



Education Secretary Rescinds Obama-Era Campus Sexual Assault Guidance

Insights

9.22.17

In a long-anticipated move, the United States Department of Education Office for Civil Rights withdrew the Obama Administration's 2011 Dear Colleague Letter on Sexual Violence this morning, as well as its Questions and Answers on Title IX and Sexual Violence. It also issued a replacement "Q&A on Campus Sexual Misconduct," which will provide institutions with guidance on an interim basis pending formal regulations to be issued by the Department.

The following are some of the more notable points from the new Q&A:

60-Day Investigation Timeframe Rejected

The Office for Civil Rights (OCR) rejected the 60-day recommended timeframe for completing investigations and instead indicated "there is no fixed time frame under which a school must complete a Title IX investigation." Rather, "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."

Burden On School

According to OCR, "in every investigation conducted under the school's grievance procedures, the burden is on the school – not on 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."

Broad Confidentiality Requirements Orders Frowned Upon

OCR indicated that "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."

Written Notices Explained

With respect to written notice of charges, OCR makes plain that "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." Along those lines, similar written notice is to be provided in advance of any student conduct hearing.

Informal Resolutions On The Table

OCR opened up the possibility for “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”

“Clear And Convincing” Evidence Standard Acceptable

Similarly, schools are no longer required to use a preponderance of evidence standard and may also use a clear and convincing evidence standard. Regardless, the standard employed should be “consistent with the standard the school applies in other student misconduct cases.”

Limited Appeals Approved

Finally, OCR has confirmed that schools can be allowed to offer appeals solely to respondents.

What Should Your Institution Do Now?

In sum, the interim guidance continues to require institutions covered by Title IX to respond to allegations of sexual assault. With that said, it also affords institutions with more flexibility in how to approach several significant aspects of this work, while at the same time providing specific guidance on due process protections institutions must employ.

The Fisher Phillips [Higher Education Practice Group](#) will conduct a detailed free webinar on this new guidance on Wednesday, September 27, 2017, at 12:00 p.m. EDT. [Click here](#) to register for this event.

For more information, contact any member of our [Higher Education Practice Group](#) or your regular Fisher Phillips attorney.

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Industry Focus

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