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OFFICE OF THE GENERAL COUNSEL

October 2, 2017

LEGAL UPDATE: TITLE IX

This notice provides guidance on the U.S. Department of Education's Office for Civil Rights ("OCR") change in policy guidance for addressing sexual assault under Title IX. Please contact our office for a more detailed discussion of the law or with any questions you may have.

The September 22, 2017 Dear Colleague Letter (DCL) reaffirms policy guidance contained in the 2001 Revised Sexual Harassment Guidance: Harassment of Students by School Employees, other Students, or Third Parties. The 2017 DCL letter states that:

- OCR has withdrawn the April 4, 2011 DCL which provided policy guidance on student-on-student sexual harassment and sexual violence, procedural requirements, and remedies and enforcement.
- OCR has also withdrawn the "April 29, 2014, Questions and Answers on Title IX and Sexual Violence," which provided additional policy guidance and clarification about the requirements in the April 4, 2011 DCL and the 2001 Revised Sexual Harassment Guidance.
- OCR will now use the following documents:
 - the 2001 Revised Sexual Harassment Guidance,
 - the reaffirmation of that policy guidance as provided in the January 25 2006 DCL on Sexual Harassment,
 - the September, 2017 Questions and Answers on Campus Sexual Misconduct, and
 - and other policy guidance still in effect, (e.g. the April 24, 2016 guidance on Title IX Coordinators) enforcing Title IX.

- OCR will provide “formal” regulations following a notice and comment period for rulemaking process.

The 2017 DCL included a document entitled “September 2017 Questions and Answers on Campus Sexual Misconduct,” (Q&A). The Q&A includes clarification on compliance with Title IX procedures.

The following are the major changes and/or clarifications in policy guidance to Title IX procedures stated in the Q&A:

Standard of Review. The standard of review for evaluating a claim of sexual misconduct must be consistent with the standard the institution applies in other student misconduct cases”¹ The standard of review may be **EITHER** a “preponderance of the evidence” **OR** a “clear and convincing evidence” standard. Only **ONE** standard shall apply to all types of misconduct complaints.

Timeframe to Complete an Investigation. OCR requires institutions to provide “prompt and equitable” grievance procedures. The Q&A affirms prior policy guidance that there is no fixed timeframe to complete an investigation; however, an investigation should be resolved “promptly.” The Q&A provides additional guidance about whether an investigation was resolved “promptly.” OCR will evaluate an institution’s good faith effort to conduct an investigation in a timely manner “designed to provide all parties with a resolution.”²

Interim Measures. The Q&A provides additional guidance about the use of interim measures. The guidance provides that interim measures may not be “fixed rules or operating assumptions that favor one party over another,” or are made available only to one party. Interim measures need to be flexible and may change over the course of the investigation. Interim measures are individualized services offered as appropriate, based on the information gathered, “making every effort to avoid depriving any student of her or his education.”

Equitable Investigation of a Complaint. The Q&A provides policy guidance regarding gathering evidence, training, and notice to parties.

Gathering Information and Training. The burden is on the institution, not the parties, to gather sufficient evidence to reach a “fair” and “impartial” determination. Moreover, the investigator must be trained to:

- analyze and document the available evidence to support reliable decisions,
- objectively evaluate the credibility of parties and witnesses,

¹ September 2017 Q&A on Campus Sexual Misconduct, Answer 8.

² The Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, further provides that the evaluation will be based upon the complexity of the investigation and the severity and extent of the harassment. p.20.

- synthesize all available evidence—including both inculpatory and exculpatory evidence, and
- take into account the unique and complex circumstances of each case.

Notice of Alleged Complaint to Respondent. Once the institution opens an investigation that may lead to disciplinary action, the institution should provide certain information to the respondent. The Q&A guidance makes clear that information should be provided to the respondent “**once the institution opens an investigation**” and **prior to any “initial” interview with the respondent.** The information that should be provided to the respondent includes:

- written notice of the allegations constituting a potential violation of the institution’s policy;
- sufficient details of the complaint which includes the identities of the parties involved, the specific section of the Code allegedly violated, the precise conduct allegedly constituting the potential violation, and the date and location of the alleged incident.
- sufficient time to prepare a response “**before any initial interview.**”

Notice to all parties. Each party should receive written notice in advance of any interview or hearing, with sufficient time to “**prepare for meaningful participation.**”

Investigative Report. A written report should be the result of the investigation which summarizes the “relevant exculpatory and inculpatory evidence.” The parties must have timely and equal access to any information that will be used during informal and formal disciplinary meetings and hearings.

Informal Resolutions. An informal resolution of the complaint, including mediation may be appropriate when:

- all parties have been informed of their option for a full investigation and adjudication of the complaint and the option for a formal resolution;
- both parties voluntarily agree to participate in an informal resolution; and
- the institution determines that the Title IX complaint is appropriate for such a process.

Note: The 2001 Revised Sexual Harassment Guidance specifically provides that “In some cases, such as alleged sexual assaults, mediation will not be appropriate even

on a voluntary basis.” Therefore, although the Q&A allows for informal resolutions, it may need to be limited to nonviolent sexual misconduct claims.³

Advisor. The choice or presence of an advisor by a party cannot be limited by the institution. The institution may place restrictions on the extent to which the advisor may participate in the proceedings.

Imposition of disciplinary sanctions. The person who determines the disciplinary sanction after a finding of responsibility may be the same or different individual from the decision-maker who made the finding of responsibility.

Right to Appeal. If an institution has an appeal process, the right to appeal may be provided solely to the respondent or to both parties.

Existing Resolution Agreements with institutions. Existing resolution agreements entered into by institutions are binding.

³ “Grievance procedures may include informal mechanisms for resolving sexual harassment complaints to be used if the parties agree to do so. OCR has frequently advised schools, however, that it is not appropriate for a student who is complaining of harassment to be required to work out the problem directly with the individual alleged to be harassing him or her, and certainly not without appropriate involvement by the school (e.g., participation by a counselor, trained mediator, or, if appropriate, a teacher or administrator). In addition, the complainant must be notified of the right to end the informal process at any time and begin the formal stage of the complaint process. In some cases, such as alleged sexual assaults, mediation will not be appropriate even on a voluntary basis.” Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, p.21.