Education Amendments of 1972 – Title IX

The Dear Colleague Letter of 2011 its impact on colleges and universities

Title IX

- “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.”

Title IX

- Federal law considered a portion of the United States Education Amendments of 1972
- Was written as a byproduct of the Civil Rights Act of 1964 which was written in order to end discrimination of several types

- The Civil Rights Act of 1964 did not specifically include biological sex discrimination for those who were not employed at educational institutions (i.e. students)
- Legislators were lobbied to draft a separate law, one which addressed anti-discrimination for biological females in all aspects of American education; as well as employment opportunities exclusively for biological women

Title IX

- When the law was enacted, much of the public focus was on its impact on athletics and equity in sports, but the law addressed equity on many levels

January 2001 Guidance

- In January of 2001the Office of Civil Rights (OCR) in the U.S. Department of Education issued revised sexual harassment guidance, specifically addressing harassment of students by school employees, other students, or third parties

Sexual Harassment

- Sexual harassment is a form of sex discrimination prohibited under Title IX

- Sexual harassment is conduct that:
  - Is sexual in nature
  - Is unwelcome; and
  - Denies or limits (on the basis of sex) a student's ability to participate in or receive benefits, services or opportunities in the schools program.

Sexual Harassment

- Sexual harassment includes:
  - Sexual advances
  - Requests for sexual favors
  - Verbal, nonverbal or physical conduct of a sexual nature

- Quid Pro Quo Harassment
- Hostile Environment Harassment

January 2006 Guidance

- On January 25, 2006 the Office of Civil Rights issued a Dear Colleague Letter (DCL) to schools to discuss sexual harassment and to remind them "of the principles that a school should use to recognize and effectively respond to the sexual harassment of students in its programs and activities". In this letter they also referred to the January 2001 guidance.

The Dear Colleague Letter of 2011

- On April 4, 2011 the Office of Civil Rights (OCR) issued a Dear Colleague Letter (DCL) addressing student-on-student sexual harassment and sexual violence
- The DCL, which essentially was sub-regulatory guidance, explained schools responsibility to respond promptly and effectively to sexual violence against students in accordance with the requirements of Title IX around sexual harassment

The Dear Colleague Letter of 2011

- In the DCL, Sexual Violence as a form of Sexual Harassment was discussed
- Sexual Violence includes Rape, Sexual Assault, Sexual Battery and Sexual Coercion

How does the concept of sexual violence relate to Title IX?

- Sexual Violence is a form of Sexual Harassment
- Sexual Harassment is a form of Harassment
- Harassment if a form of Discrimination
- Discrimination is prohibited by Title IX

The Dear Colleague Letter of 2011

- The DCL provided "guidance" around the handling of sexual violence cases on campus, including:

  * schools have an independent responsibility under Title IX to investigate and address sexual violence, separate from any criminal investigation conducted by the police;

  * are required to designate a Title IX Coordinator and adopt and publish grievance procedures;

  * must comply with Title IX, FERPA and the Clery Act relating to a complainant's right to know the outcome of a complaint and any sanctions imposed, and;

  * provided examples of remedies and enforcement strategies schools and OCR may use to respond to sexual violence

The Dear Colleague Letter of 2011

- The DCL also made is very clear that if schools were not in compliance with Title IX they would be investigated and fined

Obligations under Title IX as defined in the DCL of 2011

- Duty to investigate – once a school knows or reasonably should know of possible sexual violence, it must take immediate and appropriate action to investigate or otherwise determine what occurred
- If it is determined sexual violence has occurred, schools must take prompt and effective steps to end the sexual violence, prevent its recurrence, and address its effects – ***whether or not the sexual violence is the subject of a criminal investigation***
- Interim measures – Steps to protect the complainant as necessary
- Must provide a grievance procedure for students and employees to file complaints of this type

Obligations under Title IX as defined in the DCL of 2011

Standard of Proof – Schools were directed to use the "preponderance of the evidence standard" (often described as 50.1%) to resolve complaints of sexual discrimination

