9 Things to Know about Betsy DeVos' Proposed Title IX Rule

On November 29th, 2018, the Department of Education ("ED") published a proposed regulation that would dramatically alter schools' responsibilities under Title IX, a federal law that bars recipients of federal funds from engaging in sex discrimination. You can read the proposal here. The publication of the proposed rule kicks off a formal notice and comment period. Students and their families can submit comments regarding the rule until 1/28/2019.

If you are interested in submitting a comment on the rule, you can do so through our online portal using our outline and easily available resources.

DeVos' proposed rule would have devastating consequences for students and their families. Specifically, the rule would:

1) Require schools to only investigate the most extreme forms of harassment and assault.

The Department of Education has proposed a definition of sexual harassment as "unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity."

As the American Civil Liberties Union notes, this definition would require schools to act only when the sexual violence or harassment **completely denies** a student access to education. That means students would be forced to endure repeated and escalating levels of abuse without being able to ask their schools for help. By the time their school would be legally required to intervene, it might be too late—the student might already be ineligible for an important AP course, disqualified from a dream college, or derailed from graduating altogether.

What ED Should Do Instead: The Department should adopt a standard that harassing conduct creates a hostile environment "if the conduct is sufficiently serious that it interferes with or limits a student's ability to participate in or benefit from the school's program." This definition, from ED's 2011 Dear Colleague Letter, appropriately recognizes that schools should never permit violence and harassment to interfere with students' education.

2) Allow schools to ignore sexual violence that occurs outside of a school program, such as off-campus apartments. The rule would also allow schools to eliminate protections for students studying abroad.

DeVos' proposed rules would narrow the definition of sexual harassment to include only conduct within a schools' programs or activities. If such a rule were finalized, Betsy DeVos could strip Title IX rights from survivors who are assaulted off-campus or outside of a school's educational

programs, even when the aftereffects of an assault impair their ability to learn. This rule would have grave consequences for the eighty-seven percent of college students and even more K-12 students who live off-campus.

The Department's proposal would also hurt students in study abroad programs, grant-funded trips, or university programs outside of the U.S by allowing their schools to limit Title IX protections to only students studying in the United States.

What ED Should Do Instead: Schools should be required to provide services to students who are assaulted off-campus or in a study abroad program when the violence interferes with their education. Schools should also be required to discipline perpetrators who assault students off-campus when the school exercises substantial control over them (i.e. they are also a student of the institution).

3) Let schools like Michigan State off the hook by increasing barriers to reporting sexual harassment and violence.

DeVos' proposal would only hold schools accountable for instances when its leadership was directly aware of sexual assault or harassment. Schools would have an incentive to make the process of reporting sexual assault unnecessarily burdensome, complex, or traumatic — deterring students from coming forward, and limiting the cases which their leaders have notice of discrimination. In other words, schools could ignore best practices and create an environment where survivors were intimidated out of reporting sexual assault — then disclaim responsibility because they chilled reports of harassment. Schools like Michigan State., Ohio State, and Baylor would be let off the hook, even when lower level employees intentionally buried reports regarding serial perpetrators.

What ED Should Do Instead: Survivors shouldn't need to navigate complex school bureaucracies to report sexual harassment. When a survivor decides to come forward to an employee of the school, the school should be held accountable for mishandling a report. Every employee should be aware of schools' procedures for handling sexual violence so that every survivor has the resources they need to succeed in school.

4) Permit schools to discriminate against survivors and adopt a "clear and convincing" standard only for sexual harassment complaints.

The Department's rule would allow schools to adopt a higher standard of proof for sexual harassment complaints, as opposed to other serious, nonsexual campus misconduct. When a school uses one standard for individuals who perpetrate physical assault or engage in discriminatory conduct but adopts a higher standard for sexual harassment, the school has discriminated by imposing different burdens on victims of similarly serious campus misconduct. This proposal relies on age-old stereotypes that women and girls "cry rape" and are less credible.

More generally, the proposed regulation would allow schools to directly weigh the education of an accused student more than a survivor. Preponderance of the evidence, the standard employed by the vast majority of schools and favored by the Bush and Obama Administrations, values the word of both parties equally. This standard is drawn from standards used in civil courts and recognizes

that a finding of non-responsibility can result in constructive expulsion, where survivors leave school to avoid seeing their perpetrator. DeVos' proposed rule pushes schools to adopt a "clear and convincing" standard, thereby indicating that the school is more concerned about the loss of the accused student's education than the survivor.

What Ed Should Do Instead: First, schools not be permitted to engage in discrimination and single out survivors for worse treatment. Second, schools should be required to adopt a preponderance of the evidence standard for sexual harassment cases, or else the school is discriminating by valuing the accused student's education more than the survivor's education.

