
BEHIND THE SCENES: A CLOSER LOOK AT OCR'S ENFORCEMENT AUTHORITY

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Note from the Editor:

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- United States Department of Justice, Civil Rights Division, *Title IX Legal Manual*, <http://www.justice.gov/crt/title-ix> (see especially Section VII, Federal Funding Agency Methods to Enforce Compliance).
 - Know Your IX, *Title IX: The Basics*, <http://knowyourix.org/title-ix/title-ix-the-basics/>.
 - Department of Education, Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence*, <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.
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I. INTRODUCTION

By the latest count, 129 institutions of higher education are under investigation by the Office for Civil Rights (OCR) of the U.S. Department of Education (Department) for their handling of sexual violence reports¹ under Title IX of the Education Amendments of 1972 (Title IX).² In 2014, six institutions of higher education executed Title IX resolution agreements concluding pending complaints or compliance reviews of sexual violence, sexual harassment, or both.³ These resolution agreements are long and complex, and they bind colleges and universities to dozens of obligations that impact many areas of campus life. While no one questions the binding nature of these agreements, there is much debate about the origin and scope of OCR's authority to bind colleges and universities through such agreements. This article briefly analyzes the statutory and regulatory framework underlying OCR's enforcement authority, as well as the application of the framework to Title IX resolution agreements.

II. TITLE IX STATUTORY AND REGULATORY FRAMEWORK

A. Statute

The key words of Title IX are short and simple: "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."⁴ The Department "is authorized and directed to *effectuate* the provisions of section

1681 [Title IX's prohibition against sex discrimination] . . . by issuing *rules, regulations, or orders of general applicability*."⁵ Title IX does not grant OCR any authority to "effectuate" the prohibition against sex discrimination through sub-regulatory guidance.⁶ "[R]ules, regulations . . . [and] orders of general applicability" are the sole means of effectuating or carrying out the prohibition of § 1681.⁷ All three terms have meanings distinct from "guidance."⁸

The administrative component of Title IX, 20 U.S.C. § 1682, specifically authorizes two means of effecting "[c]ompliance with any requirement [rule, regulation or order of general applicability] adopted pursuant to this section [§ 1682]." The first is "by the termination of or refusal to grant or to continue assistance . . . to any recipient to whom there has been an express finding on the record, after an opportunity for hearing, of a failure to comply with such requirement."⁹ Section 1682 provides a recipient with a formal enforcement process consisting of "an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement."¹⁰

The second means of effecting compliance is "by any other means authorized by law."¹¹ The obvious questions that arise are "What are these 'other means'?" and "What is the scope of this legal authority?" Section 100.8(a) defines "any other means authorized by law" to include a referral to the U. S. Department of Justice, or an applicable proceeding under state or local law.¹² This author is unaware of the Department of Education ever invoking state or local law proceedings to enforce Title IX.¹³

Further, no compliance or enforcement action may be taken by the Department of Education against a federal funding recipient¹⁴ until the recipient has been "advised . . . [by the Department of Education] of the failure to comply with the requirement and [the Department of Education] has determined that compliance cannot be secured by *voluntary means*."¹⁵ By referring to "compliance . . . by *voluntary means*," Congress understood that a separate voluntary effort of some kind between the Department and a recipient could potentially resolve an issue—apart from "an express finding on the record, after [an] opportunity for [a] hearing."¹⁶ The precise contours of "voluntary means" are unclear; however, the "voluntary means" used by the Department must have a basis in law.¹⁷ The word "law" occurs once in 20 U.S.C. § 1682. The context suggests

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Further discussion by the author of Title IX sexual assault and sexual harassment resolution agreements reached with OCR in 2014 can be found at www.educationlawreview.com.

“law” means “statute.” By contrast, where Congress intended a non-statutory reference in § 1682, such as “rules, regulations, or orders,” it so designated.¹⁸ When recently presented with a similar interpretive question involving the Homeland Security Act, the Supreme Court found “Congress’s choice to say ‘specifically prohibited by law’ rather than ‘specifically prohibited by law, rule, or regulation’ suggests that Congress meant to exclude rules and regulations.”¹⁹ There, Congress used the word “law” standing alone, and did not use the phrase “law, rule, or regulation.”²⁰

The negotiations that occur over a Title IX resolution agreement appear to be the “voluntary means” used by OCR to achieve compliance. However, the larger question of authority for specific remedial actions must be traceable to the Title IX statute or other non-Title IX statutory text as discussed further below.