- Prior to the 2011 DCL some schools were using the standard of "clear and convincing evidence"

- In the criminal justice process the higher standard of "beyond a reasonable doubt" is used because a person can lose their liberty through the criminal justice process

Obligations under Title IX as defined in the DCL of 2011

- Both complainants and respondents may use an "advisor of their choice" who may be present and involved at every step of the process.
- Discouraged the use of informal mechanisms, like mediation for the resolution of sexual harassment complaints.
- Appeals may be made by both a complainant and a respondent
- Investigations must be prompt, equitable and impartial: "Based on OCR experience, a typical investigation takes approximately 60 calendar days following receipt of the complaint".
- Title IX Coordinators, investigators and adjudicators must have training

Obligations under Title IX as defined in the DCL of 2011

- Required "that all schools implement preventive education programs and make victim resources, including comprehensive victim services, available"

- Interim measures – "When taking steps to separate the complainant and alleged perpetrator, a school should minimize the burden on the complainant, and thus should not, as a matter of course, remove complainants from classes or housing while allowing alleged perpetrators to remain".

I Was Willing to Do Everything': Mothers Defend Sons Accused of Sexual Assault

From the New York Times – October 2017

Four women met late last month at a restaurant in a Twin Cities suburb, where they spoke for hours, so intently their waiter had trouble getting their drink orders.
Each had a son who had been accused at college of sexual assault. One was expelled and another suspended. The other two were cleared, yet one had contemplated suicide and the other was so crushed he had not returned to school.
The women had been meeting regularly to share notes and commiserate. Now, over red wine in a corner booth, they were finally savoring a victory.

A few days before, Betsy DeVos, the education secretary, had rescinded tough Obama-era guidelines on campus sexual assault, saying they violated principles of fairness, particularly for accused students like their own sons.

“What she is doing with this issue is spot on,” one of the women, Sherry Warner Seefeld, said.

Few issues in education today are as intensely debated as the way colleges deal with sexual misconduct.

Women’s groups and victims’ advocates have deplored Ms. DeVos’s moves, saying they will allow colleges to wash their hands of the problem. But a growing corps of legal experts and defense lawyers have argued that the Obama rules created a culture in which accused students, most of them men, were presumed guilty.

And some of the most potent advocates for those men have been a group of women: their own mothers.

Some of the mothers met with Ms. DeVos in July to tell their stories, and Ms. DeVos alluded to them in a speech she gave last month. An advocacy group founded in 2013 by several mothers, Families Advocating for Campus Equality, or FACE, has grown to hundreds of families, who have exchanged tens of thousands of messages through their email list, said Cynthia Garrett, co-president of the group.

The mothers lobby Congress, testify on proposed legislation and policy, and track lawsuits filed by men who say they have been wrongly accused. A bill in the California Legislature that they testified against, which would have enshrined the Obama-era regulations into state law, passed both houses but was vetoed this month by Gov. Jerry Brown, a Democrat, who said it was "time to pause" on the issue.
The group holds twice-yearly meetings, where parents and sons share personal experiences and listen to advice from psychologists and lawyers.

Away from the public eye, families have spent tens of thousands of dollars and dipped into retirement savings to hire lawyers and therapists for their sons. Some have pressured colleges to reconsider punishment or expunge disciplinary notations from transcripts, so that other colleges and employers cannot see them.

Ms. Seefeld said she hired a lawyer and even a public relations firm, and used her political connections as a teachers' union leader, to try to get the University of North Dakota to reverse her son's three-year banishment after a woman accused him of nonconsensual sex. "I was willing to do everything and anything," Ms. Seefeld said. Her son Caleb Warner was ultimately cleared after the college took a second look at the case.

The mothers' resolve comes from their raw maternal instinct to protect their children. But several who agreed to interviews also said they did not doubt that their sons' accusers had felt hurt.
Their sons may not have been falsely accused, the mothers said, but they had been wrongly accused. They made a distinction.