5) Make it impossible for survivors to request that their perpetrator be moved out of their dorm or classes as an interim accommodation.

For many survivors, the effects of sexual violence and harassment are amplified in circumstances where they share residential spaces or classes with the perpetrator. Because the power differentials between the parties are lopsided, the burden of withdrawing from shared arrangements often falls on survivors, many of whom will affirmatively withdraw for fear of encountering the assailant. The Obama Administration recognized this reality and allowed schools to remove perpetrators from shared classes and living arrangements so that the survivor's education would not be further compromised by violence.

Betsy DeVos would ban schools from removing perpetrators from dorms or shared classes with survivors unless the survivor wins a disciplinary proceeding. Because few survivors opt for a formal proceeding, many students will be forced out of their classes and common spaces, thereby impairing their education further. The Department also requires schools to issue mutual no-contact orders, which could make survivors worse off than if they had not filed a complaint in the first place.

What Ed Should Do Instead: Schools should be able to remove accused students from dorms or shared classes before a full disciplinary proceeding when it is clear that the survivor's education will be harmed if the individual is not moved.

6) Allow schools to use unregulated "mediation" processes in lieu of investigations.

The proposed rule states that, "at any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication." If students choose an informal resolution, such as mediation, they cannot, at any point, return to a formal adjudication process, thus trapping them in a process that may not have their best interest at heart.

Although restorative justice practices may hold some promise in the context of sex discrimination, mediation does not require individuals to take responsibility for the harm that they have caused prior to participation in an informal resolution proceeding. As a result, facilitators engaged in a mediation proceeding (as opposed to restorative justice), may engage in conduct implying that survivors and perpetrators are equally at fault for experiences of intimate partner or acquaintance violence. Moreover, schools have monetary and reputational incentives to downplay claims of

violence and harassment, and in some cases have ave pressured survivors to participate in informal mediations.

What Ed Should Do Instead: The Department should fund research regarding community-based restorative justice programs, which would require perpetrators to admit responsibility for the harms they caused prior to participation. Expanding access to community-based restorative justice programs for college students and K-12 students would increase survivors' options and decrease the risk of coercion.

7) Require schools to establish live cross-examination, where an accused student's representative would be able to directly question a victim in real time.

The Department of Education would require institutions of higher education to provide for live cross-examination by a party's advisor of choice. This proposal is an improvement over a previously leaked draft rule, which allowed assailants to question victims directly, but we remain concerned that live cross examination, as opposed to written questions submitted to the hearing panel, will traumatize survivors and discourage them from reporting.

What Ed Should Do Instead: The Department of Education under the Obama Administration permitted panels to test parties' credibility through the submission of written questions to the hearing panel. This method strikes a balance between the need to test the strength of the evidence and the risk of re-traumatizing a complainant. The Department should permit schools to use a written submission model, as opposed to a live cross examination procedure.

8) Make it harder for students to know whether or not their school has claimed a religious exemption to Title IX

In the proposed rule, the Department states that a religious school may but is "not required to – seek assurance of its religious exemption by submitting a written request for such an assurance to the Assistant Secretary." The written assurances policy benefited students insofar as they could determine whether their school reserved the right to discriminate based on sex. In the absence of this information, students may decide to attend institutions without knowing whether their institution will discriminate against them.

What Ed Should Do Instead: The Department of Education should maintain a public list of schools that have sought religious exemptions so that students and the public are aware of their rights. The Department should also maintain requirements that schools submit written requests for religious exemptions.

9) Allow schools to delay investigations for unspecified periods when a concurrent law enforcement investigation is ongoing

The proposed rule establishes that "good cause" for delaying an investigation includes "concurrent law enforcement activity." Specifically, "if a concurrent law enforcement investigation has uncovered evidence that the police plan to release on a specific timeframe and that evidence would likely be material to determining responsibility, a recipient could reasonably extend the timeframe of the grievance process in order to allow that evidence to be included in the final

determination of responsibility." Under this position, it is possible that a school delay investigations for months, to the immediate detriment of the complainants' educational access.

What Ed Should Do Instead: The Department should maintain the position it adopted in the 2011 Dear Colleague Letter and make clear that a "school should not delay conducting its own investigation or taking steps to protect the complainant because it wants to see whether the alleged perpetrator will be found guilty of a crime." Furthermore, as the Dear Colleague Letter states, "schools should not wait for the conclusion of a criminal investigation or criminal proceeding to begin their own Title IX investigation and, if needed, must take immediate steps to protect the student in the educational setting."