

Dealing with Campus Sexual Misconduct in a Post-2011 DCL World

WITH BRICKER & ECKLER LLP

Joshua
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Live Forum

To ask a question using the chat function:

The screenshot displays the Cisco WebEx Event Center interface. The main content area features a red banner with the title "Dealing with Campus Sexual Misconduct in a Post-2011 DCL World" and the text "WITH BRICKER & ECKLER LLP". Below the banner are three headshots of panelists: Joshua Nolan, Melissa Carleton, and Courter Shimeall. On the right side, the "Participants" panel shows the host, Traci Graham, and attendees. The "Q&A" panel is active, showing a list of questions and a "My Q&A (1)" filter. A text input field is visible with the placeholder "Type your question here", and a "Send" button is located to its right. Red annotations highlight the input field and the "Send" button, with callouts that read "Type your question in the box" and "Hit send".

Event Info: 10600802_1

Dealing with Campus Sexual Misconduct in a Post-2011 DCL World

WITH BRICKER & ECKLER LLP

Joshua Nolan Melissa Carleton Courter Shimeall

Participants

Speaking

Panelists: 1

TG Traci Graham (Host)

Attendees:

Q&A

All [2] My Q&A (1)

Carole Christer: 3:52 PM

Ask: All Panelists

Type your question here

Send

Type your question in the box

Hit send

What Just Happened?

~~2011 Dear Colleague~~

~~2014 Q&A~~

2017 Press Release, DCL, Q&A

What Just Happened?

Press Release:

- 2011 DCL “created a system that lacked basic elements of due process and failed to ensure fundamental fairness”
- Includes its own Q&A

What Just Happened?

New DCL: "The Department will not rely on the withdrawn documents in its enforcement of Title IX."

What Is Binding?

- Dear Colleague Letter – on par with 2011 DCL
- Q&A – on par with 2014 Q&A
- “Significant Guidance”

What Is Binding?

- Approves a return to the 2001 Revised Sexual Harassment Guidance
- Approves 2006 DCL that reiterated 2001 Guidance
- April 2015 DCL on Title IX Coordinators

What's Still There

- Eliminate the harassment, prevent its recurrence, remedy its effects
- Establish grievance procedure
- Identify Title IX Coordinator
- Investigate

Q&A – School's Resp.

- Know/reasonably should know: understand what occurred and respond appropriately
- Must respond to hostile environment
- Off-campus conduct – still an issue if it creates hostile environment

Q&A – School's Resp.

- Responsible employee – authority to take action, duty to report, or student reasonably believes this is so (this is the same)
- Continue to consider free speech issues (2003 DCL approved)

Q&A – Clery

- It still exists
- OCR is aware that it exists
- Focuses on the four Clery categories: dating violence, domestic violence, sexual assault, stalking

Q&A – Interim Ms

- For both parties
- “Prior to an investigation or while an investigation is pending”
- No fixed rules or operating assumptions that favor one party over another

Q&A – Interim Ms

- “Mak[e] every effort to avoid depriving any student of [their] education”
- May evolve over time
- “Nor may a school make such measures available only to one party” – interim suspensions?

Q&A – Grievances

- Notice of procedures
- Applies to complaints
- Adequate, reliable, impartial investigations, “including the opportunity to present witnesses and other evidence”

Q&A – Grievances

- Designates and follows “reasonably prompt time frame for major stages of the complaint process”
- What is prompt? ~~60 days~~ “no fixed time frame”

Q&A – Equitable Process

- Burden on school to collect evidence
- Determine “whether sexual misconduct has occurred and, if so, whether a hostile environment has been created that must be redressed”

Q&A – Equitable Process

- “Requires a trained investigator to analyze and document the available evidence to support reliable decisions, objectively evaluate the credibility..., synthesize all available evidence... and take into account the unique and complex circumstances of each case.”

Q&A – Equitable Process

- Rights equal for both parties
- No gag orders (“likely inequitable”)
- Don’t use sex stereotypes or generalizations in training
 - Data?
 - Trauma-informed training?

Q&A – Equitable Process

- Before first interview: allegations, details, date/time
- “Investigation should result in a written report summarizing the relevant exculpatory and inculpatory evidence”
- Timely/equal access to evidence

So what about...

- Law enforcement investigations
 - 2001 Guidance still requires that you conduct your own investigation and make your determination
 - Don't interfere with law enforcement (practical advice!)

Q&A – Informal Res.

- May be used “if a school determines that the particular Title IX complaint is appropriate for such a process”
- But → 2001 Guidance still prohibits for sexual assault

Q&A – Decisions

- No hearing requirement
- Decision-maker(s) must make findings of fact and conclusions as to whether facts support a finding of responsibility
- PE or C&C – standard of evid must be consistent for all misconduct

Q&A – Decisions

- Equal opportunity to respond
- Equal rights in process
- Avoid conflicts of interest and biases

Q&A – Sanctions

- Sanctioning can be separate from responsibility determination
- “Considering the impact of separating a student from her or his education”
- Sanctions must be proportionate

Q&A – Notice of Outcome

- Provide in writing, concurrently
- Proceedings not covered by Clery – limit what is shared with complainant due to FERPA
- But – Title IX overrides FERPA and they may need more info due to appeal rights...

Q&A – Appeals

- Can allow only respondent to have right to appeal*
- Can allow both parties to appeal, but then must give the same rights
- New DCL refers to “not-guilty” findings and the right of appeal...

Q&A – Existing Agreements

- Will still be binding
- Questions should be directed to OCR on this point

To Do List

- Communicate with campus
- Treat parties equitably
- Same standard of proof for student conduct/Title IX
- Stay tuned

Save the Date

Oct. 6, 12:00 – Webinar: Public Records and Private Police (Ohio-centric)

Nov. 3, 12:00 – Webinar: Hot Topics in Labor & Employment



You can register for all of our upcoming
webinars/events by visiting:

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