The Department of Education is currently in the process of developing new Title IX regulations related to campus sexual assault. The following summary describes provisions contained in the notice of proposed rulemaking (NPRM) that was published on November 29, 2018.

Background

In September 2018, a leaked draft of the proposed Title IX regulations on campus sexual assault became public while still undergoing regulatory review by the Trump Administration. Although the Department made several changes to the draft rules during the review process, the majority of the provisions contained in the NPRM remain unchanged from the leaked draft.

The official NPRM was published in the Federal Register on November 29, 2018. The proposed regulations are subject to a 60-day public comment period, which ends on January 28, 2019. After the comment period closes, the Department will respond to the comments and issue final rules. It is important to note that the final rules that are eventually published are likely to differ in some respects from the version described below.

Department of Education’s Summary of the Draft Proposed Rule

In the introduction to the NPRM, the Department provides a summary of and justification for its decision to issue new Title IX regulations governing campus sexual assault. According to the Department, the new regulations are necessary because “current regulations and guidance do not provide appropriate standards for how recipients must respond to incidents of sexual harassment” and because the previous guidance left institutions “uncertain about whether the Department’s guidance was or was not legally binding.” The Department also cites the need to “better align” the regulations with the text and purpose of Title IX, Supreme Court precedent, and the Clery Act.

In general, the provisions contained in the NPRM appear to be similar in many respects to the interim guidance that the Department issued in 2017 when it rescinded Obama-era campus sexual assault guidance. Collectively, the provisions in the proposed rules appear designed to provide some additional flexibility to institutions of higher education, reduce liability for institutions, and provide new due process protections to students accused of sexual misconduct. A summary of the most significant provisions in the NPRM is provided below.

Recipient’s Response to Sexual Harassment

- The proposed regulations would, for purposes of administrative enforcement by the Department, adopt the same standards that the Supreme Court has applied in individual Title IX sexual harassment lawsuits for monetary damages.
Institutions with actual knowledge of sexual harassment in an education program or activity would be required to respond to complaints of harassment in a manner that is not deliberately indifferent. Several new definitions would be adopted:

- “Sexual harassment” would be 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 recipient’s education program or activity.”
- “Sexual harassment” would also include quid pro quo harassment or sexual assault as defined in the Clery Act.
- “Deliberate indifference” would be defined as a response to sexual harassment that is clearly unreasonable in light of the known circumstances.
- “Actual knowledge” would occur only if a school official with the authority to institute corrective measures receives notice of sexual harassment.

This standard would differ from the standard under the Obama-era guidance, which held schools responsible for responding to sexual harassment if they reasonably should have known of the harassment.

- Schools would also not be deemed to have “actual knowledge” of harassment solely on the basis of the actions of its employees or agents.
- The obligation to report sexual harassment would not cause an employee to be deemed an official with authority to take corrective action.
- Title IX coordinators would always qualify as officials with authority to take corrective measures.

An institution’s treatment of both victims and accused students could constitute discrimination on the basis of sex under Title IX.

Responding to Complaints of Sexual Harassment

- Institutions would be required to respond only to formal complaints of harassment.

- Formal complaints could be initiated by a complainant or the Title IX coordinator.
- Title IX coordinators would be required to file a formal complaint when there are multiple reports of misconduct by the same party.

- Institutions would be responsible for responding only to conduct that occurred within its program or activity.

- Several safe harbors would be available.

  - An institution would not be found deliberately indifferent if it follows the procedures specified in the regulations in response to a formal complaint.
  - An institution would not be found deliberately indifferent if it implemented supportive measures for a victim in the absence of a formal complaint.
Supportive measures could be provided both to students who file a formal complaint and to students who do not wish to file a formal complaint that would initiate grievance procedures.

Supportive measures would be defined as “non-disciplinary, non-punitive individualized services” that are designed to support continued access to an education program or activity “without unreasonably burdening the other party.”

To be entitled to this safe harbor, institutions would have to notify complainants in writing of their right to file a formal complaint.

- An institution would not be found deliberately indifferent if the Department of Education would have reached a different determination.

- If, after conducting a risk analysis and determining that an accused student poses an immediate threat to the health or safety of a student or employee, institutions would be allowed to remove such a student from campus, provided that the student receives notice and an opportunity to respond.

- Institutions would be permitted to place accused employees on administrative leave.

**Grievance Procedures**

- The proposed regulations would adopt new requirements related to grievance procedures.

