

Obama Administration Releases Additional Campus Sexual Misconduct Guidance

January 6, 2017

The Obama Administration's latest guidance comes at a time when many are speculating on how President-elect Donald Trump and Betsy DeVos, Trump's pick for Education Secretary, will address the issue of campus sexual misconduct. In fact, some Republican members of Congress are already encouraging the incoming Trump Administration to scale back the federal government's extensive involvement in campus sexual misconduct and relax the enforcement efforts of the U.S. Department of Education's Office of Civil Rights ("OCR").

Over the last several years, the White House and Congress have given significant attention to the issue of sexual misconduct, including assaults, on college and university campuses and as a result, institutions throughout the country have been inundated with a sometimes overwhelming volume of federal guidance. For example:

- In April 2011, OCR issued the *Dear Colleague Letter: Sexual Violence* to help institutions understand their obligations under Title IX to take immediate and effective steps to prevent, investigate and resolve complaints of sexual misconduct.
- In January 2014, President Obama and Vice President Biden established the White House Task Force to Protect Students from Sexual Assault (the "Task Force") to strengthen and address compliance issues and provide institutions with additional tools to respond to and address rape and sexual assault.
- In April 2014, the Task Force released *Not Alone: The First Report of the White House Task Force to Protect Students from Sexual Assault*. On the same day, OCR issued a significant guidance document titled *Questions and Answers on Title IX and Sexual Violence*.
- In September 2014, President Obama and Vice President Biden launched "It's On Us" an awareness campaign to help put an end to sexual assault on college campuses.
- In April 2015, OCR issued a *Title IX Resource Guide* and a *Dear Colleague Letter on Title IX Coordinators*.

To date, more than 200 colleges and universities are currently being investigated by OCR over the handling of sexual misconduct cases under Title IX. In addition, at an increasing rate, students who have been accused of sexual misconduct are suing their institutions under Title IX, while complainants use the same statute as a basis to sue their institutions for allegedly failing to properly investigate claims of sexual misconduct. Moreover, recently accused parties have also started to bring due process and breach of contract claims, in addition to Title IX claims, alleging that their institutions unfairly punished them because of their gender status.

Yesterday, in its most recent attempt to address campus sexual misconduct, the White House released *The Second Report of the White House Task Force to Protect Students from Sexual Assault* (the "Second Report") and hosted its final event focused on preventing and stopping sexual violence against students, the "It's On Us

Summit.” The Second Report builds on the recommendations and lessons learned from the first report of the Task Force released in 2014 and illustrates the steps taken by the Obama Administration to address sexual misconduct in higher education.

Along with the Second Report, Vice President Biden issued a letter to college and university leaders calling on them to “step up” and end campus sexual misconduct. “[W]e haven’t seen enough of you. As presidents, chancellors, deans, and administrators, you have an obligation to stand up, to speak out, to foster the safest and most inclusive environment possible for every student that walks onto your campuses,” Vice President Biden wrote in the letter. He noted, “I asked my White House Task Force to Protect Students from Sexual Assault to prepare a guide specifically to help you develop your plans for addressing sexual assault on campus.”

The guide that the Vice President mentioned is called *Preventing and Addressing Campus Sexual Misconduct: A Guide for University and College Presidents, Chancellors, and Senior Administrators (the “Guide”)*. The Guide can be located [here](#). The Guide outlines best practices for how college presidents and senior administrators should address campus sexual violence and methods by which institutions can further develop responses to sexual misconduct. The Guide focuses on six primary elements that colleges and universities may want to consider:

1. Coordinated Campus and Community Response
2. Prevention and Education
3. Policy Development and Implementation
4. Reporting Options, Advocacy, and Support Services
5. Climate Surveys, Performance Measurement, and Evaluation
6. Transparency

In short, the Guide recommends that institutions regularly conduct research-based sexual misconduct climate surveys, provide ongoing prevention, education and training programs for students, and annual sexual misconduct training for university and college administrators at all levels, campus law enforcement and security, faculty, staff, contract employees and volunteers. The Guide further suggests that institutions establish their own task forces to implement and monitor the campus and community response framework, and launch prevention campaigns, similar to the federal government’s “It’s On Us” campaign. The Guide also emphasizes the important role of the Title IX coordinator and explains that “it is critical that the employee has the qualifications, training, authority and time to address all complaints raising Title IX issues.” Lastly, the Guide states that campus investigations should provide complainants and accused individuals with the same opportunity to present witnesses and evidence, and “equal access to lawyers, other advocates, or support persons.”

