TITLE IX UPDATE: OCR’S WITHDRAWAL OF 2011 AND 2014 GUIDANCE

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What Happened on Friday, September 22, 2017 and What is New?

OCR withdrew 2011 DCL and 2014 Q&A
  ➢ Note: OCR did not withdraw the April 14, 2015 DCL re: Title IX Coordinators

OCR released a 2017 DCL and 2017 Q&A on Campus Sexual Misconduct
  ➢ OCR will rely on the Revised 2001 Sexual Harassment Guidance (adopted in 2001; revised in 2006)

DOE will initiate a notice and comment rulemaking process—leading to regulations.
  ➢ Timeline unknown.
Main Takeaways

OCR is taking an equitable, neutral focus on rights of both complainants and respondents.

No changes to UT System Model Policy required at this time

➢ But:

  Check your specific policies; and
  Consider certain practices may need to be altered

Notable Takeaways

**Standard of Proof**: Grants institutions discretion to choose (i.e., preponderance of evidence or clear and convincing).

➢ But use the same SOP for all student conduct matters (?)

➢ UT System = PPE standard (no policy change)

**Interim Measures**: 

➢ Cannot favor one party over another

➢ Caution = do not rush to issue no contact orders/interim suspensions without thoroughly analyzing the complaint
Notable Takeaways

Off Campus Conduct:

➢ 2001: “A university does not have a duty under Title IX to address an incident of alleged harassment where the incident occurs off-campus and does not involve a program or activity of the recipient.”

➢ 2017: Not barred from adjudicating off-campus incidents of sexual misconduct when sufficient nexus between conduct and institution’s educational program/activity.

➢ No recommended changes to UTS Model Policy or practice.

Notable Takeaways

Notice SHOULD:

➢ Provide “sufficient details” about a complaint to respondent before an initial interview.
➢ Provide following details:
  - Identities of parties
  - Specific alleged policy violation
  - Precise conduct allegedly constituting the potential violation; and
  - Date and location of the alleged incident.
➢ Provide written notice to all parties allowing “sufficient time” for each party to prepare for a meaningful participation in an interview.
  ✓ This may impact your institution’s practice regarding the timing/content of the respondent interview.
➢ Provide complainant, respondent and appropriate officials (i.e., hearing officers) timely and equal access to any information that will be used during informal and formal disciplinary meetings and hearings.
  ✓ Any practice or policy that does not provide timely and equal access to information to all parties (including a hearing officer) to be used at a disciplinary hearing is not in compliance with this new guidance.
Notable Takeaways

Responsible Employees:
- UTS Model Policy definition of “Responsible Employees” is consistent with 2001 Guidance.
- No changes re: the identities or duties of “Responsible Employees” required.

Duties of Title IX Coordinator:
- April 14, 2015 DCL not withdrawn by OCR and remains in place.
- Duties and responsibilities of the Title IX Coordinator = unchanged.

Investigation Timeline:
- 60 day mandate no longer exists.
- UTS Model Policy states, in relevant part, “the University will endeavor to resolve complaints … no later than 60 calendar days.”
- No change is needed to UTS Model Policy.

Informal Resolution
- Permitted in certain cases (if appropriate and voluntary)
- But “sexual assault” not appropriate
- No change to UTS Model Policy BUT use caution when deciding what case is appropriate
Notable Takeaways

Confidentiality

- New guidance = “Restricting the ability of either party to discuss the investigation is … likely inequitable.”
- UTS Model Policy compliant with new guidance.
- BUT practice of cautioning students to “not discuss the matter” may be deemed “inequitable.”
  - Recommend abandoning this practice.

Appeal Rights

- New guidance = limits appeals to responding party
- But if appeals allowed for both parties, appeal procedures must be equally available to each party.
  - UTS Model Policy permits appeals for both parties

Conflicts of Interest

- 2017 Guidance:
  - A Title IX investigator should be free of conflicts of interests and biases for or against any party.
  - Must “ensure that institutional interests do not interfere with the impartiality of the investigation.”
- Review your practices to ensure no conflict exists.
  - e.g., Title IX Office Reporting Structure
QUESTIONS?