B. Procedural Regulations

1. “Voluntary” and “Informal” Means

In its procedural regulations, the Department includes a reference to “informal means,” which can be found at 34 C.F.R. § 100.7(d)(1) (Resolution of Matters). Section 100.7(d)(1) provides:

If an investigation pursuant to paragraph (c) of this section indicates a failure to comply with this part, the responsible Department official or his designee will so inform the recipient and the matter will be resolved *by informal means whenever possible*. If it has been determined that the matter cannot be resolved by *informal means*, action will be taken as provided for in § 100.8 [procedures for effecting compliance].²¹

The question arises whether the statute’s “voluntary means” and the regulation’s “informal means” are intended to communicate the same message. Neither Title IX, nor its implementing regulations, define the term “informal means.” Do, therefore, “voluntary” and “informal” means encompass the authority of a government agency to demand an infinite range of remedial actions of a recipient to achieve compliance with Title IX? Based upon OCR’s pattern and practice, OCR appears to construe “informal” and “voluntary” expansively (i.e. to encompass any remedial action to which a recipient will agree in a resolution agreement without regard to any independent statutory basis for the remedy). Under such a construction, nothing constrains OCR. What remains clear is that OCR has not communicated to institutions of higher education its specific views of the statutory and regulatory limits placed upon its authority to demand specific remedial actions.

2. “Remedial Action”

With respect to remedies, one further regulation warrants close attention, 34 C.F.R. § 106.3(a). Section 106.3(a) reads:

(a) *Remedial action*. If the Assistant Secretary [for Civil Rights] finds that a recipient has discriminated against persons on the basis of sex in an education program or activity, such recipient shall take *such remedial action as*

the Assistant Secretary deems necessary to overcome the effects of such discrimination.²²

The regulation’s expansive reach—“such remedial action as the Assistant Secretary deems necessary”—finds no authority in the law’s enforcement scheme as laid out in 20 U.S.C. § 1682. While § 1682 does authorize the Department to promulgate regulations to effectuate or carry out Title IX, any regulation written under the authority of § 1682, and more specifically any “remedial action,” must derive its authority from the text of a law. No part of Title IX nor any other law grants such infinite remedial authority to the Assistant Secretary as encompassed in 34 C.F.R. § 106.3(a). Congress did, however, specifically authorize one form of remedial action—the “termination of or refusal to grant or to continue assistance . . . to any recipient.”²³

To be sure, § 1682 also states compliance may “be effected . . . by any other means authorized by law.”²⁴ However, there are no “other means” in the statute granting authority to the Assistant Secretary for Civil Rights to take “remedial action.” The Department of Education Organization Act does not authorize the Assistant Secretary to take remedial actions, levy fines, or impose penalties.²⁵ In those instances where the Department is permitted to take remedial actions against recipients, it is pursuant to express authority.²⁶

As referenced earlier, under 34 C.F.R. § 100.8(a) “[s]uch other means may include, but are not limited to” referral of a matter to the U.S. Department of Justice (DOJ) “with a recommendation that appropriate proceedings be brought to enforce any rights of the United States” or “with a recommendation that appropriate proceedings be brought to enforce . . . any assurance or other contractual undertaking [of the recipient].”²⁷ “Other means” may also include “any applicable proceeding under State or local law” or some other process not specified in the regulation, though the “means” must be “authorized by law.”²⁸ Absent from both § 100.8(a) and Title IX is any affirmative authority of the Assistant Secretary, for example, to compel a recipient to pay individual monetary remedies, conduct climate surveys, or prohibit students from serving on sexual violence hearing panels.

