

WilmerHale Webinar: Title IX—What's Next for Colleges and Universities?

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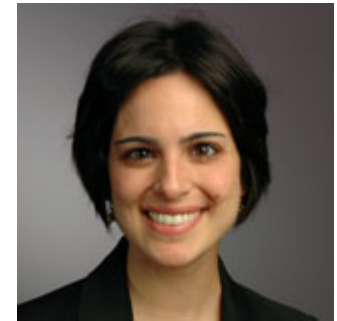
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Webinar Guidelines

- Participants are in listen-only mode
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Overview

- **Changes in Title IX guidance and enforcement under the Trump Administration**
 - OCR's rescission of 2011 Dear Colleague Letter and 2014 Q&A
 - OCR's September 2017 Interim Guidance
 - Policy and practice challenges for schools
- **Title IX litigation**
 - Current trends in respondent and complainant litigation
 - Potential litigation risks following OCR's new guidance

Initial Shift in OCR Enforcement Practices

- In June 2017, OCR internal guidance shifted focus to individual complaints.
 - “OCR will only apply a ‘systemic’ or ‘class-action’ approach where the individual complaint allegations themselves raise systemic or class-wide issues”
 - Departure from OCR’s previous practice of requiring three years of past complaint data or files to assess a university’s compliance.
 - Regional offices are no longer required to automatically confer with OCR headquarters regarding certain kinds of “sensitive” cases.
 - “OCR’s goal is to swiftly address compliance issues raised by individual complaint allegations, reach reasonable agreements with defined, enforceable obligations placed upon recipients directly responsive to addressing the concerns raised in the individual complaint being resolved, and encourage voluntary settlements wherever possible.”



OCR's September 2017 Interim Guidance

- September 2017: OCR releases a new Dear Colleague Letter and an accompanying Q&A on Campus Sexual Misconduct. These documents:
 - Rescind OCR's 2011 Dear Colleague Letter and 2014 Q&A.
 - Indicate that the Department of Education will “engage in rulemaking on the topic of schools’ Title IX responsibilities concerning complaints of sexual misconduct.”
 - No timeline yet for the proposed rule. (*Source: NACUA Session with C. Jackson*).
 - OCR has indicated the rule is in the “pre-drafting stage” and intends to hold listening sessions with stakeholders. (*Source: NACUA Session with C. Jackson*).
 - Provide interim guidance, purportedly based on OCR's 2001 Revised Sexual Harassment Guide.



OCR's September 2017 Interim Guidance

- The Q&A focus on fairness: that procedures should be equitable and not favor either party
 - “Any rights or opportunities that a school makes available to one party during the investigation should be made available to the other party on equal terms.”
 - “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.”
- OCR's stated intention is to provide increased flexibility and to build on what schools have achieved since 2011
 - Q&A are not intended to create an enforcement “checklist,” but to provide schools with flexibility to implement procedures in a fair and impartial manner. (*Source: NACUA Session with C. Jackson*).



OCR's September 2017 Interim Guidance – Key Features

- ***Sufficient notice of charges to respondents required***
 - “[S]ufficient details and with sufficient time to prepare a response before any initial interview.”
- ***Interim measures must be offered to both parties***
 - “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.”
- ***No fixed time frame for completing investigations***
 - “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.”



OCR's September 2017 Interim Guidance – Key Features

- ***Informal resolutions permitted where both parties agree***
 - OCR has suggested that mediation may be appropriate even in cases of alleged sexual assault. (*Source: NACUA Session with C. Jackson*). This may conflict with OCR's 2001 guidance.
- ***Preponderance of the evidence vs. clear and convincing***
 - Footnote 19 of the Q&A states that “[t]he standard of evidence for evaluating a claim of sexual misconduct should be consistent with the standard the school applies in other student misconduct cases.”
 - OCR has indicated that schools are not required to use the same standard in all cases during this interim period. (*Source: NACUA Session with C. Jackson*).
- ***Right to appeal***
 - Right to appeal is not required, but where offered, may be available solely to the responding party or to both parties.



OCR's September 2017 Interim Guidance – Key Features

- **Concern re: use of sex stereotypes in adjudication**
 - Decision-making approaches “that apply sex stereotypes or generalizations may violate Title IX and should be avoided.”
 - OCR has expressed concern that schools have adopted “minimum sentencing” or pre-determined sanctions. (*Source: NACUA Session with C. Jackson*).
- **Concern re: protecting educational interests of the parties**
 - In imposing interim measures, schools should make “every effort to avoid depriving any student of her or his education.”
 - In imposing sanctions, the decision-maker should consider “the impact of separating a student from her or his education.”
- **Off-campus conduct**
 - In determining when a school’s Title IX obligations are triggered for off-campus conduct, control is the key principle. (*Source: NACUA Session with C. Jackson*).



