"Dear Colleague . . . "

Insights
10.01.12

With that disarming salutation, a little over a year ago Vice President Joe Biden and Secretary of Education Arne Duncan announced new Department of Education mandates, issued under Title IX of the Education Amendments of 1972, to eliminate sexual assault on American campuses. Simply worded, but vastly complex as well as controversial in application, Title IX prohibits sex discrimination in public and private K-12 schools and universities that receive any federal financial assistance.

The Background
Speaking at the University of New Hampshire, Vice President Biden said: "Students across the country deserve the *safest possible environment* in which to learn. That's why we're taking *new steps* to help our nation's schools, universities, and colleges end the *cycle of sexual violence* on campus." [emphasis added]. Achieving the safest possible environment implicates a zero tolerance standard for, or for what may be perceived and alleged as, sexual violence.

Speaking more bluntly, the Vice President amplified the focus of these new steps: "Rape is rape is rape, and the sooner universities make that clear, the sooner we'll begin to make progress on campuses." Thus, the Dear Colleague requirements have as their object the eradication of sexual violence on campus, but reflect the government's apparent belief that secondary and higher education forgives or condones campus rape. Many see the government's redefinition of sexual assault from a state criminal issue to a federal sex discrimination issue as a radical administrative intrusion into local criminal law enforcement.

If you didn't notice the government's strident tone, if you haven't paid attention to the new Department of Education guidelines, if you haven't ensured that your internal policies (which you must have) are compliant, and if you haven't trained your Title IX Coordinators on their new responsibilities, your school is not in compliance and is at significant risk. The Dear Colleague guidelines are not suggestions; they are mandatory, coercive requirements that you must install and follow as a condition of taking federal money.

Insurance carriers for schools and universities are very concerned that inadequate responses to the Dear Colleague standards by their insureds will lead to increased liability for sexual assault. They are also concerned that the Dear Colleague requirements themselves will encourage increased litigation from alleged victims and also – as an unintended consequence –*from those falsely*

Copyright © 2024 Fisher Phillips LLP. All Rights Reserved.

accused and convicted of sexual assault in the new school court system. There is nothing to prevent a falsely-accused and wrongly-punished student or faculty member from seeking judicial vindication in the state court system, where the school does not control the process. This very real risk calls for extreme care in planning and carrying out the school investigatory and disciplinary process.

The reason for concern lies in the six primary requirements of the Dear Colleague letter. When a sexual assault is reported, the school must; 1) immediately and appropriately investigate the incident; 2) take prompt and effective steps to end any sexual violence that it discovers, to prevent any recurrence, and to address its effects, regardless of any contemporaneous state or local criminal investigation; 3) protect the complainant; and 4) provide a fair grievance forum and procedure for students to file complaints of sex discrimination, including sexual violence, and the process has to provide for presenting witnesses and evidence and for an appeal for both the victim and the accused.

The next requirement is especially troublesome. The school's grievance procedure must 5) apply the *civil* law "preponderance of the evidence" standard to evaluate and resolve what are in truth complaints of alleged *criminal* behavior. The "preponderance" standard means simply whether it is more likely than not that an assault occurred. In contrast to the "beyond a reasonable doubt" standard that would be applicable in any parallel criminal trial, this evidentiary hurdle is very low and is easily manipulated. Finally, the school must 6) notify both parties of the outcome of its investigation.

While a school cannot deprive a student or a faculty member of liberty for a finding of guilt in this low threshold process, it can impose any of its arsenal of punishments, including expulsion of a student and dismissal of a faculty member. Lives can be ruined and careers can be destroyed in resolving the invariable "she said, he said" dispute by mistakenly "weighing" the evidence and concluding that it is 1% more likely than not that an assault occurred. Hence, the importance of taking these obligations very seriously.

The Actions You Need To Take

Regardless of whether you agree with the new rules, don't ignore them. If your school's policy has not been reviewed and modified to conform with these requirements, your process is tainted and will result in a tainted investigation and a flawed grievance. That in turn could result in liability for your school.

Once a school official is aware of conduct violating Title IX and reacts indifferently to it, perhaps by not ensuring compliance with the Dear Colleague letter, the school is subject to monetary liability. Schools should not take solace in the fact that the Department of Education has never revoked federal funding for a Title IX violation, which historically has been seen as the ultimate sanction; the risk is in private lawsuits, involving significant claims.

Copyright © 2024 Fisher Phillips LLP. All Rights Reserved.

What should you do? There are two immediate tasks. First, ensure that your internal policies are up-to-date and in compliance with the Dear Colleague requirements. Second, once the policies are compliant and in place, ensure that your Title IX Coordinators are appropriate for those positions and know their specific responsibilities. You will have to train the Coordinators; on-the-job training is pointless unless the Coordinators know what to do in the first instance.

Remember, in any Title IX lawsuit, the first questions are going to be "what process do you have in place to ensure proper investigation and resolution of reported sexual assault claims," and "what did you do throughout the investigation that shows your understanding of and compliance with that process?"

If you can't point to anything that is compliant with Title IX and its Dear Colleague obligations, you will not be able to answer those questions, and you likely will lose.

For more information contact the author at BDodd@fisherphillips.com or 404.231.1400.

Related People

Burton F. Dodd
Partner & General Counsel
404.240.4226
Email

Copyright © 2024 Fisher Phillips LLP. All Rights Reserved.