

Sanghavi Law Office, LLC

CHANGES TO OCR GUIDANCE - NOW WHAT?

Some Matters for Consideration by Schools in Light of Changes to OCR Guidance

On September 22, 2017, the U.S. Department of Education, Office for Civil Rights released guidance announcing the withdrawal of the April 4, 2011 Dear Colleague Letter on Sexual Violence, and the April 29, 2014 Questions and Answers on Title IX and Sexual Violence. The Department announced in its September 22, 2017 Dear Colleague Letter that it intends to engage in a rulemaking process to “develop an approach to student sexual misconduct that responds to the concerns of stakeholders and that aligns with the purpose of Title IX to achieve fair access to educational benefits.” In the interim, the Office for Civil Rights has released a Q&A on Campus Sexual Misconduct which, along with the 2001 Revised Sexual Harassment Guidance, provides a framework for schools’ compliance with Title IX.

Below is a summary of issues addressed in the 2017 Q&A document and, in *italics*, items Sanghavi Law Office, LLC suggests that schools consider in light of this new guidance:

- Schools continue to have a duty to respond appropriately when they know or reasonably should know of incidents of sexual misconduct.
- There is no fixed timeframe within which a school must complete an investigation. A school’s compliance will be evaluated based upon the school’s good faith effort to conduct a fair, impartial investigation in a timely manner.
 - *Although the guidance does not reaffirm OCR’s prior suggestion that investigations be completed in 60 days, schools should nonetheless continue to ensure that they are acting in a timely manner in investigations. The timeframe for conducting an investigation depends on the scope and complexity of the allegations. Schools should continue to be prepared to explain any delays in completing an investigation.*
 - *For dating violence, domestic violence, sexual assault, and stalking, under the Clery Act, each school must complete investigations “within reasonably prompt timeframes designated by an institution’s policy” and this policy must allow for extensions for good cause.*
- Restricting the ability of either party to discuss the investigation is likely inequitable, as such restrictions likely deprive the parties of the ability to obtain and present evidence or otherwise defend their interests.
 - *Many schools request that parties keep information learned during the investigative process confidential. Schools should examine such practices to*

ensure they do not deprive parties of the ability to obtain and present evidence or otherwise defend their interests.

- Once a school determines that an investigation will be opened, the school should provide the responding party with written notice of the allegations, including: 1) the identities of the parties involved; 2) the specific section(s) of the code of conduct allegedly violated; 3) the specific conduct that constitutes the alleged potential violation; and 4) the date and location of the alleged incident. This notice should be provided with sufficient time for parties to prepare “for meaningful participation” prior to their initial interviews.
 - *Although not stated in the guidance, schools might be required to adhere to this notice standard not only at the beginning of an investigation, but also each time additional allegations are raised, different policy provisions are implicated, or new parties are named throughout the course of the investigation.*
- To be “equitable,” investigations must utilize trained investigators to analyze and document available evidence, objectively evaluate the credibility of parties and witnesses, and synthesize all available evidence. The investigation should result in a written report summarizing the relevant exculpatory and inculpatory evidence.
 - *Schools should consider their continued obligations under the Clery Act to ensure that investigators are appropriately trained. The Clery Act indicates that disciplinary proceedings be conducted by individuals who “receive annual training on the issues related to dating violence, domestic violence, sexual assault, and stalking and on how to conduct an investigation and hearing process that protects the safety of victims and promotes accountability.”*
- A school may facilitate an informal resolution of a Title IX complaint if all parties voluntarily agree to participate after receiving a full disclosure of the allegations and the options for formal resolution, and if the school determines that an informal resolution is appropriate for that particular complaint.
 - *Although this new guidance permits informal resolution, including mediation, in instances of sexual misconduct, the 2001 Revised Sexual Harassment Guidance, still in effect, notes, “In some cases, such as alleged sexual assaults, mediation will not be appropriate even on a voluntary basis.” Schools should carefully consider what criteria they will use to determine when informal resolutions may be appropriate.*
- A school may apply either a preponderance of evidence standard or a clear and convincing evidence standard to determinations of policy violations, and the chosen standard should be consistent with the standard applied to other student misconduct cases.
 - *Schools should ensure that the decision-maker is trained to understand and apply the standard of evidence. Having a decision-maker who understands the meaning of the standard applied (i.e., what it means to make a determination using a clear and convincing or preponderance of evidence standard) will place schools in the best position to defend their applications of the selected standard of evidence.*
- Parties must have the same meaningful access to any information that will be used during informal and formal disciplinary meetings and hearings, including the investigation

report, and should have the opportunity to respond to the report in writing prior to the decision of responsibility and/or hearing to decide responsibility.

- *Schools should review their procedures regarding access to the investigation report in advance of the decision. If schools do not currently allow this, they will need to ensure their practices comply with the new standard. Schools should consider, and be prepared to explain, whether the type of access provided is “meaningful” (e.g., electronic version, an opportunity during a specified period to review the report in an administrator’s office).*
- Disciplinary sanction decisions must be made for the purpose of deciding how best to enforce the school’s code of student conduct while considering the impact of separating a student from her or his education, and must be proportionate to the violation.
- It is recommended that schools provide written notice of the outcome to parties concurrently.
 - *Although OCR only recommends concurrent notice, the Clery Act requires that for dating violence, domestic violence, sexual assault, and stalking, such notice occur simultaneously.*
- Schools may choose to allow appeals either solely by the responding party, or by both parties, in which case appeal procedures must be made equally available to both parties.
 - *Schools continue to have the option not to have an appeals process.*
- Existing resolution agreements remain binding upon the schools that voluntarily entered into them, and do not bind other institutions.
 - *Schools with active agreements should consider engaging with their local OCR office if they plan to make any changes to their policies or procedures in light of the new guidance.*

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