

PUBLICATION

DOE Replaces Obama Title IX Guidance with New, Interim Q&A Document

September 26, 2017

As predicted in our previous update, the Office for Civil Rights (OCR) of the U.S. Department of Education (DOE) rolled out its first wave of changes to the Obama Administration's Title IX guidance on Friday, September 22. Via a letter from Acting Assistant Secretary for Civil Rights Candice Jackson, OCR withdrew what it characterized as the "widely criticized" 2011 Dear Colleague Letter and 2014 Q&A Title IX guidance from the Obama-era OCR and issued a new Title IX Q&A document to serve as interim guidance until the DOE circulates new sexual misconduct rules through the regulatory notice-and-comment process in the near future.

Effects of New Guidance

In announcing the changes on Friday, OCR reiterated many long-standing aspects of the law. For instance, institutions are still required to have clearly formulated Title IX policies and procedures and must give notice of those policies so affected parties know how to file a complaint. Additionally, institutions are still required to conduct "adequate, reliable, and impartial investigation[s] of complaints, including the opportunity to present witnesses and other evidence," which include "[r]easonably prompt time frame[s] for major stages of the complaint process." OCR also reiterated that all parties are entitled to notification of the outcome of an investigation and that institutions must redress sexually-hostile environments in ways that mitigate the effects of sexual misconduct and provide a safe community and educational environment. In the new Q&A, OCR also reiterated the Supreme Court's well-established standard for when a school is responsible for redressing a hostile environment on campus or in a school's educational program or activity: "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."

The OCR Q&A changed certain recommendations that had been contained in the withdrawn 2011 guidance, and some of those changes have received attention on social media. Most notably:

- OCR clarified that schools must complete a Title IX investigation in a "prompt" manner, but not necessarily within 60 days;
- OCR stated that a school's "findings of fact and conclusions [in a Title IX investigation] should be reached by applying either a preponderance of the evidence standard or a clear and convincing evidence standard" ... "consistent with the standard the school applies in other student misconduct cases;" and
- The new Q&A permits schools to allow appeals "solely by the responding party."

Less impactful changes include an emphasis on free speech, a limit on "gag orders" imposed by a school during an investigation, an emphasis on each party's right to conduct cross-examinations in some form, and a more liberal ability to use informal resolutions if both parties voluntarily agree to such a process.

In general, the new Q&A loosened some of the specificity contained in the Obama-era guidance, but schools committed to the progress they have made over the last several years are unlikely to implement major changes on a permissive basis.

What the New Guidance Did Not Do

Contrary to social media and trending news reports, the interim Q&A guidance does **not** mandate the use of a heightened "clear and convincing" evidence standard. Although schools may choose to employ that standard, we have not heard any report of a school making such a change to its policy for determining responsibility for a potential policy violation.

Additionally, the guidance did **not** change schools' jurisdiction for off-campus incidents: "Schools are responsible for redressing a hostile environment that occurs on campus even if it relates to off-campus activities."

What This Means for You

At this time, OCR's interim guidance remains just that – interim guidance and not binding law. For clients with whom we have worked to develop Title IX policies and procedures, we recommend that you stay the course for now, as these Washington, D.C. developments do not impair your policies. Our recommended processes will continue to include the prompt and impartial investigation of all allegations of sexual misconduct, fair processes for all parties, and comprehensive support systems that encourage survivors, bystanders and others to feel safe in coming forward, knowing they will be supported and taken seriously. We remain committed to protecting and preserving the safety, well-being and respect for all students, faculty and staff. Particular recommendations in light of the new interim guidance include:

- Schools should continue to utilize the preponderance of the evidence standard for determining responsibility for potential policy violations in Title IX cases;
- Schools should continue to permit appeals by both parties, not "solely by the responding party," in the interests of fairness; and
- We recommend rejecting the permissive guidance that "a school *should* provide written notice to the responding party ... *before any initial interview* [that] ... include[s] the identities of the parties involved [and their personally-identifiable information]," as that approach may lead to violations of the Family Educational Rights and Privacy Act of 1974 (FERPA). Consistent with FERPA, a school should provide that type of equal access to information only after it determines that such information "*will be used* during informal and formal *disciplinary meetings and hearings*," which do not necessarily include initial fact-finding interviews.

Next Steps

We will continue to keep you informed about forthcoming proposed rules that the DOE will submit for the regulatory notice-and-comment process.

If you have any questions or would like to discuss your Title IX policies and procedures in light of these recent changes, please contact any of the members of our Higher Education Team.