Facing the Challenges of DOE's Recent Title IX ‘Interim Guidance’

Sponsored by VALIC

October 11, 2017

Poll Question
What Is Your Role On Campus?

a) Human Resources Professionals
b) Title IX Coordinators
c) General Counsel, In-house Attorneys
d) Other Administrators
e) Outside Counsel
f) Faculty
g) Students
h) Other
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Agenda

- The DOE’s Interim Guidance
- What Has Changed?
- What Is Unclear?
- What Is Next?
- Action Items

The “Interim Guidance”

September 22, 2017

- The New “Dear Colleague Letter”
- The New Q&A On Campus Sexual Misconduct

Poll Question

Before we get started, …
How do you feel about the “Interim Guidance”?

a) Upset!! 😞
b) Displeased. 😞
c) Unsure? 🤔
d) Happy. 😊
e) Thrilled!! 😊
“This conversation may be uncomfortable, but we must have it.”

“And we are here today because the previous administration helped elevate this issue in American public life. They listened to survivors, who have brought this issue out from the backrooms of student life offices and into the light of day.”

~ Betsy DeVos, U.S. Secretary of Education, September 7, 2017

Fairness Concerns (2014-2015)

“…procedures for deciding cases of alleged sexual misconduct which lack the most basic elements of fairness and due process, are overwhelmingly stacked against the accused, ….”

~ Harvard Law School Faculty, The Boston Globe, October 15, 2014

“…we believe that OCR’s approach exerts improper pressure upon universities to adopt procedures that do not afford fundamental fairness.”


Dear Colleague Letter, dated September 22, 2017

- Withdraws The Dear Colleague Letter, dated April 4, 2011, and the Q&A on Title IX and Sexual Violence, dated April 29, 2014. (Both “criticized because they “do not afford fundamental fairness…”)

- “The Department intends to implement such a policy [to student sexual misconduct] through a rulemaking process that responds to public comment.”

- “The Department will not rely on the withdrawn documents in its enforcement of Title IX.”
The 2017 DCL Criticizes The 2011 DCL:

“The 2011 Dear Colleague Letter…

- required…the preponderance-of-the-evidence standard…
- insisted that schools with an appeals process allow complainants to appeal not-guilty findings…
- "discouraged cross-examination by the parties…"
- "forbade schools from relying on investigations of criminal conduct by law-enforcement…while at the same time…"
- "directing schools to resolve complaints on an expedited basis."

2017 Q&A:
What Has Changed?

- Interim Measures?
- Investigation Time Frame
- “Equitable Investigations”
- Informal Resolutions?
- Evidentiary Standard?
- Advisors?
- Appeals?

Interim Measures

- During An Investigation, Interim Measures May Be Appropriate But…
- “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:"
- Schools Should Make “Every Effort To Avoid Depriving Any Student Of His Or Her Education”
Investigation Time Frame

- No Longer Required To Complete Investigations Within 60 Days
- “OCR Will Evaluate A School’s Good Faith Effort To Conduct A Fair, Impartial Investigation In A Timely Manner…”

Poll Question

How Long Did It Take To Complete Your Most Recent Title IX Investigation?

a. 60 Days Or Less?
b. 61-90 Days?
c. 91-120 Days?
d. More Than 120 Days?

“Equitable Investigations”

- “The burden is on the school…”
- “Schools should ensure that institutional interests do not interfere with the impartiality of the investigation.”
- “…requires a trained investigator…”
- “Any rights and opportunities” made available to one party must be made available to the other party.
- No “gag orders”
- “Training materials or investigative techniques…that apply sex stereotypes…may violate Title IX…”
“Equitable Investigations” (cont’d)

Must give respondent written notice of …
- Allegations,
- Including sufficient details (e.g., identities, specific policy, specific conduct, date and location),
- With sufficient time to respond.

Give each party advance notice of any interview or hearing.

Investigation should result in a written report summarizing relevant exculpatory and inculpatory evidence.

“Informal Resolution” (Mediation)

- Mediation or other informal resolution methods are no longer prohibited.
- If all parties voluntarily agree to informal resolution after a full disclosure of the allegations and their options …

Poll Question:

Do you think that your institution will offer voluntary mediation, during this academic year?

a) Yes
b) No
c) Not sure
Decision-Making As To Responsibility

May use "preponderance of the evidence" standard, or "clear and convincing" standard

➢ Must be consistent with standard applied to all other cases of student misconduct

Fairness Reminders:

➢ "Must offer each party the same meaningful access to any information that will be used…"
➢ "Any process…should be made equally available…"
➢ May not limit choice of advisor or presence for accuser or accused

Advisors

➢ Must Allow Parties To Have An Advisor Of Their Choice Present At Any Meeting Or Hearing
➢ May Be An Attorney
➢ School’s May Restrict Extent Of Advisor’s Participation

Decision-Making As to Disciplinary Sanctions

➢ “…how best to enforce the school’s code of student conduct while considering the impact of separating a student from her or his education.”
➢ “Any disciplinary decision must be made as a proportionate response to the violation.”
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Appeals

- Provide Notice Of Discipline To Both Parties “Concurrently”
- Schools May Allow Appeals
  - Available To The Responding Party, OR
  - Available To Both Parties

Some Of What We Don’t Know

- How Will OCR Enforce The Current Rules?
- Will Interim Guidance Be Clarified?
- When Will There Be Rulemaking?
- What Will Final Rules Require?
- How Will Interim Guidance Be Applied To Open Investigations?
- How Will Interim Guidance Impact Existing Resolution Agreements?
- How Will Different Groups On Campus React?

Poll Question

How Long Before We Get New Title IX Rules, Pursuant To A Formal Process Of Notice And Proposed Rulemaking?

a) One Year?

b) Two Years?

c) Three Years?

d) Longer?
Action Items

- Review Your Title IX Policies And Procedures
  - And Any Resolution Agreement(s)

- Be Clear About Applicable Law
  - Interim Guidance, Title IX, Other Title IX Guidance
  - State Law
  - VAWA
  - Consult With Counsel

- Key Consideration:
  - Fairness And Due Process

Action Items

Focus On:

- Investigation Timeline
- Interim Measures
- Informal Resolution
- No “Gag Orders”
- Decision-Making Processes
  - Advisors
  - Evidentiary Standard
  - Investigation Report
  - Sanctions
  - Appeals

- Train Employees
- Train Students
- Anticipate Protests
- Stay Tuned
  - Expect More Changes

Questions?
Thank You!

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