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- Designs and delivers training programs on a host of education issues, including Title IX compliance obligations; legal issues in faculty hiring, promotion, and tenure revocation; and managing risk in student affairs.
- Retained by the National Center for Campus Public Safety to serve as a faculty member for its Trauma-Informed Sexual Assault Investigation and Adjudication training program for campus officials.
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- 2011 DCL & 2014 Q&A Rescinded
- “The 2011 and 2014 guidance documents may have been well-intentioned, **but those documents have led to the deprivation of rights for many students** — both accused students denied fair process and victims denied an adequate resolution of their complaints . . . Instead, schools face a confusing and counterproductive set of regulatory mandates, **and the objective of regulatory compliance has displaced Title IX’s goal of educational equity.**”
- “The Department imposed these regulatory burdens without affording notice and the opportunity for public comment. Under these circumstances, the Department has decided to withdraw the above-referenced guidance documents in order to develop an approach to **student sexual misconduct** that responds to the concerns of stakeholders and **that aligns with the purpose of Title IX to achieve fair access to educational benefits.**

Rulemaking

“The Department of Education intends to engage in rulemaking on the topic of **schools’ Title IX responsibilities concerning complaints of sexual misconduct, including peer-on-peer sexual harassment and sexual violence.**”

- VAWA: 13 months



“Interim Guidance”

“In the interim, these questions and answers—along with the Revised Sexual Harassment Guidance previously issued by the Office for Civil Rights—provide information about **how OCR will assess a school’s compliance with Title IX.**”

OCR Instructions to the Field re Scope of Complaints

Regional Directors:

These Instructions set forth new internal guidance regarding the scope of the investigation of all OCR cases. This guidance is effective immediately and applies to all complaints currently in evaluation or investigation, as well as newly-filed complaints. These Instructions shall be applied consistently with OCR’s Case Processing Manual (CPM), and if any questions arise about how to apply these Instructions consistently with the CPM, please contact your designated Enforcement Director for clarification.

Effective immediately, there is no mandate that any one type of complaint is automatically treated differently than any other type of complaint with respect to the scope of the investigation, the type or amount of data needed to conduct the investigation, or the amount or type of review or oversight needed over the investigation by Headquarters. There is no longer a “sensitive case” or “call home” list; rather, Headquarters and the Regional Offices (Regional Director) will consult regularly to determine on a case-by-case basis whether complex or problematic investigations require Headquarters review or intervention and when trends emerge that require Headquarters oversight or direction. Cases are retroactive and can/will be returned to the respective Regional Office if the RD feels a case can be adjudicated at the regional level.

Is the Era of Rule By Letter Over?

The Department refers you to the *Q&A on Campus Sexual Misconduct*, issued contemporaneously with this letter, and will continue to rely on its *Revised Sexual Harassment Guidance*, which was informed by a notice-and-comment process and issued in 2001,³ as well as the reaffirmation of that *Guidance* in the Dear Colleague Letter on Sexual Harassment issued January 25, 2006.⁴ As always, the Department's enforcement efforts proceed from Title IX itself⁵ and its implementing regulations.⁶

³ The *Revised Sexual Harassment Guidance* is available at <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html>.

⁴ The 2006 Dear Colleague Letter is available at <https://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html>.

⁵ 20 U.S.C. §§ 1681-88.

⁶ 34 C.F.R. § 106.1 *et seq.*; *see also* 34 C.F.R. § 668.46(k) (implementing requirements of the Violence Against Women Act).

“What is the nature of a school’s responsibility to address sexual misconduct?”

- “Whether or not a student files a complaint of alleged sexual misconduct or otherwise asks the school to take action, where the school knows or reasonably should know of an incident of sexual misconduct, the school must take steps to **understand what occurred** and to respond appropriately. In particular, when sexual misconduct is so severe, persistent, or pervasive as to deny or limit a student’s ability to participate in or benefit from the school’s programs or activities, a hostile environment exists and the **school must respond.**”

Interim Measures

Interim Guidance

- “In **fairly** assessing the need for a party to receive interim measures, **a school may not rely on fixed rules or operating assumptions that favor one party over another, nor may a school make such measures available only to one party.** Interim measures should be individualized and appropriate based on the information gathered by the Title IX Coordinator, **making every effort to avoid depriving any student of her or his education.** The measures needed by each student may change over time, and the Title IX Coordinator should communicate with each student throughout the investigation to ensure that any interim measures are necessary and effective based on the students’ evolving needs.

