

Higher Education Alert

September 8, 2017

Key Points

- The Department of Education (DOE) plans to gather public input—including input from educational institutions—on new Title IX policy, rejecting the prior administration’s issuance of policy by letter.
- The DOE has not, at this time, rescinded existing policy, as stated in a 2011 “Dear Colleague Letter.”
- Secretary DeVos’s remarks focused on increased protections for students accused of Title IX violations, but she remained silent on the role of local law enforcement and prosecutors in responding to allegations of rape on college campuses.



The Department of Education Seeks Public Input for New Title IX Policy

On September 7, 2017, Secretary of Education Betsy DeVos announced the Department of Education’s decision to significantly revamp guidance sent to thousands of U.S. colleges and universities in the form of an April 2011 “Dear Colleague Letter” from the DOE’s Office of Civil Rights. Speaking at George Mason University in Virginia, Secretary DeVos rejected the Obama administration’s guidance set out in the Dear Colleague Letter. Condemning acts of sexual misconduct as “reprehensible, disgusting, and unacceptable,” Secretary DeVos expressed concerns about how Title IX investigations may have infringed the due process rights of the accused, imposed unworkable requirements on colleges and universities, and traumatized victims. She also cited the increase in litigation, both in the federal courts and before the Office of Civil Rights, as evidence of a need for reform. Secretary DeVos did not rescind the 2011 guidance, however, but plans to initiate a public notice and comment period before issuing any new policy. This presents an important opportunity for colleges and universities to formally weigh in on what does and does not work under the current 2011 guidance, suggest new solutions and help shape the new policy.

Proposed Revisions to DOE Guidance

Earlier this summer, Secretary DeVos held a series of informal “listening sessions” to hear complaints about the current Title IX investigation and adjudication system from victims, accused and college administrators. In her September 7 speech, Secretary DeVos placed new and significant emphasis on the DOE’s commitment to protecting the due process rights of the accused, stating that students “should not have to sue to get due process.” The 2011 Dear Colleague Letter mandated that colleges and universities apply a “preponderance of the evidence” standard when determining whether an accused student was

responsible for an alleged Title IX violation. That means that an accused is held responsible if there is a slightly greater than 50 percent chance that he or she committed a violation. A troubling consequence of the preponderance of the evidence standard is that the accused may suffer grave personal consequences, such as expulsion, when there is still significant doubt about actual liability. As a result, groups like The American College of Trial Lawyers have advocated the use of the more stringent “clear and convincing” evidentiary standard in Title IX proceedings to better protect the accused’s due process rights. As Secretary DeVos acknowledged, the use of the lower preponderance of the evidence standard is responsible, at least in part, for hundreds of due process complaints filed by accused students.

Secretary DeVos also expressed concern about punishments imposed on the accused prior to any decision on responsibility. The 2011 guidance encourages colleges and universities to take “interim steps to ensure the safety and well-being” of the accuser. These steps, imposed at the school’s discretion, run the gamut from restricting contact between the accuser and the accused (e.g., by juggling class schedules or changing dorm assignments) to banning the accused from campus altogether. Even if accused students are ultimately exonerated, their college careers have often been irreparably derailed by “interim steps” that prevented them from participating in college life or, in some cases, attending classes at all.

The Secretary then criticized the 2011 guidance on behalf of accusers, saying that victims should not have to act as their own attorneys or be retraumatized by numerous proceedings. She criticized the guidance conveyed in the Dear Colleague Letter as requiring school administrators to act as investigators, lawyers, juries and judges without adequate training. Moreover, college and university staff must make decisions about responsibility using definitions for sexual harassment and sexual assault that, according to Secretary DeVos, are too imprecise.

Notably absent from yesterday’s remarks by Secretary DeVos was any concrete reference to the role of local criminal investigators and prosecutors in responding to allegations of rape on college campuses. One of the most controversial provisions of the 2011 Dear Colleague Letter involves the circumstances under which a criminal complaint is filed by or on behalf of a victim of sexual assault. While the Dear Colleague Letter requires a school to notify a complainant of the right to file a criminal complaint, colleges and universities are under no duty to give notice to local police and are advised to determine whether law enforcement authorities should be notified “consistent with State and local law.” This approach has led to numerous disjointed cases in which a Title IX investigation concludes that a violent rape has taken place, but no report is ever made to law enforcement authorities. The result is that the case receives no attention from those with the unique training and resources to conduct a complete investigation and pursue criminal prosecution—police and prosecutors.

What Happens Next?

While Secretary DeVos did not rescind the 2011 Dear Colleague Letter (that guidance remains in effect), in her speech at George Mason, she clearly signaled rejection of the existing Title IX policy guidance. She called for a transparent notice-and-comment process involving input from members of the public;

educational institutions; legal groups, such as the American Bar Association and the American College of Trial Lawyers; and other experts. Secretary DeVos specifically cited a proposal by Gina Maisto Smith and Leslie M. Gomez (published in the spring issue of the American Bar Association's *Dispute Resolution Magazine*) that educational institutions refer alleged Title IX violations to independent "Regional Centers for Investigation and Adjudication" staffed with trained investigators. Ultimately, Secretary DeVos stressed that the DOE will consider all alternatives proposed during the notice-and-comment process.

Contact Information

If you have any questions concerning this alert, please contact:

Catherine Elizabeth Creely

ccreely@akingump.com

202.887.4331

Washington, D.C.

Mark J. MacDougall

mmacdougall@akingump.com

202.887.4510

Washington, D.C.