III. NEGOTIATING THE TERMS OF A RESOLUTION AGREEMENT

The scope of OCR’s enforcement authority becomes an important consideration when negotiating a resolution agreement. OCR relies upon statements found in its sub-regulatory guidance of April 4, 2011 and April 29, 2014²⁹ in negotiating agreements and in its correspondence with schools.³⁰ Yet, the administrative enforcement provision of Title IX, 20 U.S.C. § 1682, only authorizes rules, regulations, and orders of general applicability as the means to effectuate Title IX’s prohibition on sex discrimination.

Second, OCR makes no reference to its independent basis, if any, for certain remedial actions it requires of institutions of higher education in resolution agreements. To this author’s knowledge, OCR has never cited any specific authority or independent statutory basis for requiring a recipient to pay individual monetary remedies (e.g. medical and counseling expenses) to a Title IX complainant. Such

remedies were a part of four of the six resolution agreements reached in 2014.³¹ During the negotiations of at least one agreement, OCR expressly required a school to provide individual monetary remedies as a condition for reaching an agreement.³² The same is true for climate surveys. Climate surveys were either mandated or reaffirmed in all six agreements reached with institutions in 2014.³³ In like manner, schools have been pressed to prohibit students from serving on sexual violence hearing panels. While there is no legal authority for OCR's position (first articulated in April 29, 2014 sub-regulatory guidance),³⁴ such prohibitions were alluded to in one agreement and two resolution letters in 2014.³⁵

By contrast, OCR's legal authority to require (as a part of a resolution agreement), the designation of a Title IX Coordinator (with appropriate contact information),³⁶ the adoption and publication of grievance procedures providing for the prompt and equitable resolution of complaints,³⁷ and the publication of a Notice of Nondiscrimination with the requisite specificity,³⁸ are all authorized remedial actions.

IV. CONCLUSION

Though the origin and scope of OCR's enforcement authority has received little attention in recent years, a careful review of the Title IX statute, its implementing regulations, and applicable procedural regulations³⁹ reveals fundamental questions about the outer limits of OCR's authority to leverage certain remedial terms for which an independent basis in law may be lacking.

Endnotes

1 Matt Fossen, *Feds Slow and Struggling to Keep up with Growing List of College Sexual Assault Investigations*, FoxNews.com (August 11, 2015), <http://www.foxnews.com/politics/2015/08/11/feds-slow-and-struggling-to-keep-up-with-growing-list-college-sexual-assault/>. A review of the U.S. Department of Education's web site finds an initial list of 55 schools as of May 1, 2014 labeled "ARCHIVED INFORMATION," available at <http://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-ix-sexual-violence-investigations> (last visited October 28, 2015). No further updated list of the Department could be located.

2 20 U.S.C. §§ 1681-1688.

3 The six institutions are Tufts University ("Tufts"), Virginia Military Institute ("VMI"), Ohio State University ("OSU" or "Ohio State"), Princeton University ("Princeton"), Southern Methodist University ("SMU"), and Harvard Law School ("Harvard"). While space limitations do not permit a discussion of the Title IX sexual harassment or sexual violence-related agreements reached in 2013 (State University of New York and University of Montana) or 2012 (Xavier University and Yale University), the reader may wish also to review those agreements prior to entering any negotiations with OCR. For purposes of this article, the term "sexual violence" encompasses all forms of sexual violence including "sexual misconduct" and "sexual assault," unless otherwise indicated.

4 20 U.S.C. § 1681(a).

5 20 U.S.C. § 1682 (emphasis added).

6 20 U.S.C. § 1682.

7 *Id.*

8 A "rule" "means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice

requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing." 5 U.S.C. § 551(4) (Administrative Procedures Act). A "regulation" refers to the "act of regulating; a rule or order prescribed for management or government; a regulating principle; a precept." *Black's Law Dictionary* 1156 (5th ed. 1979). Regulations are issued by various government departments to carry out the intent of the law. *Id.* An "order" is "[a] mandate; precept; command or direction authoritatively given; rule or regulation." *Id.*

