



## ***Title IX and Sexual Misconduct***

Under Title IX of the Education Amendments Act of 1972 and its implementing regulations, an institution that receives federal funds must ensure that no student suffers a deprivation of his or her access to educational opportunities on the basis of sex. Almost all school districts and colleges receive some federal funds. The Department of Education, Office for Civil Rights (OCR) has determined that sex-based harassment, including sexual violence and gender-based harassment, is prohibited by Title IX.

Recent media attention has highlighted student-on-student sexual harassment and sexual violence and the requirements under Title IX that educational institutions provide an environment that is free from sexual harassment. While the focus of recent media has been sexual violence involving college students, the problem of sexual harassment and sexual violence also exists at the K-12 school level.

A recent analysis done of OCR's records found that only about one in ten sexual violence OCR complaints against elementary and secondary schools led to improvements in schools' policies and procedures regarding handling complaints of sexual violence. There appears to be significant room for improvement this area.

### **NEW OCR GUIDANCE ISSUED**

On September 22, 2017, OCR issued a new Dear Colleague Letter and new Question and Answer Guidance on Schools' Responsibility to Address Sexual Misconduct. In announcing the new guidance, the Department also withdrew the Dear Colleague Letter on Sexual Violence dated April 4, 2011, and the Questions and Answers on Title IX and Sexual Violence dated April 29, 2014.

One of the reasons the Department withdrew the 2011 and 2014 guidance was because the Department did not go through the normal public notice and comment process before issuing these documents. Critics of the earlier guidance claimed the Obama administration pushed colleges and schools, under the threat of withholding federal funds, to respond more quickly and more comprehensively to resolve complaints regarding sexual violence and protect students who reported sexual assaults. As a result, the number of complaints rose dramatically. However, critics warned that the Obama administration guidance went too far, creating makeshift courts on campuses ill-equipped to judge such cases and adding rules that made it difficult to ensure a fair hearing for both sides. The Department stated it will be seeking to replace the "failed system" of campus sexual assault enforcement to ensure that such procedures are fair to all students. Education Secretary DeVos stated, "Every survivor of sexual misconduct must be taken seriously. Every student accused of sexual misconduct must know that guilt is not pre-determined."

One of the major issues with the Obama administration guidance was the standard of proof educational institutions were required to use when resolving complaints of sexual violence. Most educational institutions did not use a “beyond a reasonable doubt” standard which is used in criminal cases. Many had previously used a “clear and convincing evidence” standard. However, the Obama administration guidance required that a “preponderance of the evidence” standard be used. This was a much lower standard and many felt it was unfair to those accused. The 2017 guidance does not dictate which standard of proof must be used moving forward. However, it does clearly state that schools have the discretion to apply either the preponderance of the evidence standard or the clear and convincing evidence standard in determining whether sexual misconduct occurred. One concern noted in the 2017 Question and Answer guidance is whether school districts and colleges should use the same standard of evidence for a claim of sexual misconduct that they use in other student misconduct cases. The guidance notes that at least one federal court suggested using the lower standard of preponderance of the evidence makes it easier for a college or district to prove, and harder for the accused student to defend, such allegations. The court noted this lower standard may be seen as part of an effort to tilt the playing field against accused students which is particularly troublesome in light of the elimination of other basic rights of the accused in this process.

## CURRENT REQUIREMENTS

While the Department engages in the rulemaking process, what are educational institutions to do? The September 2017 guidance makes it clear that the “Revised Sexual Harassment Guidance” issued on January 19, 2001, provides the basic information about how OCR will assess a school’s compliance with Title IX. While some individuals may feel that returning to a 2001 guidance document is a step backwards, complying with that guidance is what OCR expects until further notice. While the new guidance explicitly states it does not add legal requirements to fund recipients, it also does not limit the right of persons to file Title IX complaints. Colleges and districts can, and maybe should, do more than what OCR suggests. OCR compliance is just one component to consider. Districts and colleges can be sued in court for violations of Title IX as well, and the standards applied by courts are not identical to the standards applied by OCR.

