U.S. Department of Education Issues New Interim Title IX Guidance

By Kara T. Rozin / Sep 27, 2017

On Friday, September 22, 2017, the U.S. Department of Education (“the Department”) issued new interim guidance on sexual misconduct under Title IX. The guidance, which is a Q&A document, is available here.

The guidance is in advance of rulemaking by the Department on Title IX responsibilities arising from complaints of sexual misconduct. In announcing the new guidance, the Department withdrew the Dear Colleague Letter on Sexual Violence dated April 4, 2011, and the Questions and Answers on Title IX Sexual Violence dated April 29, 2014.

The new guidance significantly changed the previous Office for Civil Rights (“OCR”) guidance. The notable changes are:

- **Preliminary Notice to Respondent**
  - A respondent must be provided with written notice of the allegations constituting a potential violation of the school's sexual misconduct policy, including sufficient details and sufficient time to prepare a response before any initial interview. Written notice must include:
    - Identity of the parties involved;
    - Specific section of the code of conduct allegedly violated;
    - Precise conduct allegedly constituting the potential violation; and
    - Date and location of the alleged incident.
  - Further, each party must receive written notice in advance of any interview or hearing with sufficient time to prepare for meaningful participation.

- **Interim Measures**
  - Interim Measures are individualized services offered to a party (typically, the victim/complainant) while a Title IX investigation is ongoing (i.e., no contact order, counseling services, modifications of class schedules, etc.). The new guidance states schools can no longer favor one party over another, nor may a school make such measures available only to one party. During a Title IX investigation, every effort should be made to not deprive any student of his or her education, and interim measures should be applied equally, so as to not adversely affect one party over another.

- **Burden of Proof**
  - The new guidance states schools may continue to use a "preponderance of evidence" burden of proof (i.e., "more likely than not") to determine whether a Title IX violation has occurred; however, schools may now choose to use a higher burden of proof known as "clear and convincing."

- **No "Gag Orders"**
  - Schools can no longer restrict the ability of either party to discuss the investigation.
  - However, schools may still require the involved students to refrain from retaliation, bullying, or harassment.

- **Investigation Report Required and Not Confidential**
  - The Title IX Investigation shall result in a written report summarizing the relevant evidence. Each party must have the same meaningful access to any information that will be used during informal or formal disciplinary meetings and hearings, including the investigation report. Each party has an opportunity to respond to the report in writing in advance of any decision and/or at a live disciplinary hearing.

- **No Fixed Timeframe for Investigation**
  - Under prior Title IX guidance, a typical Title IX investigation was to be completed within 60 calendar days. Under the new guidance, there is no fixed timeframe under which a school must complete a Title IX investigation. However, 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 a resolution.

- **Right to an Appeal**
  - The new guidance allows schools to offer an appeals process to either or both parties involved or to only the respondent in a case. The prior guidance stated that both parties must be given an equal opportunity to appeal an outcome.

The new guidance has solicited both praise and ire from activists on both sides of the Title IX coin. There is no question the guidance affords greater protections to the individual rights of the accused/respondent.

Before further official guidance is released, the Department will solicit input from stakeholders and the public during its official rulemaking process. In the interim, the Q&A Guidance provides information about how OCR will assess a school's compliance with Title IX. Schools should be prepared to revise Title IX policies and procedures after the official rulemaking is issued. If you have any questions about the interim guidance and its impact on your school's responsibility to investigate Title IX complaints, please contact Kara T. Rozin at (616) 608-1110 | krozin@clarkhill.com or another member of Clark Hill's Education Practice Group.

1 Respondent is the accused in a Title IX investigation.