



— 2017 UT SYSTEM — LEGAL CONFERENCE

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

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Ashley A. Palermo, Assistant General Counsel, The University of Texas System, Austin, TX
Melissa V. Garcia, Assistant General Counsel, The University of Texas System, Austin, TX



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.



Notable Takeaways

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



Notable Takeaways

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?

