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New Title IX guidance: A quick look at K-12 impact

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As suggested by U.S. Secretary of Education Betsy DeVos during a speech earlier this month, on September 22, 2017, the U.S. Department of Education's Office for Civil Rights (OCR) officially withdrew its April 2011 Dear Colleague Letter and the related April 2014 Q&A. In its place, OCR issued a press release with answers to frequently asked questions, a new Dear Colleague Letter and a new Q&A. These new documents replace the two withdrawn documents, resulting in the net loss of nearly a hundred pages of guidance. In issuing the new guidance, OCR has also reaffirmed its reliance on its 2001 Revised Sexual Harassment Guidance, which had previously gone through notice and comment procedures.

So, with the 2011 Dear Colleague Letter and the 2014 Q&A withdrawn, are we looking at a sea change for handling Title IX at the K-12 level? No, it does not—at least not yet. In my experience at least, K-12 sexual harassment policies are much less complex than the typical policy used at a college or university, which means that many policies did not explicitly incorporate every requirement of the withdrawn guidance. This means that sticking to the policy language, so long as it complies with what remains, is still a good bet. But what remains?

As the 2001 Guidance makes clear, schools still have the obligation to eliminate

sexual harassment, prevent its recurrence and remedy its effects. They are required by federal regulations to establish a grievance procedure for prompt and equitable resolution of student and employee complaints. 34 C.F.R. 106.8(b).

Upon receiving such complaints, the school district should still take immediate and appropriate steps to investigate or otherwise determine what occurred. 2001 Guidance, page 15. Informal resolution of such complaints is still possible if the school district determines that it is appropriate in a particular case. 2017 Q&A, Question 7. The 2001 Guidance indicates that informal resolution is not appropriate in cases involving sexual assault. 2001 Guidance, page 21.

The 2017 Q&A indicates that OCR will still be ensuring that school districts undertake an "adequate, reliable, and impartial investigation of complaints...." 2017 Q&A, Question 4. While such investigations are occurring, school districts should still offer interim measures as appropriate to either or both parties. 2017 Q&A, Question 3. Because legal standards for criminal investigations differ from the school district's policies, police investigations or reports may not be determinative of whether harassment occurred under Title IX and do not relieve the school of its duty to respond promptly and effectively. 2001 Guidance, page 21. Perhaps more simply put, law enforcement still investigates whether criminal laws were violated and whether a criminal law was violated or not does not determine whether a school district's policy on sexual harassment was violated. The standards are still very different. This means that school districts must still conduct their own investigations and act on those findings.

Once the matter has been investigated, schools are still required to determine whether the responding party to a complaint has violated the district's sexual harassment/discrimination policy. 2017 Q&A, Question 8. Disciplinary sanctions that are imposed must be a proportionate response to the violation. 2017 Q&A, Question 9. In K-12 settings, the school district must notify both parties when the outcome is concluded, with the content of that notices differing slightly due to what information can be release under the Family Educational Rights and Privacy Act. 2017 Q&A, Question 10; see also 34 C.F.R. Part 99.

All of what I've just described probably—hopefully—is reflected in your current policies and procedures. So what is different? We are missing the details on compliance (and the corresponding obligations that OCR was imposing) that were present in the withdrawn documents. We are also granted extra "wiggle room" on a few items in the 2017 Q&A. For example, whereas previously both parties were required to have an equal right to appeal, now the school district can allow both parties to appeal, or it can limit the appeal rights to the responding party. Here in Ohio at least, the idea of limiting appeal rights to the responding party may help schools better conform their disciplinary process to the mandates of Ohio Revised Code Section 3313.66, which provides the mandatory statutory procedure for suspension and expulsion of students. Another example is that schools are no longer

required to use a “preponderance of the evidence” standard for determining whether a violation occurred but can now use the “clear and convincing” standard of proof if it uses that standard for other non-Title IX misconduct.

For now, keep training your investigators and adjudicators, keep enforcing your prohibition against sexual harassment, and keep striving to eliminate the harassment, prevent its recurrence and remedy its effects. A brief policy review might also be in order to ensure that your procedures comply with the current guidance. In the meantime, stay tuned for more nuanced guidance in the future.