Department of Education withdraws Obama-era Title IX Guidance: What does it mean going forward?

By Michael J. Cooney, Tina Sciocchetti, and Steven M. Richard

In a major policy speech on September 7, Education Secretary Betsy DeVos announced the Trump administration’s intention to rescind Obama administration mandates regarding the investigation, adjudication and resolution of student-on-student sexual misconduct cases. Fifteen days later, on September 22, the Department of Education’s Office for Civil Rights (OCR) issued a Dear Colleague Letter (DCL) implementing such action by withdrawing the statements of policy and guidance reflected in (1) the April 4, 2011 DCL on Sexual Violence and (2) Questions and Answers on Title IX and Sexual Violence dated April 29, 2014. In doing so, OCR opines that, “while well-intentioned,” these guidance documents have deprived rights for both complainants and respondents, and left colleges and universities facing “a confusing and counterproductive set of regulatory mandates.” Going forward, the Department of Education will not rely upon these withdrawn documents in its Title IX enforcement.

The newly issued DCL stresses that the “Department’s enforcement efforts proceed from Title IX itself and its implementing regulations.” OCR criticizes the withdrawn documents for imposing “regulatory burdens” without notice and public comment. The DCL refers colleges and universities to OCR’s Revised Sexual Harassment Guidance, issued in January 2001 following a notice-and-comment process,1 and the reaffirmation of the 2001 Guidance in a DCL on Sexual Harassment dated January 25, 2006.2 The Department intends to engage in rulemaking on the topic of schools’ responsibilities concerning sexual misconduct, including peer-on-peer sexual harassment and sexual misconduct. In the interim, OCR has issued a Q&A on Campus Sexual Misconduct, which along with the Revised Sexual Harassment Guidance, “provide information about how OCR will assess a school’s compliance with Title IX.” Below, we analyze the Q&A, noting particularly where OCR moves away from the Obama-era mandates.

1 The 2001 Guidance may be viewed at https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf
2 The January 25, 2006, DCL may be viewed at https://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html.
Responsibility to address sexual misconduct

The Q&A reiterates that, under OCR’s administrative regulatory oversight, a school must take steps to understand what occurred and respond appropriately where it “knows or reasonably should know of an incident of sexual misconduct,” regardless of whether a student files a complaint or otherwise asks the school to take action. It is important to recognize that this administrative requirement, which necessitates remedial action upon either actual or constructive notice of an incident, is broader than the liability standard applied in Title IX lawsuits. In a private Title IX cause of action seeking damages, a funding recipient can be held liable only when it is deliberately indifferent to sexual harassment or assault of which it has actual, not merely constructive, knowledge.

Interim measures

Respondents and their advocates have complained that the 2011 DCL and 2014 Q&A prompted schools to act too quickly in imposing unfair and unequal interim measures, particularly in instances of the immediate removal or suspension of an accused student. The Q&A stresses that interim measures must be balanced and fairly applied, continually monitored and adjusted as appropriate. The range of interim measures include “counseling, extensions of time or other course-related adjustments, modifications of work or class schedules, campus escort services, restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of campus, and other similar accommodations.”

OCR prescribes that interim measures must not be imposed on fixed rules or operating assumptions favoring one party and must not be made available to solely one party. Particularly, schools must avoid actions that could promote presumptions of responsibility of the accused student. All appropriate efforts should be made to “avoid depriving any student of her or his education.” OCR has sent a clear signal that schools must weigh all reasonably available options and conduct careful threat assessments when imposing interim measures, especially where a school is considering the necessity to separate a student from campus resources and perhaps from the campus entirely.

Time frame for a “prompt” investigation

OCR will no longer apply any presumption that an investigation should be completed within 60 calendar days. There is no fixed or presumed time frame under which a school should complete a Title IX investigation. This demonstrates the importance of evaluating interim measures, where an investigation may span several months and into another semester or school year.

Equitable process

When a school commences an investigation, “the burden is on the school—not the parties—to gather sufficient evidence to reach a fair, impartial determination as to whether sexual misconduct has occurred and, if so, whether a hostile environment has been created that must be redressed.” OCR stresses the need to employ properly trained and qualified investigators to obtain and evaluate all available evidence (both inculpatory and exculpatory), which must be viewed based upon “the unique and complex circumstances of each case.” Without addressing any particular scenario or hypothetical case, OCR appears to warn colleges and universities that their investigations should pursue all reasonably available means to acquire relevant evidence that can often be difficult to obtain, such as text messages or social media postings. OCR also warns that restrictions such as “gag orders” likely constrain students in their ability to obtain or present evidence.
Upon opening the investigation, a school should provide written notice to the responding party of the alleged policy violations, with sufficient details and time to prepare a response before the initial interview. Sufficient details should include the identity of involved parties, the applicable code of conduct violations, the precise conduct that could be deemed to be a code violation and the date and location of the alleged incident. Here, OCR makes clear that notice of violation letters must not be generically written and that an accused student should have ample details and notice before answering questions posed in an investigation interview.