Many educational institutions are confused about what they should do or where they should begin to comply with Title IX and OCR’s positions. The following actions can have the biggest impact on combatting sexual violence and harassment in a college or school district and begin the process towards compliance:

- Appoint a Title IX coordinator, as required by Title IX (34 C.F.R. §106.8(a));
- Develop and publish a district-wide anti-discrimination policy and grievance procedure;
- Conduct training of employees and students;
- Select qualified, unbiased investigators when complaints are made; and
- Ensure accused students receive appropriate due process during grievance procedures, particularly when these procedures could result in disciplinary consequences for accused students.

Each district or college must designate a Title IX coordinator and that individual should be trained in Title IX compliance requirements along with other applicable state and federal laws. In larger institutions, a full-time Title IX coordinator may be advisable. In smaller institutions, it is important that the Title IX coordinator be given adequate training to effectively perform the job. In April 2015, OCR published a number of documents concerning Title IX coordinators and their duties and responsibilities. Those documents are available on OCR’s website. <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/index.html>

The obligation to develop and publish a district-wide anti-discrimination policy and grievance procedure is not only required by Title IX and OCR; Wisconsin state law also requires school districts to address discrimination and harassment in schools and requires each school board to develop a written policy and procedure. (See Wis. Stat. § 118.13).

OCR suggests that employees be trained annually on how to identify, stop, and prevent sexual harassment and sexual violence. Any training should include a review of the institution's anti-discrimination policy and grievance procedures, how to make a complaint, and the resources available to victims. For students, age-appropriate training should focus on how to identify and report harassment if a student witnesses or experiences an incident.

Finally, conducting a proper, impartial investigation is paramount in school sexual harassment and violence cases. Each institution's investigation procedures may vary, but all investigations must be prompt, thorough, and impartial. The now-withdrawn 2011 guidance made it clear that a district could not rely solely on a law enforcement investigation. Rather, the institution had an obligation to conduct its own investigation to determine whether a student's right to an education free of sex discrimination had been violated. Even in light of the withdrawal of the 2011 guidance, the institution must impose any appropriate disciplinary action separate and independent of any criminal investigation, due to the different legal standards for criminal investigations. It may be wise for districts or colleges to coordinate their investigation with any law enforcement investigation so as not to interfere with such investigations, however.

## MOVING FORWARD

It may be some time before the Department issues new guidance on sexual harassment and sexual violence under Title IX. While districts and colleges are waiting for such guidance, they should continue to abide by the requirements of Title IX and state law concerning harassment in the schools. OCR states it will continue to aggressively enforce the requirements of Title IX. Many, however, see this new guidance as a sign of slowed down or relaxed enforcement. While time will tell, developing and implementing an anti-discrimination policy and grievance procedure is the best step a district or college can take to protect itself. We can assist educational institutions in developing policies or providing training for Title IX coordinators.

We will continue to monitor developments in this area and keep you apprised of key changes which occur.

---

■ Douglas E. Witte	(608) 283-7529	■ Eileen A. Brownlee	(608) 822-3251	■ Richard F. Verstegen	(608) 286-7233
■ Michael J. Julka	(608) 286-7238	■ JoAnn M. Hart	(608) 286-7162	■ M. Tess O'Brien-Heinzen	(608) 283-1798
■ James K. Ruhly	(608) 283-1738	■ Steven C. Zach	(608) 283-1736	■ Brian P. Goodman	(608) 283-1722

---

*Disclaimer: Boardman & Clark LLP provides this material as information about legal issues. It does not offer legal advice with respect to particular situations and does not purport that this newsletter is a complete treatment of the legal issues surrounding any topic. Because your situation may differ from those described in this Newsletter, you should not rely solely on this information in making legal decisions. In addition, this material may quickly become outdated. Anyone referencing this material must update the information presented to ensure accuracy. The use of the materials does not establish an attorney-client relationship, and Boardman & Clark LLP recommends the use of legal counsel on specific matters.*