

Department of Education Rescinds Obama-Era Guidance on Sexual Harassment & Provides Interim Rules

September 22, 2017

The U.S. Department of Education Office of Civil Rights ("OCR") this morning formally rescinded its April 4, 2011, Dear Colleague Letter as well as the April 29, 2014, Questions and Answers on Title IX and Sexual Violence. Together the two documents had set forth detailed requirements for schools to respond to allegations of sexual harassment, sexual assault and other sexual misconduct. In rescinding the documents, the OCR indicated it would largely revert to pre-2011 guidance, specifically its 2001 **Revised Sexual Harassment Guidance** together with a **Q&A on Campus Sexual Misconduct** also issued this morning. The new Q&A relaxes several of the requirements imposed in 2014 and sends signals that the Department will be more open to claims of discrimination brought by students accused of sexual misconduct.

Significant changes are:

- 1) Informal resolution is permitted in all cases, provided that all parties agree after a full disclosure of the allegations and paths for more formal adjudication.
- 2) The preponderance of the evidence standard is no longer required and schools may use a higher "clear and convincing evidence" standard for proving violations. However, the standard of proof selected for sexual misconduct cases must be the same as is used in other discipline matters.
- 3) The right to appeal findings or sanctions may be limited to respondents.
- 4) Requires and redefines an "equitable investigation" in a manner that is likely to benefit students accused of misconduct. The accused is entitled to written notice in advance of any interview with "sufficient time to prepare." The pre-interview notice must include details of a) the specific code section violated; b) precise conduct alleged to constitute the violation; c) the identity of the parties involved, and d) the date and location of the incidents. Item c) is likely to present difficult choices when the victim requests anonymity but the institution believes the accused is potentially a serial offender. In addition, investigation reports must include any exculpatory matter uncovered in the investigation.
- 5) Both interim measures and ultimate sanctions must be made with consideration of the "impact of separating a student from her or his education." Sanctions are required to be "proportionate" to the offense.
- 6) The Q&A notes that any "special procedures" for resolving sexual misconduct cases are suspect, and several times reiterates the need for an unbiased investigator who does not rely on sexual stereotypes in reaching conclusions.

Schools need to reexamine their student conduct policies and processes to determine alignment with these new guidelines. Many institutions adopted sexual misconduct specific policies and procedures in response to the Obama era guidance, all of which may now be viewed as evidence of discrimination by the OCR.

If you have questions related to the contents of this alert or any other issue, please contact a Miller Canfield attorney.

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Robert Zielinski
+1.312.460.4216
zielinski@millercanfield.com

Megan Norris
+1.313.496.7594
norris@millercanfield.com