

LEGAL UPDATES

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## U.S. Department of Education Withdraws Title IX Guidance

On Friday, September 22, 2017, Acting Assistant Secretary for Civil Rights Candice Jackson issued a letter formally “withdrawing the statements of policy and guidance” reflected in the U.S. Department of Education’s April 2011 Dear Colleague Letter concerning sexual violence and its April 2014 Questions and Answers on Title IX and Sexual Violence. Ms. Jackson’s letter indicates that the Department’s Office for Civil Rights (OCR) will “not rely on the withdrawn documents in its enforcement of Title IX” and will instead rely on its 2001 Revised Sexual Harassment Guidance and January 2006 Dear Colleague Letter on sexual harassment. Ms. Jackson’s letter also indicates the Department’s intent to undergo a new public rulemaking process which will result in an “approach to student sexual misconduct that responds to the concerns of stakeholders and that aligns with the purpose of Title IX to achieve access to educational benefits.” The letter is accompanied by a document titled “Q&A on Campus Sexual Misconduct,” intended to provide interim guidance related to the Department’s enforcement positions. Notably, this guidance emphasizes that schools must continue to meet their legal obligations under the Clery Act, which includes amendments by the Violence Against Women Reauthorization Act of 2013 and accompanying regulations.

Ms. Jackson’s letter is notable for its critique that the now-withdrawn 2011 Dear Colleague Letter and 2014 Questions and Answers created new mandates “without affording notice and the opportunity for public comment.” In addition, the letter criticizes the prior guidance as leading to a “deprivation of rights for many students” and failing to provide “clarity for educational institutions.” Among other critiques, Ms. Jackson notes that prior guidance “forbade schools from relying on investigations of criminal conduct by law-enforcement authorities to resolve Title IX complaints, forcing schools to establish policing and judicial systems while at the same time directing schools to resolve complaints on an expedited basis.”

While the accompanying Q&A on Campus Sexual Misconduct restates the Department's general view that Title IX requires schools to respond to reported sexual misconduct, there are several substantial differences between the Department's new enforcement position and the prior guidance, including:

**OFF CAMPUS CONDUCT:** The Q&A restates the OCR's previous interpretation of Title IX under the Bush administration that "a university does not have a duty under Title IX to address an incident of alleged harassment where the incident occurs off-campus and does not involve a program or activity of the recipient."

**FREE SPEECH:** The new Q&A emphasizes that in regulating sexual misconduct, schools must do so in a manner that "respects the legal rights of students and faculty, including those court precedents interpreting the concept of free speech."

**INTERIM MEASURES:** The guidance notes that interim measures "may be appropriate" during an investigation of sexual misconduct, but that a school "may not rely on fixed rules or operating assumptions that favor one party over another," suggesting that the automatic issuance of no contact orders and interim suspensions without considering the facts of a given case is prohibited.

**INVESTIGATION TIMELINE:** The Q&A removes the prior guidance's 60 day recommended timeline for conducting investigations, stating instead that "[t]here is no fixed time frame under which a school must complete a Title IX investigation," and indicating the OCR will consider a school's "good faith effort" to conduct a "fair, impartial investigation in a timely manner."

**CONFIDENTIALITY:** Unlike prior guidance which indicated schools should not place gag orders on parties that prohibit them from discussing the outcome of an investigation, the new guidance states that "[r]estricting the ability of either party to discuss the investigation is . . . likely inequitable."

**NOTICE:** The new guidance states that a school should provide "sufficient details" about a complaint to a respondent before an initial interview, including "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."

**INFORMAL RESOLUTION:** The Q&A specifically permits the use of informal resolution, including mediation, in any Title IX investigation if all parties "voluntarily agree" and have received full

disclosures regarding the allegations and their procedural options, and the school determines informal resolution is “appropriate.”

**STANDARD OF EVIDENCE:** The guidance permits schools to use either a preponderance standard or a clear and convincing standard of evidence in resolving Title IX cases. However, whatever standard a school uses for sexual misconduct cases must be the same as that used to determine other forms of student misconduct.

**RESPONSE TO REPORT:** Addressing a point not covered by the prior guidance, the new Q&A states that the parties should be allowed to respond to any written investigation report, in writing or at a live hearing, “in advance of the decision of responsibility.”

**APPEALS:** The new guidance permits a school to limit the right of appeal to solely the “responding party.” However, it continues the prior guidance’s standard that, if an appeal is allowed for both parties, the appeal procedures must be equal.

While there are substantial differences between the new Q&A and prior guidance, the new guidance reaffirms several broad points of essential Title IX policy compliance, including:

The need to provide notice of the school’s grievance procedures, including how to file a complaint;

The requirement that grievance procedures apply to complaints alleging sexual misconduct carried out by “employees, other students, or third parties”;

The “adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence”;

“Reasonably prompt time frame[s] for major stages of the complaint process”;

Notification to the parties of the outcome of an investigation; and

Other steps by the school to prevent the recurrence of sexual misconduct and to remedy its discriminatory effects, as appropriate.

### **What This Means to You**

The legal effect of the Department’s action (at least from the perspective of regulatory enforcement) is to remove the necessity of compliance with those portions of the 2011 Dear Colleague Letter and the 2014 Questions and Answers that were not included in the 2001 Revised Sexual Harassment Guidance, as interpreted by the January 2006 Dear Colleague Letter and the Department’s new Q&A

guidance. The practical effect of this change is that colleges, universities, and K-12 institutions have more flexibility with respect to standards of evidence, the timing of investigations, the design of the investigation and appeal process, and the components of the institutional response. The new guidance also suggests that the Department will increase its enforcement expectations with respect to the protection of constitutional rights, due process, and the elimination of certain stereotypes and assumptions that could render investigation practices systematically biased against respondents.

While some institutions may be inclined to enact immediate changes to their sexual misconduct policies, schools must consider that the Department plans to issue new and formal guidance after a notice and comment period. That guidance may add to, or differ from, the interim guidance contained in the Q&A, resulting in the necessity of further policy revisions. Thus, some institutions may choose only to make policy revisions necessary to remove any conflicts with the current guidance, while waiting to make other changes until final guidance is issued at a later date.

In addition, although the OCR has not explicitly stated as much, presumably the new guidance will be applied to Title IX complaints currently under OCR investigation. As such, your school's response to an OCR investigation may need to be reevaluated. If your school has an existing resolution agreement related to a resolved Title IX complaint investigation, your school is still bound by the terms of the agreement. However, the Q&A guidance invites such schools to contact the OCR with questions related to current agreements. If your school has questions regarding a current agreement, especially to the extent that its requirements may conflict with the new guidance, you or your institution's legal counsel should contact the appropriate OCR regional office.

### **Contact Us**

For more information on how this update may affect your organization, contact Hayley Hanson, Julie Miceli, Derek Teeter or another member of Husch Blackwell's Education team.