

## DOE Issues New Title IX Interim Guidance

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On September 22, 2017, the Department of Education (“DOE”) issued new interim guidance for Title IX, formally withdrew prior guidance documents, including the April 4, 2011 Dear Colleague Letter and the Questions and Answers on Title IX Sexual Violence dated April 29, 2014, and announced its intention to engage in formal rulemaking. Guidance documents do not carry the force of law, but the interim guidance echoes recent federal cases concerned with the rights of the accused. Based on the interim guidance and the case law described below, educational institutions should examine their policies and procedures to ensure fairness to both the alleged victim and the accused at all stages of Title IX investigations and adjudications.

The interim guidance, which totals seven pages, offers less detailed guidance than the withdrawn guidance documents. The general tenor of the interim guidance is to enhance protections for the accused. It furthers this objective by granting institutions more flexibility in Title IX procedures than the withdrawn guidance. For example, it eliminates any suggested timeframe in which to complete an investigation, allows informal resolution like mediation, and allows either a preponderance of the evidence or clear and convincing standard of proof, as long as institutions use the same standard in all disciplinary proceedings.

The interim guidance makes clear that the institution bears the burden to gather sufficient evidence, inculpatory and exculpatory, and, in a further departure from the prior guidance, which discourages cross-examination by the parties, the interim guidance states that institutions should ensure that any procedure afforded to one party be afforded to the other, including cross-examination of witnesses.

But some aspects of the interim guidance are in tension with the 2001 guidance—guidance the DOE states it will rely upon. For example, while the interim guidance allows for mediation, the 2001 guidance states that in cases of alleged sexual assaults “mediation will not be appropriate even on a voluntary basis.” Additionally, the interim guidance requires written notice in advance of any interview or hearing that includes “sufficient details,” including the identities of the parties involved, and it cautions against “gag orders” because they are likely to “deprive the parties of the ability to obtain and present evidence.” However, the DOE cites to the confidentiality section of the 2001 guidance, which does allow an institution to withhold the name of the student reporting the harassment, with the caution that this may impact the “scope of a reasonable response.”

The DOE will hopefully address the tensions between the interim guidance and the 2001 guidance, but, in the meantime, institutions should review the interim guidance and the 2001 guidance and should monitor case law for perspective on how courts are interpreting compliance with Title IX. The interim guidance echoes—and even cites—some of the recent federal case law addressing fairness to the accused. For example, courts have found:

- Fairness to the accused is denied when the university applies a standard of proof for a sexual assault case that is less stringent than the standard used for other disciplinary cases, an issue the interim guidance explicitly addresses, citing to a recent federal case. *Doe v. Brandeis* 177 F.Supp.3d 561 (D. Mass. 2016).
- Fairness to the accused requires institutions to extend the same rights and opportunities to both parties, including when collecting and presenting evidence. See *Doe v. Amherst Coll.*, 2017 U.S. Dist. LEXIS 28327 (D. Mass. Feb. 28, 2017); *Neal v. Colo. State University-Pueblo*, 2017 U.S. Dist. LEXIS 22196 (D. Colo. Feb. 16, 2017).
- Allegations that public pressure and criticism of institutions’ handling of sexual assault cases may be sufficient to plausibly infer—at least at the motion to dismiss stage—that the institution was biased in favor of the alleged victim. See *Doe v. Columbia Univ.*, 831 F.3d 46, 58 (2d Cir. 2016); *Ralph v. Hobart & William Smith Colls.*, 2017 U.S. Dist. LEXIS 153838 (W.D.N.Y. Sept. 20, 2017).

The interim guidance and public statements by the DOE suggest that fairness to both parties will be a central consideration in the rulemaking process that DOE intends to initiate. DOE will seek public comments in the rulemaking process, and educational institutions should consider participating. In the meantime, institutions should review their Title IX procedure and policies in light of the interim guidance, the 2001 guidance, the Clery Act, and any applicable state law and should continue to monitor the growing body of relevant case law.

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