

## SECRETARY DEVOS ANNOUNCES CHANGES TO TITLE IX DIRECTIVES REGARDING CAMPUS SEXUAL MISCONDUCT ALLEGATIONS

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### U.S. Tax-Exempt Organizations Alert

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On Thursday, September 7, 2017, Department of Education Secretary DeVos announced that the Department will launch a notice-and-comment process to incorporate the "insights of all parties" in creating new directives that govern how higher education institutions deal with campus sexual assault allegations. Although Secretary DeVos did not state whether the Department would eventually issue new rules, interpretations, or guidance, she did stress that "educational institutions have a responsibility to protect every student's right to learn in a safe environment and to prevent unjust deprivations of that right." [1] Secretary DeVos's announcement was significant, in at least three respects.

First, DeVos criticized the Office of Civil Rights' previously issued Dear Colleague Letters, which were issued without notice and comment and provided guidance to institutions on responding to issues of campus sexual assault. Guidance documents, like the Dear Colleague Letters, that have been issued without notice and comment can generally be rescinded without notice and comment. [2] By stating that the "era of 'rule by letter' is over," Secretary DeVos may have suggested that the Department may rescind its existing guidance while it begins the notice-and-comment process as to new directives. If that were to occur, there will be questions as to exactly how the Department will inform schools of their current Title IX obligations—for example, whether it will propose interim measures or other guidance.

Second, there will likely be changes with respect to the Department's directives on investigating and adjudicating sexual assault incidents. As Secretary DeVos stated, individuals, institutions, and organizations have voiced concerns and suggestions as to how institutions of higher education should respond to sexual assault allegations. She specifically cited an open letter from Harvard's law faculty, recommendations from the American College of Trial Lawyers, and recommendations from the American Bar Association. She also called attention to an alternative model: a proposed regional investigation and adjudication center for responding to incidences of campus sexual assault that would involve a "voluntary, opt-in Center where professionally-trained experts handle Title IX investigations and adjudications." [3]

Third, Secretary DeVos's announcement does not change the basic obligation of colleges and universities to address instances of sexual assault and gender-based harassment on campus, which remain a serious concern. Colleges and universities continue to risk losing federal funding, being subject to government investigations, or defending private lawsuits for violating Title IX. And colleges and universities remain practically incentivized to address instances of sexual assault and harassment in a broader effort to improve campus safety and protect their students from harm. Such measures improve recruitment, student retention, institutional development,

student success and morale. The announcement does, however, indicate that colleges and universities are likely to face a new set of directives on how they are to deal with campus sexual assault allegations.

The notice-and-comment process provides an opportunity for educational institutions to bring to bear their experience and learning based on the Dear Colleague Letters and seek a solution that improves student safety in an administrable and stable manner.

**Notes:**

[1] Betsy DeVos, U.S. Secretary of Education, Address at George Mason University's Antonin Scalia Law School (Sept. 7, 2017), <https://www.ed.gov/news/speeches/secretary-devos-prepared-remarks-title-ix-enforcement>.

[2] See *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1206 (2015).

[3] DeVos, *supra* note 1. See generally, Gina Maisto Smith & Leslie M. Gomez, *The Regional Center for Investigation and Adjudication: A Proposed Solution to the Challenges of Title IX Investigations in Higher Education*, 120 PENN STATE L. REV. 977 (2016).

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