- Grievance procedures would be required to:
  - Be prompt and equitable;
  - Include due process for both parties;
  - Involve an impartial investigation that considers all relevant evidence;
  - Preclude conflicts of interest or bias on the part of coordinators, investigators, and decision-makers;
  - Ensure training for coordinators, investigators, and decision-makers;
  - Rely on training materials that encourage objective investigations and disciplinary procedures and that do not promote sex stereotypes;
  - Include a presumption that the respondent is not responsible;
  - Allow delays in investigations for good cause, including absence of parties or witnesses, law enforcement activity, or disability accommodations;
  - Describe the sanctions and remedies that are available;
  - Specify the standard of evidence to be used;
  - Detail the procedures available for appeals, if any; and
  - Specify the supportive measures that are available.

- Institutions would continue to be able to use their own employees to investigate and adjudicate complaints or to hire outside individuals for this purpose.

- Institutions would have to inform students if their code of conduct prohibits students from providing false information during the grievance process.

**Notice**

- Institutions would be required to provide notice about grievance procedures and complaint allegations to both parties.
Such notice would be required to contain:
- Adequate information about the alleged misconduct, including identities of the parties involved, date and location of the alleged incident, and the conduct that allegedly constitutes a violation;
- Sufficient time to prepare for an interview;
- A statement that the respondent is presumed not responsible; and
- Information about the parties' right to request disclosure of evidence.

Investigations

- Institutions would be required to conduct investigations of allegations set forth in a formal complaint.
  - Such investigations must be conducted even if a law enforcement report has been filed.
- Institutions would be permitted to halt the grievance process if allegations in the complaint do not constitute sexual harassment.
- During investigations, institutions would be required to:
  - Assume the burden of gathering evidence;
  - Allow both parties the unrestricted ability to present evidence;
  - Provide an equal opportunity for both parties to be accompanied to proceedings by advisors of their choice, although an advisor's participation could be limited by the institution;
  - Provide written notice and sufficient preparation time for any meetings related to the investigation or disciplinary process;
  - Provide equal access to evidence and an opportunity to respond to such evidence;
  - Disclose all requested evidence, even if such evidence will not be relied upon in reaching a determination; and
  - Produce an investigative report to be provided to both parties for review and response.
- Institutions would be required to provide for a live hearing and to allow advisors for both parties to ask relevant questions and cross-examine the other party and witnesses.
  - If a student does not have an advisor to conduct the cross-examination, the institution must provide an advisor aligned with that student.
  - Cross-examination would not be permitted to include questions about a complainant's sexual behavior or disposition, unless evidence of such behavior is offered to establish consent or to demonstrate that another party is responsible for committing the violation.
  - At the request of either party, an institution must permit cross-examination to occur with the parties located in separate rooms.
  - Institutions would not be allowed to rely on statements made by a party or witness who does not submit to cross-examination.
- In disciplinary proceedings, institutions would be allowed to choose between applying a preponderance of the evidence standard or a clear and convincing evidence standard.
  - Institutions that choose to use the preponderance of the evidence standard must apply the same standard of evidence to other misconduct subject to the same maximum disciplinary sanctions as sexual harassment violations; and
  - Institutions would be required to apply the same standard of evidence they select for complaints against students as they do for complaints against employees, including faculty.
Investigators or adjudicators would be required to issue a written determination regarding responsibility.

Institutions would have discretion to offer an appeals process.
  o If an institution chooses to allow appeals, it must provide the opportunity to appeal to both parties.

Institutions would have the option to facilitate an informal mediation process, such as mediation, in lieu of a full investigation and adjudication.
  o Before engaging in informal mediation, an institution would be required to disclose information about the process and receive voluntary written consent from the parties.

Institutions would be required to maintain complete records about all investigations and resolutions for three years.

Miscellaneous

The Department would be prohibited from assessing damages against institutions found to have violated Title IX, though the Department could still take other forms of remedial action.

The proposed regulations would clarify that Title IX does not require institutions to restrict speech or other conduct that would be protected by the First Amendment or constitutional due process requirements.

The proposed regulations would clarify that nothing in the Family Educational Rights and Privacy Act would preclude institutions from complying with the Title IX regulations.

Requirements related to publication of Title IX notices would be streamlined to reflect modern communication practices.

Religious institutions would no longer be required to submit written requests in order to invoke the religious exemption from Title IX regulations.