

Changes to Title IX Complaint Processing Procedures

May 18, 2020

Jon Mayes

Mark Wohlford

Bose McKinney & Evans LLP

jmayes@boselaw.com

(317) 684-5245

BOSE MEANS BUSINESSSM

Outline

- Timeline of recent Title IX changes
 - 2011 “Dear Colleague Letter”
 - 2014 “Q&A” Guidance
 - 2017 Rescission of DCL and Q&A
 - 2017 New Q&A
- New regulation changes

Prior Title IX Guidance

- Publish notice of nondiscrimination
- Designate a Title IX coordinator
- Publish procedures
 - Facilitate prompt and equitable resolution
 - Adequate, reliable, and impartial investigation including opportunity for both parties to present evidence
 - Notice to parties of outcome

April 11, 2011 *Dear Colleague Letter*

- More expansive “knew or should have known of sexual harassment” test for knowledge
- Mandated “preponderance of the evidence” standard
- Instituted strict investigation requirements (*e.g.*, stated time lines, formal v. informal)
- Discouraged allowing parties to question each other
- Introduced 60 day timeline

April 2014 Q&A on Title IX and Sexual Violence

- 46-page guidance covering 14 topics
- Reinforced broader “knew, or in the exercise of reasonable care should have known about the incident” standard
- Extended coverage to transgender students
- Reinforced procedural requirements

September 22, 2017

- OCR withdrew April 4, 2011 Dear Colleague Letter on sexual misconduct as well as the April 29, 2014 *Questions and Answers on Title IX and Sexual Violence*
- Issued new guidance while the DOE began official rulemaking: September 2017 Q&A on Campus Sexual Misconduct

September 2017 Q&A on Campus Sexual Misconduct

- Withdrew expectation that investigations will be completed within 60 days; “prompt”
- Retracted “preponderance of evidence” standard
- Emphasized importance of impartiality
 - Investigators are to be “trained” and “free of actual or reasonably perceived conflicts of interest and biases for or against any party.”

September 2017 Q&A on Campus Sexual Misconduct

- Retracted its previous list of topics on which investigators and adjudicators must be trained
- In its place, the Department cautions against “training materials or investigative techniques and approaches that apply sex stereotypes or generalizations.”
- The Department retracted its prohibition on mediation in sexual violence cases

September 2017 Q&A on Campus Sexual Misconduct

- The Department discouraged any restriction on the ability of either party to discuss an investigation
- Investigation should result in a written report summarizing both “the relevant exculpatory and inculpatory evidence”, that the parties should be provided “equal access” to this information, and that parties have ability to respond to the report

September 2017 Q&A on Campus Sexual Misconduct

- The Department has reversed its previous position that, if an opportunity for appeal is afforded to one party, it must be provided to both parties. Now, institutions may restrict the right to appeal to responding parties only.

New Rules

- Effective August 14, 2020
- Actual rules and no longer “Dear Colleague Letters”
 - Informal Best Practices vs. Formal Legal Requirements
- Implements as law many of the 2001 guidance

New Rules

- “Actual knowledge” redefined:
 - imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge;
 - the mere ability or obligation to report sexual harassment does not qualify an employee, even if that employee is an official, as one who has authority to institute corrective measures on behalf of the recipient

New Rules

- Allows choice between the preponderance of the evidence standard or the clear and convincing evidence standard
 - Must use same standard for student complaints as for employee complaints
- Allows for removal of students based on individualized safety and risk analysis
 - Due process must be given before removal

New Rules – Complaint Process

- Must dismiss complaint before starting process if not sexual harassment as defined or if did not occur in program or activity
- Equal opportunity to parties
- Not restrict ability of parties to discuss allegations
- Applies due process
- Reasonably prompt timeframes

New Rules – Complaint Process

- Innocent until proven guilty
- Right to “advisors” during meetings and proceedings
- If live hearing, detailed provisions on who receives notice of the hearing and how it is conducted

Proposed Rules – Complaint Process

- Right to “advisors” during meetings and proceedings
- If live hearing, provide to the party whose participation is invited or expected written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings with a party, with sufficient time for the party to prepare to participate

Proposed Rules – Complaint Process

- If no live hearing, parties must be able to send questions to parties/witnesses, receive answers, allow for follow-up questions
- Preliminary report prior to hearing summarizing evidence
- Written determination must be provided simultaneously to parties
- Must document no deliberate indifference and reason for no supportive measures

New Rules – Complaint Process

- Appeals allowed:
 - Appellate decision-maker must be different
 - Notice of appeal to all parties required
 - Both parties afforded opportunity to submit written statements on appeal
 - Written appellate decision to parties

Proposed Rules – Complaint Process

- Informal resolution:
 - Mediation
 - Notice of informal process
 - Voluntary, written consent

Proposed Rules – Recordkeeping

- Records must be maintained for 7 years
 - Each investigation
 - Appeals
 - Informal resolutions
 - Training materials

Challenges in New Rules

- District decision on preponderance v. clear & convincing standard
- More stringent due process that is formalized process mandated by law
- Knowledge by teacher is sufficient notice
- Report must address no deliberate indifference and how requested supportive measures are “clearly unreasonable”

Questions and Answers

BOSE MEANS BUSINESSSM