OCR's September 2017 Interim Guidance – Policy and Practice Challenges for Schools

- OCR's September 2017 DCL states that the Q&A do “not add requirements to applicable law” and that OCR's 2001 guidance remains binding.
- OCR's April 2015 DCL, re: the selection of a Title IX coordinator and the Title IX coordinator's duties and responsibilities, remains in effect.
- School policies during the interim rulemaking period
 - OCR has indicated that schools are not “required” to change their policies in response to the interim guidance—but need to apply their procedures “fairly.” (*Source: NACUA Session with C. Jackson*).
 - OCR will apply the same “fairness” standard to public and private institutions.
- Schools are unlikely to be held noncompliant or to face litigation risk for failure to comply with the interim guidance.



OCR's September 2017 Interim Guidance – Policy and Practice Challenges for Schools

- Institutions have obligations under the Violence Against Women Act separate from Title IX; those obligations remain in effect
- Although OCR rescinded the 2011 DCL, some of its provisions were codified in the 2013 VAWA amendments to the Clery Act
 - Certain procedural requirements for disciplinary proceedings
 - Annual training for officials conducting disciplinary proceedings
- Some states have passed legislation regarding how institutions should handle sexual misconduct cases
- Schools should consider submitting comments during notice-and-comment period



What's Next for OCR?

- Kenneth Marcus nominated to be the next head of OCR
 - Founder and president of the Louis D. Brandeis Center for Human Rights Under Law
 - Served as Staff Director of the U.S. Commission on Civil Rights and Deputy Assistant Secretary for Civil Rights at DOE during the Bush Administration
 - Known for his focus on Israel-related speech on campus
- Limited information on Marcus's views of issues related to sexual assault
 - Likely to be a central topic in his confirmation hearings

Current Trends: Respondent Litigation

Claims of denial of due process (public institutions) or basic fairness (private institutions)

- *John Doe v. Brandeis Univ.* (D. Mass. Mar. 31, 2016). Breach of contract claim (denial of basic fairness based on failure to provide procedural protections) survived motion to dismiss.
- *John Doe v. Brown Univ.* (D.R.I. Sept. 28, 2016). Successful breach of contract claim alleging that university failed to follow policies in place at the time the alleged conduct occurred.
- *John Doe v. Pennsylvania State Univ.* (M.D. Pa. Aug. 18, 2017). Preliminary injunction against suspension granted where plaintiff demonstrated likelihood of success on claim that university significantly deviated from its policy.
- *John Doe v. Univ. of Cincinnati* (6th Cir. Sept. 25, 2017). Preliminary injunction against suspension upheld based on university's failure to provide plaintiff the opportunity to confront his accuser.



Current Trends: Respondent Litigation

Claims that disciplinary proceedings are being conducted in a gendered manner

- Plausible allegation of gender bias where Rollins discouraged male respondent from pursuing his own complaint against female accuser. *See Mancini v. Rollins College* (M.D. Fla. July 20, 2017).
- Allegations that universities are motivated by anti-male bias to appease campus activists or to counter negative publicity are surviving motions to dismiss. *See, e.g., John Doe v. Amherst College* (D. Mass. Feb. 28, 2017); *John Doe v. Columbia Univ.* (2nd Cir. July 29, 2016).
- Gender bias claims must be based on allegations that a university is responding to specific pressures on campus—not on allegations of a general national bias against male students. *See Doe v. Colgate University* (N.D.N.Y. Oct. 31, 2017).



Current Trends: Complainant Litigation

Claims of deliberate indifference (post-reporting claims)

- *Karasek v. Regents of the University of California* (N.D. CA. Dec. 22, 2016). Plaintiffs failed to state a Title IX discrimination claim because allegations did not meet the “exacting standard” of deliberate indifference—*i.e.*, that the school’s response to harassment was “clearly unreasonable.”
- *Doe v. University of Kentucky* (E.D. KY Aug. 31, 2016). Deliberate indifference claim survived a motion to dismiss—not because the university “bungled the disciplinary hearings so badly, so inexcusably” that three appeals and reversals were required, but because the university subsequently failed to schedule a fourth disciplinary hearing or otherwise resolve the matter without explanation.
- *Feminists United on Campus, et. al v. Univ. of Mary Washington* (E.D. Va. Sept. 19, 2017). Plaintiffs failed to state a Title IX discrimination claim because university had only limited control over anonymous social media postings, and thus did not act with deliberate indifference in, *e.g.*, declining to disable the social media site on campus.

Potential trend: suits raising both post-reporting and pre-reporting (heightened risk) claims

- *Hernandez v. Baylor Univ. and Jane Doe 1-10 v. Baylor Univ.* (W.D. Tex.). In addition to their post-reporting deliberate indifference claims, Plaintiffs claim that Baylor had an official policy of discrimination that created a heightened risk of sexual assault.



What's Next for Colleges and Universities?

- **Private lawsuits under Title IX are likely to increase and fill any enforcement void**
 - Students, advocacy groups, and other stakeholders will remain highly engaged.
- **Potential increased litigation risk following OCR's interim guidance**
 - Pending litigation will continue to rely on due process (public) and fundamental fairness (private) in assessing a school's procedures or application of procedures.
 - Advocates for respondent rights have indicated they will pursue claims against schools that do not change their policies under the interim guidance.



Questions?

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