submit to cross-examination***

Under Obama-era guidance, survivors could be examined by the accused. But that same guidance suggested direct cross examination was not required. By contrast, the DeVos' rule requires that survivors participate in live hearings, including cross examination conducted by counsel for the alleged perpetrator, for proceedings at the postsecondary level.

While the final rule does not require live hearings and cross examination in the K-12 setting, the requirement for cross examination in any level of educational setting is problematic and should not be instituted without first balancing the potential harms to survivors. Survivors of sexual assault may be discouraged from reporting if there is a possibility they will have to face the perpetrator of their assault in an adversarial proceeding.

### **The DeVos rule weakens accountability for schools that fail to prioritize students' safety**

#### ***Under the DeVos rule, schools can more easily avoid addressing instances of sexual misconduct.***

Under the final rule, while reporting to any employee of an elementary or secondary school satisfies the knowledge standard for liability purposes, a college or university is held liable under Title IX only if it has actual knowledge of harassment or allegations of harassment, in which the incident must be reported to an "official of the [college or university] who has authority to institute corrective measures on behalf of the [college or university]." This rule effectively allows postsecondary schools to choose not to investigate potential sexual misconduct despite general, but not "actual," knowledge—weakening student safety.

#### ***The DeVos rule radically narrows the definition of sexual assault***

The final rule changes a core portion of the definition of sexual harassment to: "[u]nwelcome conduct [on the basis of sex] determined by a reasonable person to be so severe, pervasive and objectively offensive that it effectively denies a person equal access to the [school's] education program or activity." The [current definition](#) stands as conduct that "is sexual in nature; is unwelcome; and denies or limits a student's ability to participate in or benefit from a school's education program."

The Department is abandoning a definition in effect at the Department at least since 2001 and provides no evidence that a new definition will improve the reporting, response, or management of incidents of sexual harassment in schools or on campuses. This narrower definition will give schools license to avoid addressing a host of incidents do not rise to this high standard of sexual harassment.

#### ***Under the DeVos rule, even schools that fail to meet their newly limited obligations to survivors will rarely face accountability.***

The DeVos rule raises the bar for the level of negligence schools must exhibit to violate Title IX. Only schools found to be "deliberately indifferent" to complaints — rather than the established standard that required "prompt and effective action" — will be considered in violation of Title IX.

### **How Congress Should Respond**

House Democrats can respond by passing a comprehensive reauthorization of the Higher Education Act that strengthens protections for students' safety. The *College Affordability Act*, which was reported out the Education and Labor Committee with unanimous Democratic support, includes specific language reversing Secretary DeVos's Title IX rule and strengthening schools' responsibility to report and address instances of sexual misconduct.