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### US Department of Education Prepares to Upend Title IX Regulations

For the first time in 40 years, the U.S. Department of Education (DOE) will make significant regulatory changes to Title IX, the federal law regulating sex and gender discrimination in the educational environment. These new regulations will require every school in the United States receiving federal funds, both K-12 and post-secondary, to revamp how they handle sex and gender equity issues. The DOE submitted the [proposed regulations](#) to the Office of Management and Budget in early November 2019, and the proposed regulations should appear in the federal register this month.

### **The Title IX Pendulum Has Swung Back and Forth**

High profile sexual assault cases involving students and public attention generated by Jon Krakauer's *Missoula*, a book about a series of sexual assaults at the University of Montana, highlighted Title IX during President Obama's administration. Dramatic upheavals to the Title IX landscape in [2011](#) and [2014](#) were spurred by the [now-rescinded](#) Dear Colleague Letters from the DOE's Office of Civil Rights, not new regulations. So, while some schools and colleges risked ignoring the Dear Colleague Letters (and many did), Education Secretary Betsy DeVos's new regulations will carry the force of law.

### **Significant Regulatory Changes Will Likely Spur Legal Challenges**

The proposed Title IX regulations cover a lot of familiar ground, with the majority reiterating prior guidance. A significant percentage, however, will represent contentious major changes, frequently placing schools in a no-win situation. For example:

- Schools and students have become accustomed to using the "preponderance of the evidence" standard for making determinations regarding culpability in sexual harassment and sexual assault cases. The new regulations will allow schools to continue to use that standard or to implement the higher "clear and convincing evidence" standard. College and university faculty unions vigorously advocate for the higher standard and will likely demand that it not be implemented without collective bargaining, while any deviation from the preponderance standard may be seen as a retreat on an issue important to students and victims' rights groups.
- Under the Obama administration's Dear Colleague Letters, schools were largely prohibited from subjecting the complaining student to cross-examination during an investigatory or disciplinary hearing. This position has been widely criticized in some legal circles, but victims' advocates argue that it is necessary to prevent a chilling effect on complainants' willingness to pursue their claims of sexual assault and harassment. The new regulations are likely to allow some form of cross-examination, which will require significant hearing officer training, and may deter some victims from coming forward.
- The Obama administration Dear Colleague Letters prohibited informal resolution of sexual assault cases through alternative dispute resolution processes and mediation. Victims' groups allege that these informal processes are misused to either deter complainants from pursuing claims or to brush serious cases under the rug. It is anticipated that the new regulations will allow mediation and other forms of alternative dispute resolution.

Other landmines also exist, such as deciding what rights those accused of misconduct will have to a quasi-judicial hearing panel, and what training will be required for the panel. These are all contentious issues in the

educational environment, and the consequences of missteps may prove significant.

## **Takeaway for Schools**

The bottom line is that all federally funded schools—K-12 and post-secondary—will quickly need to assemble a team, study the new Title IX regulations and analyze them against existing policies. Once the required changes are noted, the team will have to decide what policies must be changed immediately, what policies require an institutional decision and what policy changes require additional processes such as collective bargaining, shared governance review or board deliberation. Once a decision-making framework is set, schools will have to work diligently to implement the new regulations, factoring in the effects of each change on students, labor unions and public relations. There may be a short grace period after the regulations are adopted to allow schools to implement the regulations, but students, unions and activist groups will be ready to litigate if they disagree with implementation steps or if implementation occurs too slowly.

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