

# Title IX Investigations:

What's Changed, What Hasn't, and What to Expect

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# A brief overview

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## Title IX

“ No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”

# Obama Era Guidance: 2011 Dear Colleague Letter



## Problems with the 2011 Dear Colleague Letter

- No notice and comment rulemaking
- Due process concerns
- 1<sup>st</sup> amendment concerns
- Uncertainty/shifting standards and requirements

## **Problems with OCR enforcement**

- Scope of Investigations
- Aggressive, Adversarial Approach
- Uneven and Heavy Hand
- Publicity

## Heavy-Handed Treatment of Institutions



## Push Back





## The Trump-Devos Era



## New Guidance Issued 2017

- Revoked 2011 DCL and 2014 Q&A
- Fundamental T. IX responsibilities under 2001 Guidance, Clery Act, unchanged
- No immediate changes mandated, but substantial differences in tone and approach
- Added ammunition for respondent challenges

## 2017 Guidance Substantive Changes

- “Preponderance of the evidence” no longer mandatory
- “Prompt” investigation redefined
- Interim measures – greater balance required

## **2017 Guidance Substantive Changes (cont'd)**

- Detailed written notice of investigation required
- Advance notice of interviews
- Informal resolution of sexual assault claims permitted
- Other requirements for “equitable” investigation

## **2017 Guidance Substantive Changes (cont'd)**

- Sanctions
- Free speech issues
- Appeals

## OCR's New Priorities

- Due process focused
- Fewer systemic investigations
- Data requests more tailored
- Faster closing of cases



## OCR's New Case Processing Manual

- Increased access to OCR complaint
- Broader grounds for mandatory dismissal of complaints
- More rapid resolution or facilitated resolution between parties
- Longer time to respond to data requests (no longer 15 days)



## Have the changes made a difference?

- Actual practices in OCR regional offices in flux
- Unclear how guidance has impacted case resolutions





## Rulemaking



- Proposed rules due in September
- Opportunity for public comment
- Potential Areas of Concern & Open Issues

## Open Questions



- Written notice requirements
- Anonymous complaints or incomplete reports
- Different evidentiary standards
- Federal v. state law requirements
- Cross-examination of victims

## More Open Questions



- Flexibility of process and remedy
- Access to information about OCR investigation
- Free speech

# Litigation



# QUESTIONS



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