2011 DCL

- Title IX requires a school to take steps to **protect the complainant as necessary**, including taking interim steps before the final outcome of the investigation . . . The school should notify the complainant of his or her options to avoid contact with the alleged perpetrator and allow students to change academic or living situations as appropriate. For instance, the school may prohibit the alleged perpetrator from having any contact with the complainant pending the results of the school’s investigation. When taking steps to separate the complainant and alleged perpetrator, **a school should minimize the burden on the complainant**, and thus should not, as a matter of course, remove complainants from classes or housing while allowing alleged perpetrators to remain.

Grievance Procedures

A school must adopt and publish grievance procedures that provide for a prompt and equitable resolution of complaints of sex discrimination . . . OCR has identified a number of elements in evaluating whether a school's grievance procedures are prompt and equitable, including whether the school:

1. Provides notice of the school's grievance procedures, including how to file a complaint, to students, parents of elementary and secondary school students, and employees;
2. Applies the grievance procedures;
3. Ensures an adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence;
4. Designates and follows a reasonably prompt time frame for major stages of the complaint process;
5. Notifies the parties of the outcome of the complaint; and
6. Provides assurance that the school will take steps to prevent recurrence of sexual misconduct and to remedy its discriminatory effects, as appropriate.

What Constitutes a “Prompt” Investigation?

“There is no fixed time frame under which a school must complete a Title IX investigation. OCR will evaluate a school’s good faith effort to conduct a fair, impartial investigation in a timely manner designed to provide all parties with resolution.”



What Constitutes an “Equitable” Investigation?

- “burden is on the school—not on the parties—to gather sufficient evidence to reach a fair, impartial determination”
- “A person free of actual or reasonably perceived conflicts of interest and biases for or against any party must lead the investigation on behalf of the school.”
- “Schools should ensure that institutional interests do not interfere with the impartiality of the investigation.” X2
- “An equitable investigation of a Title IX complaint requires a trained investigator to analyze and document the available evidence to support reliable decisions, objectively evaluate the credibility of parties and witnesses, synthesize all available evidence—including both inculpatory and exculpatory evidence—and take into account the unique and complex circumstances of each case.”

What Constitutes an “Equitable” Investigation?

- “Restricting the ability of either party to discuss the investigation (e.g., through “gag orders”) is likely to deprive the parties of the ability to obtain and present evidence or otherwise to defend their interests and therefore is likely inequitable.”
- “Training materials or investigative techniques and approaches that apply sex stereotypes or generalizations may violate Title IX and should be avoided so that the investigation proceeds objectively and impartially.”
- “Once it decides to open an investigation that may lead to disciplinary action against the responding party, a school **should provide written notice** to the responding party of the allegations constituting a potential violation of the school’s sexual misconduct policy, including sufficient details and with sufficient time to prepare a response **before any initial interview**. Sufficient details include the identities of the parties involved, the specific section of the code of conduct allegedly violated, the precise conduct allegedly constituting the potential violation, and the date and location of the alleged incident.”
- “The investigation should result in a written report summarizing the relevant exculpatory and inculpatory evidence. The reporting and responding parties and appropriate officials must have timely and equal access to any information that will be used during informal and formal disciplinary meetings and hearings.”

Notice

- “**Once it decides to open** an investigation that may lead to disciplinary action against the responding party, a school should provide written notice to the responding party of the allegations constituting a potential violation of the school’s sexual misconduct policy, **including sufficient details and with sufficient time to prepare a response before any initial interview. Sufficient details include the identities of the parties involved, the specific section of the code of conduct allegedly violated, the precise conduct allegedly constituting the potential violation, and the date and location of the alleged incident.**”
- “Each party should receive written notice **in advance of any interview or hearing with sufficient time to prepare for meaningful participation.** The investigation should result in a written report summarizing the relevant exculpatory and inculpatory evidence. The reporting and responding parties and appropriate officials must have **timely and equal access** to any information that will be used during informal and formal disciplinary meetings and hearings.”