However, in the Guide, “[t]he Task Force cautions institutions to consider the recommendations contained in this guide only after determining the unique needs and characteristics of the institution, its student body, and its surrounding community. This is a guide, neither exhaustive nor exclusive, to help a school to consider all of the various components of a comprehensive plan. Schools should consult their legal counsel to ensure they are meeting all elements required by law.” In this regard, it warns that “[w]hen developing a comprehensive plan to address sexual misconduct against students, schools should review all applicable federal laws, including Title IX of the Education Amendments of 1972 (Title IX), Title IV of the Civil Rights Act of 1964 (Title IV), the Jeanne Clery

Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act), the Family Educational Rights and Privacy Act (FERPA) of 1974, and their implementing regulations and related guidance; review any applicable state and local laws; and consult with legal counsel to ensure that the policy fully complies with all applicable federal, state, and local laws.”

Although this was the Obama Administration’s last official pronouncement on campus sexual assault, Vice President Biden stated that he is “working very hard with this incoming administration to convince them [to] understand that this is, in a sense, the civil rights issue of our time, the human rights issue of our time.” He also encouraged attendees of yesterday’s event to continue “to hold their universities responsible” in addressing sexual violence. Vice President Biden also revealed that he will personally be creating a foundation after he leaves the White House to continue work on ending sexual assault. “I’m no longer going to be vice president, but I’m going to be associated with several major universities and have a significant staff,” Vice President Biden told the audience at the summit yesterday. “I’m going to set up a foundation, to devote the rest of my life to dealing with violence against women.”

How much of the new guidance will be endorsed by the incoming Trump Administration remains to be seen. In that interim period while we wait for the new administration to weigh in on this very complex issue, it behooves colleges and universities to, once again, review their existing policies and procedures in order to confirm that they are in compliance with the current guidance and/or make any necessary changes as soon as practical. Thereafter, institutions should continue to provide regular, current Title IX training to students, educators and all members of the school community on properly recognizing, preventing and responding to allegations of sexual misconduct.

If you or your institution wants further information on this topic, please contact James G. Ryan at jryan@cullenanddykman.com or at 516-357-3750.

1. <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>
2. Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.*, (“Title IX”) is a federal law that prohibits discrimination on the basis of sex in any education program or activity that accepts federal funding. Traditionally, this statute was utilized in the context of college athletics, however, in recent years, the federal government has determined that discrimination on the basis of sex includes sexual harassment and sexual violence (collectively, “sexual misconduct”).
3. <https://www.whitehouse.gov/the-press-office/2014/01/22/memorandum-establishing-white-house-task-force-protect-students-sexual-a>
4. https://www.whitehouse.gov/sites/default/files/docs/report_0.pdf
5. <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>
6. <http://itsonus.org/#landing>
7. <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-guide-201504.pdf>
8. <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf>
9. <https://www.whitehouse.gov/sites/whitehouse.gov/files/images/Documents/1.4.17.VAW%20Event.TF%20Report.PDF>
10. <https://www.whitehouse.gov/the-press-office/2017/01/05/fact-sheet-final-its-us-summit-and-report-white-house-task-force-protect>

11. <https://medium.com/@VPOTUS/a-call-to-action-for-college-and-university-presidents-chancellors-and-senior-administrators-52865585c76d#.nekxeahz9>

Practices

- Higher Education

Industries

- Higher Education
- Financial Institutions

Attorneys

- Kevin P. McDonough
- Deirdre M. Mitacek
- Dina L. Vespia