The written investigation report should summarize both the relevant exculpatory and inculpatory evidence. The complainant and respondent should have the opportunity to respond to the report in writing before a decision and/or at a live hearing to determine responsibility. Any process made available to one party in the adjudication procedure should be equally available to the other party.

**Informal resolutions**

In another significant shift from the 2011 DCL and 2014 Q&A, OCR states that schools may facilitate informal resolution measures (such as mediation) if all parties agree voluntarily to participate after receiving a full disclosure of the allegations and options for formal resolution and if a school determines the Title IX complaint is appropriate for such voluntary resolution. When making this evaluation, we recommend that schools consider the severity of the allegations, the potential for further incidents or retaliatory conduct and any apparent factors impacting a student’s informed decision-making (e.g., trauma or peer pressure).

**Standard of evidence**

In what may become the most widely discussed change, the Q&A states that findings of fact and conclusions in sexual misconduct adjudications “should be reached applying a preponderance of the evidence standard or a clear and convincing evidence standard.” No longer will schools be required to apply the preponderance standard. Decision-makers should be carefully trained to understand precisely the applicable quantum of proof, particularly if the school elects to change to the clear and convincing standard.

Further, citing to fairness principles, OCR mandates that the applicable standard of evidence in a sexual misconduct case must be the same as other student misconduct cases. “When a school applies special procedures in sexual misconduct cases, it suggests a discriminatory purpose and should be avoided.”

**Notice of the outcome**

A school must provide concurrent written notice of the disciplinary outcome to the complainant and respondent. OCR does not prescribe a template or suggested details. While the content will vary based upon the underlying allegations and the institution, it must include “any initial, interim, or final decision by the institution; any imposed sanctions; and the rationale for the result and the sanctions.” OCR is directing its concerns regarding disciplinary decisions written merely in boilerplate or generalized terms. Findings and conclusions should be sufficiently detailed to inform the students of the adjudication and reasoning.
**Appeals**

If a school allows appeals from decisions regarding responsibility and/or disciplinary sanctions, it may elect to allow an appeal solely by the responding party or by both parties, in which case any appeal procedures must be equitably available and applied. This election is a departure from the 2011 DCL and 2014 Q&A prescribing that if a school allows appeals, it must do so equally for both parties.

**Clery Act obligations**

OCR reminds colleges and universities that, in addition to their Title IX responsibilities, they must simultaneously adhere to their Clery Act obligations, citing particularly to the recent changes enacted under the Violence Against Women Reauthorization Act of 2013.

**Resolution agreements**

Since the 2011 DCL, many colleges and universities have been the subject of Title IX administrative complaints and OCR investigations. Some OCR’s investigations have resulted in resolution agreements. The Q&A states that all resolution agreements remain binding upon the signatory schools. They are, however, fact specific and non-binding upon other schools.

**Will this be a seismic shift?**

While the DCL and Q&A will prompt a reexamination of Title IX policies and complaint processes (e.g., electing to apply a clear and convincing standard or limiting appeals to respondents), the mandates reinforce what schools may be largely implementing under the training and guidance of their Title IX officers. OCR has reminded us that Title IX compliance is not a static process. Each sexual misconduct complaint and resulting process raises individualized concerns in the equitable application of policy provisions.

Among our initial thoughts upon reviewing the DCL and Q&A, it will be interesting to see their impact upon existing lawsuits filed by both complainants and respondents. Pending lawsuits are focusing extensively on schools’ actions in their implementation of the 2011 DCL and 2014 Q&A. How will judges consider and weigh OCR’s criticism of the now withdrawn guidance documents? At least in the short term, the judicial playing field in the proliferation of sexual misconduct lawsuits could become more uncertain.

Also, colleges and universities must still adhere to state law obligations, such as those enacted in California, Illinois and New York. Many state law provisions were largely enacted to follow or expand upon the Obama administration’s directives. How state law requirements will be reconciled with OCR’s mandates going forward remains to be seen, which will likely result in lawsuits posing vexing questions addressing the extent to which federal and state mandates conflict and whether they can be reconciled.

We will continue to analyze and report on the impacts of the Trump administration’s Title IX directives, starting with the newly issued DCL and Q&A.

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