

# Management Alert



## Title IX Enforcement and Interpretation: The Winds of Change are Blowing

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**Seyfarth Synopsis:** Title IX enforcement issues continue to notably permeate the agenda of colleges and universities. The winds of change to Title IX enforcement may be blowing in 2017. This Management Alert will review the current state of Title IX enforcement and interpretation under the law, and offer some predictions as to where the winds of change may blow and the practical impact any change may have on American colleges and universities. It is the first in a series of Seyfarth Shaw Management Alerts addressing legal issues related to the implementation of Title IX as well as strategies and best practices for handling allegations of sexual and interpersonal violence on campus.

### Title IX and the Current State of Enforcement by the OCR

Title IX protects people from discrimination on the basis of sex in elementary, secondary, and post-secondary educational programs, whether public or private, which receive federal financial assistance. Title IX, 20 U.S.C. § 1681, states that:

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.

Even though the non-discriminatory language of Title IX is relatively brief, the enforcement guidance issued by the United States Department of Education (DOE) under the Obama administration has provided what has been viewed as expansive interpretations of a school's obligations under Title IX. Under the Obama administration, the OCR has issued policy guidance documents including: its April 4, 2011 [Dear Colleague Letter](#) which addresses the DOE's interpretation of Title IX's requirements related to addressing sexual harassment and sexual violence on college and university campuses; its April 29, 2014 [Q & A on Title IX and Sexual Violence](#) which provides detailed requirements and recommendations concerning a school's obligations under Title IX to address sexual violence as a form of sexual harassment; and, its April 24, 2015 [Dear Colleague Letter](#) addressing Title IX's requirement that each school have a designated Title IX Coordinator. In addition to being the sources of continual controversy on campuses seeking to meaningfully address sexual assault while providing appropriate due process for the accused, the OCR has treated these directives as binding regulations. The OCR has done so notwithstanding the fact that they have not gone through the notice and comment provisions required by the Administrative Procedure Act. The DOE's treatment of these directives as binding has caused colleges and universities to conform their Title IX policies and procedures for the investigation and adjudication of sexual harassment and sexual violence to the standards issued by DOE/OCR or risk the threat of losing federal funding.

Related to implementing its Title IX guidance directives, the OCR has increased its enforcement actions and proactive compliance reviews in recent years. It has engaged in investigations of numerous institutions and entered into conciliation agreements with many colleges and universities, including agreements that require reporting obligations to, and review by, the OCR. Recently, on December 8, 2016, the OCR issued its annual report entitled [Securing Equal Educational](#)

[Opportunity \(2016 Report\)](#). This 2016 Report shows that there has been a significant increase in OCR complaints regarding allegations of sexual violence involving higher education institutions since the issuance of the April, 2011 [Dear Colleague Letter](#). Notably, the Report identifies 19 complaints involving sexual violence in FY2011 and 17 in FY2012, as compared to 165 OCR complaints involving Title IX sexual violence allegations in FY2015 and 177 in FY2016. These reported statistics represent an 831% increase at the postsecondary level of sexual violence complaints since FY 2011.

The information contained in the 2016 OCR Report as well as reports of alleged misconduct such as the recent report of sexual misconduct by the University of Minnesota football team, point to a continuing need to address sexual harassment and assault on American higher education campuses. Litigation has been brought against the DOE challenging whether the agency has expanded its Title IX directives beyond its authority. The federal courts will soon weigh in and may help to clarify the law. Questions have been raised and remain to be addressed, including whether there is a need to clarify the obligations of an institution to its students and staff under Title IX or a need to clarify the means by which an institution should investigate and adjudicate instances of alleged sexual harassment and/or violence on its campus. The role that a President Trump DOE will play in the future is yet to be determined.

President Obama has recently announced his intentions to appoint Assistant Secretary of Education for Civil Rights Catherin E. Lhamon to a six-year term on the U.S. Commission on Civil Rights, a bipartisan and independent commission which addresses the development of civil rights policy and enforcement of federal nondiscrimination statutes. As Assistant Secretary for Civil Rights, Ms. Lhamon has been directly involved in Title IX enforcement efforts under President Obama's administration, including signing off on both the April 29, 2014 [Q & A on Title IX and Sexual Violence](#) as well as the April 24, 2015 [Dear Colleague Letter](#). One would expect that her future role on the U.S. Commission on Civil Rights will likely involve her commitment to continued promotion of the Title IX initiatives undertaken during the Obama administration.