One mother, Judith, said her son had been expelled after having sex with a student who said she had been too intoxicated to give consent. "In my generation, what these girls are going through was never considered assault," Judith said. "It was considered, 'I was stupid and I got embarrassed.'"

Ms. DeVos issued temporary guidance for colleges last month and will invite public comment while developing permanent regulations. Most significantly so far, she has lifted the requirement that colleges use the lowest standard of proof, "preponderance of the evidence," in deciding whether to uphold a charge of sexual misconduct. Colleges are now free to demand more convincing evidence, a move that the mothers and other advocates for the accused had called for, saying that students should not be punished in cases where there is some doubt about the accusation.

The most active mothers said they stepped forward because they often had more time than their husbands, and because they made a strategic decision that they could be effective on the issue of sexual assault precisely because they are women and, as some described themselves, feminists. "We recognized that power," Ms. Seefeld said.

Many women, however, feel exactly the opposite way.

A number of women's groups and victims' advocates have argued that a tougher standard of proof will discourage women from coming forward. They have not been shy about expressing their view of the mothers as "rape deniers" and misogynists who blame women for inviting male violence against them. Jessica Davidson, a victim of campus sexual assault and the managing director of End Rape on Campus, said it appeared that the mothers had a strong emotional impact on Ms. DeVos, who separately met with victims, including Ms. Davidson.

"It is of course an immensely difficult thing to believe somebody you love could rape or harm another person," Ms. Davidson said. But, she said of the mothers, "I think it's the wrong thing for them to do to try and push back an entire movement."

Of a dozen mothers who were interviewed, almost all asked to be identified by their first names only. They said they wanted to protect their sons from being publicly revealed as having been disciplined, or even accused, in a sexual assault case. The mothers obsessively type their sons' names into Google, and are relieved when their cases do not come up.

Some of the mothers remember the moment they learned their sons had been accused as vividly as other people remember hearing that planes had struck the World Trade Center.

Alison was pushing her cart down the aisle at a supermarket, looking at Tide detergent, when she got the call from her younger son. He had left home for college for the first time about seven weeks before.
"I think I have a problem," her son said. "It's bad."

She felt a flash of irritation. "How many times have I told you, you need to keep it zippered," she said she told him. Then the gravity of the situation sank in. "I need to hire a lawyer," she thought.
A female student had told the university police that she had been sexually assaulted at an apartment near campus.

As Alison tells it, the woman had propositioned her son and consented to sex. She learned more about her 19-year-old son's intimate behavior than any mother would want to know, and found herself talking about it "as if it were the grocery list," she recalled.

Officials at the university declined to comment on the case, citing student confidentiality rules.
According to university documents provided by Alison, her son was cleared. Additionally, a grand jury declined to indict him, she said. But, Alison contends, the investigation should never even have gotten that far, and the damage was already done.

Her son had become a pariah, dropped by his friends and called a rapist by women on campus. The semester after he was cleared he called home, sobbing, to say he could no longer take it and was dropping out, she said. Five years later, at 24, he has not received a diploma and is trying to ease back into college life by taking courses online.

Alison and her son were among the delegation that met with Ms. DeVos in July. "It was very solemn," Alison said. "It was as if we all, everyone in the room, had attended the same funeral together."

Judith, whose son was expelled, said that at first her son did not tell her about the complaint against him, thinking he could handle it alone. She found out when he was taken to a hospital, suicidal.
She described herself as a lifelong Democrat and feminist who went to college in the 1970s at the height of the sexual revolution and women's liberation movements. Her husband and their two sons were "super respectful" of women, she said. "We don't really need to teach our sons not to rape," she said.
Four years after being kicked out of school, she said, her son is leading a "double life," unable to confide in colleagues at work, and avoiding college classmates and his hometown.

Gloria Davidson, whose daughter, Jessica, runs End Rape on Campus, said that as the mother of a 21-year-old son, she could empathize with the mothers of accused students — to a point.