Informal Resolution

- “If all parties voluntarily agree to **participate** in an informal resolution that does not involve a full investigation and adjudication after receiving a full disclosure of the allegations and their options for formal resolution and if a school determines that the particular Title IX complaint is appropriate for such a process, the school **may** facilitate an informal resolution, including mediation, to assist the parties in reaching a voluntary resolution.”
- What about when respondent is faculty? Minor incident?
- Dating/domestic violence.

Grievance procedures may include informal mechanisms for resolving sexual harassment complaints to be used if the parties agree to do so.¹⁰⁹ OCR has frequently advised schools, however, that it is not appropriate for a student who is complaining of harassment to be required to work out the problem directly with the individual alleged to be harassing him or her, and certainly not without appropriate involvement by the school (e.g., participation by a counselor, trained mediator, or, if appropriate, a teacher or administrator). In addition, the complainant must be notified of the right to end the informal process at any time and begin the formal stage of the complaint process. In some cases, such as alleged sexual assaults, **mediation** will not be appropriate even on a voluntary basis. Title IX also permits the use of a student disciplinary procedure not designed specifically for Title IX grievances to resolve sex discrimination complaints, as long as the procedure meets the requirement of affording a complainant a “prompt and equitable” resolution of the complaint.

What Procedures Should a School Follow?

- “The investigator(s), or separate decision-maker(s), with or without a hearing, **must** make findings of fact and conclusions as to whether the facts support a finding of responsibility for violation of the school’s sexual misconduct policy.”
- “The findings of fact and conclusions should be reached by applying either a preponderance of the evidence standard or a clear and convincing evidence standard.”
- The decision-maker(s) **must** offer each party the same meaningful access to any information that will be used during informal and formal disciplinary meetings and hearings, including the investigation report. The parties **should** have the opportunity to respond to the report in writing in advance of the decision of responsibility and/or at a live hearing to decide responsibility.

What Procedures Should a School Follow?

- “Any process made available to one party in the adjudication procedure should be made equally available to the other party (for example . . . the right to cross-examine parties and witnesses or to submit questions to be asked of parties and witnesses).”
- “In such disciplinary proceedings and any related meetings, the institution may [n]ot limit the choice of advisor or presence for either the accuser or the accused’ but ‘may establish restrictions regarding the extent to which the advisor may participate in the proceedings.’”
- “Schools are cautioned to avoid conflicts of interest and biases in the adjudicatory process and to prevent institutional interests from interfering with the impartiality of the adjudication.”

Appeal Rights

“If a school chooses to allow appeals from its decisions regarding responsibility and/or disciplinary sanctions, the school may choose to allow appeal (i) solely by the responding party; or (ii) by both parties, in which case any appeal procedures must be equally available to both parties.”

The revised provisions related to institutional disciplinary proceedings in cases of alleged dating violence, domestic violence, sexual assault, and stalking would protect the accuser and the accused by ensuring equal opportunities for the presence of advisors at meetings and proceedings, an equal right to appeal if appeals are available, and the right to learn of the outcome of the proceedings. Victims of these crimes would gain the benefit of a written explanation of their rights and options.

8 Take-Aways & Questions

1. What will new regulations look like (direct cross-examination, “double jeopardy,” “clear and convincing”)?
2. Why rulemaking (are big changes in the offing)?
3. Is there peril in the interim?
4. How long will the interim last?
5. Remember what this is and what it is not.
6. Important to keep on top of developing case law.
7. State law – is there a conflict brewing?
8. “Because the 2011 DCL said so” won’t cut it anymore – revisit standard, appeals, etc. -- **THAT DOES NOT MEAN YOU ARE COMPELLED TO MAKE CHANGES.**

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