## Predicting the Future: What Might OCR Do in a President Trump Administration?

The upcoming Republican control of the Presidency, the House, and the Senate presage that President Obama's initiatives to address Title IX's mandates and campus sexual assault may not survive the new administration. Given that the President-elect has been busy assembling his Cabinet and preparing for assuming office as President, understandably, there has not been an opportunity to publicly comment on any planned interpretation of Title IX. That said, certain comments in the public record by some close Trump advisors and allies may portend a new direction to the statute's interpretation. For example, Sam Clovis, the National Co-chairman and policy director of Trump's campaign, suggested moving the OCR to the Department of Justice Civil Rights Division. And Trump's New York State Co-chairman, Carl Paladino, was openly critical of OCR, calling it "self-perpetuating absolute nonsense," and advocating that campus discrimination matters should be handled by prosecutors, not the schools themselves. Indeed, although the OCR has been criticized by Republicans in both houses, there is no strong indication that a Republican-controlled Congress will eliminate the OCR, although, admittedly, it may scaleback its funding. To the contrary, the Republican Party has included sexual assault and Title IX as part of its GOP platform, as reflected in the July Republican national convention, in which the party expressed the view that President Obama's initiatives "micromanage" colleges, and "contravene our country's legal traditions," which require prosecution in a "courtroom not a faculty lounge."<sup>1</sup>

President-elect Trump has nominated Betsy DeVos to run the Department of Education. Her advocacy for charter schools and vouchers at the K-12 level is known to the public, but little information is available related to DeVos's positions related to Title IX and the present DOE/OCR mandates. As such, there is uncertainty related to how and to what extent a Trump DOE/OCR will address a higher education institution's obligations under Title IX. Be it as it may, the President-elect's administration will be free to rescind, in whole or in part, any of the [Dear Colleague](#) guidance documents issued during the Obama administration; will have full flexibility to cut OCR's budget; and will have the authority to release institutions currently under investigation or conciliation agreements from existing obligations.

The legal issue of whether OCR under the Obama administration has issued directives beyond their limitation may be clarified in the federal courts soon. A Trump administration might well embrace the arguments advanced in those cases and issue new guidance based on the GOP platform or direct a new OCR leadership to develop regulations through rulemaking, which would allow for college and universities (and various advocacy groups and other interested constituents) to contribute to the

OCR decision-making process via public comment. Matters most likely to be modified by a Trump administration include the agency's directives dictating the processes and procedures colleges should (and should not) use to investigate and adjudicate sexual misconduct and in particular, the use of the preponderance of evidence standard of proof.

## Practical Impact on American Colleges and Universities

When and to what extent President-elect Trump decides to address (or re-address) Title IX initiatives remains to be determined. But independent of federal government guidance or regulations and cognizant of state law implications in certain jurisdictions, colleges and universities may elect to maintain the standards and practices established by President Obama's OCR on a moving forward basis, even if they are presented with the option (or authority) to walk back or otherwise modify those directives. And, as a practical matter, colleges and universities have made substantial investments in programming, policies, personnel, and infrastructure to adhere to the OCR's current dictates, suggesting that higher education institutions may think long and hard before changing direction or starting over.

That said, the new administration may provide colleges and universities the opportunity to take a meaningful look at what is and is not working with these efforts. In particular, looking at inefficiencies in internal processes and, most importantly, heeding the due process concerns increasingly cited by faculty, staff, the defense bar, constitutional scholars, and others, as it relates to students accused of on-campus sexual misconduct.

Seyfarth Shaw is one of the nation's leading law firms on higher education and employment issues. In the upcoming months, Seyfarth Shaw will be issuing a series of Management Alerts aimed at highlighting issues important to colleges and universities trying to meet their obligations to provide a safe and neutral learning and working environment while minimizing the ever increasing risk of Title IX litigation and enforcement -- regardless of what changes await ahead.

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<sup>1</sup> See Section 6 of the Republican Platform 2016.

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