"Any mother is watching out for the children, that's what mothers do," Ms. Davidson said. "But I think all mothers should get the facts and open their eyes to what could have happened or not."

Few mothers have been as public and assertive as Ms. Seefeld. In 2010 her son, Mr. Warner, learned he had been accused of sexual assault by a fellow student at the University of North Dakota. Mr. Warner contended that the sex was consensual, but he was suspended and banned from campus for three years. His mother leveraged the connections she had developed over years as a high school psychology and sociology teacher in Fargo, and as a union leader. She contacted the State Board of Higher Education and visited state legislators.

Hearing that the university was about to start a fund-raising drive, and thus would not want bad publicity, Ms. Seefeld said, she emailed its president about 9 p.m. one night. She wrote that she had hired a lawyer to look into suing the university, and a public relations firm to help her publicize her son's case, she said. "Within 30 minutes I heard from the president," she said, and he told her the case would be reviewed. A spokesman for the university declined to comment. But university documents provided by Ms. Seefeld show that the school did review the verdict, and nullified it because of a new development: The police said that they had found inconsistencies in the accuser's account and that some witnesses had contradicted it. They issued a warrant for her arrest on a charge of filing a false police report. (The woman left the state and has not been arrested. She did not respond to telephone messages.)

Realizing she was not alone, Ms. Seefeld helped found FACE, the advocacy group for accused students. She said the group does not want to attack women. But if the mothers do not defend their sons, she said, who will?

“I just thought it was so wrong, and I thought how could anybody let this stand,” she said of her son’s punishment. “And pretty much the most significant weapon I had was the weapon of public opinion, so that was the weapon I was wielding the hardest.”

September 2017

- In September 2017 the OCR distributed a letter to schools stating, "the Department of Education is withdrawing the statements of policy and guidance reflected in the following documents:
  - Dear Colleague Letter on Sexual Violence, issued by the Office for Civil Rights at the U.S. Department of Education, dated April 4, 2011.
  - Questions and Answers on Title IX and Sexual Violence, issued by the Office for Civil Rights at the U.S. Department of Education, dated April 29, 2014."
- "These guidance documents interpreted Title IX to impose new mandates related to the procedures by which educational institutions investigate, adjudicate, and resolve allegations of student-on-student sexual misconduct."

September 2017

- Along with this letter OCR issued a document titled "Q&A on Campus Sexual Misconduct"
- The Q & A consisted of 12 questions and answers addressing topics including:
  - A school's responsibility to address sexual misconduct
  - The Clery Act and its relationship to a school's obligations under Title IX
  - Interim measures
  - A school's obligations with regard to complaints of sexual misconduct
  - The time frame of a "prompt" investigation
  - The option of informal resolution to resolve a complaint
  - Procedures should a school follow to adjudicate a finding of responsibility for sexual misconduct

The September 2017 Q & A

- Addressed a number of points from the DCL of 2011, and in several cases reversed guidance provided in that document
- The Q & A addressed the "fundamental fairness" of institution's processes
- Interim Measures - "In fairly assessing the need for a party to receive interim measures, a school may not rely on fixed rules or operating assumptions that favor one party over another, nor may a school make such measures available only to one party"

The September 2017 Q & A

- Standard of Proof – allows schools to employ the higher clear-and-convincing-evidence standard
- Appeals – Allows schools to establish policies which allow for an appeal by the respondent, or by both parties
- Time frame of investigations – "There is no fixed time frame under which a school must complete a Title IX investigation. OCR will evaluate a school's good faith effort to conduct a fair, impartial investigation in a timely manner designed to provide all parties with resolution"

The September 2017 Q & A

- Informal resolution of complaints – "If all parties voluntarily agree to participate in an informal resolution… the school may facilitate an informal resolution, including mediation, to assist the parties in reaching a voluntary resolution"

What's Next?

- We have now entered a period of public comment, where the Department of Education will meet with various constituent groups and members of the public to solicit input towards developing a new policy.