"Guidance," on the other hand, is most commonly characterized as "an agency statement of general applicability and future effect, other than a regulatory action . . . that sets forth a policy on a statutory, regulatory or technical issue or an interpretation of a statutory or regulatory issue." *Final Bulletin for Agency Good Guidance Practices*, Office of Management and Budget, Executive Office of the President, 72 Fed. Reg. 3432, 3439 (Jan. 25, 2007). One could argue "guidance" is equivalent to an "order of general applicability." However, nowhere in the Dear Colleague Letter on Sexual Violence of April 4, 2011 or the Questions and Answers on Title IX and Sexual Violence of April 29, 2014 does the Department characterize either document as an "order of general applicability," or "rule" or "regulation." To the contrary, OCR characterizes both documents as "policy guidance" and states the "guidance does not add requirements to applicable law, but provides information and examples to inform recipients about how OCR evaluates whether covered entities are complying with their legal obligations." Dear Colleague Letter on Sexual Violence, Office for Civil Rights, U.S. Department of Education, 1 n.1 (April 4, 2011); *accord*, Questions and Answers on Title IX and Sexual Violence, Office for Civil Rights, U.S. Department of Education, 1 n.1 (April 29, 2014).

9 20 U.S.C. § 1682.

10 *Id.*

11 *Id.*

12 34 C.F.R. § 100.8(a). Further, 34 C.F.R. § 100.8(d) prohibits any action to effect compliance until the Department has taken certain steps as a precondition. The reader should be aware that procedures under Title VI of the Civil Rights Act of 1964 at 34 C.F.R. §§ 100.6-100.11 and 34 C.F.R. Part 101 apply to Title IX and are incorporated by reference in 34 C.F.R. § 106.71.

13 Two regulatory provisions, 34 C.F.R. §§ 100.8(a) and (d), shed some additional light on these questions and are discussed under "Remedial Action" below.

14 Substantially all institutions of higher education are federal funding recipients.

15 20 U.S.C. § 1682 (emphasis added).

16 *Id.*

17 See 20 U.S.C. § 1682 ("Each Federal department and agency . . . is authorized and directed to effectuate the provisions of section 1681 . . . by issuing rules, regulations, or orders . . ." and "No such rule, regulation or order shall become effective unless and until approved by the President.")

18 See *id.*

19 *Department of Homeland Security v. MacLean*, ___ U.S. ___, 135 S. Ct. 913, 919, 190 L. Ed. 2d 771, 781, 2015 U.S. LEXIS 755, ***14 (2015).

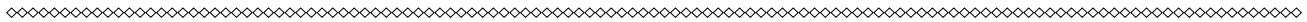
20 *Id.* at 919.

21 34 C.F.R. § 100.7(d)(1) (emphasis added).

22 34 C.F.R. § 106.3(a) (emphasis added).

23 20 U.S.C. § 1682.

24 *Id.*



25 See 20 U.S.C. § 3413.

26 See 20 U.S.C. §§ 1094(c)(3)(B)(II), 1015(c)(5), 1022d(A)(3), 1082(g), 1228c(c)(2).

27 34 C.F.R. § 100.8(a).

28 *Id.*

29 See Dear Colleague Letter on Sexual Violence, Office for Civil Rights, U.S. Department of Education (April 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> (last visited October 28, 2015), and Questions and Answers on Title IX and Sexual Violence, Office for Civil Rights, U.S. Department of Education (April 29, 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> (last visited October 28, 2015).

30 See OCR Letter of Findings to Southern Methodist University at 2, Case Nos. 06-11-2126, 06-13-2081, 06-13-2088 (Dec. 11, 2014), <http://www2.ed.gov/documents/press-releases/southern-methodist-university-letter.pdf>.

31 See Tufts University Resolution Agreement (“Tufts Resolution Agreement”), Complaint No. 01-10-2089, 13 (April 17, 2014); Ohio State University Resolution Agreement (“OSU Resolution Agreement”), OCR Docket No. 15-10-6002, 15 (Sept. 8, 2014); Princeton University Resolution Agreement (“Princeton Resolution Agreement”), Case No. 02-11-2015, 12-13 (Oct. 12, 2014); and Southern Methodist University Resolution Agreement (“SMU Resolution Agreement”), Case Nos. 06-11-2126, 06-13-2081, 06-13-2088, 15 (Nov. 16, 2014).

32 SMU Resolution Agreement.

33 Tufts Resolution Agreement at 1, 3; Virginia Military Institute Resolution Agreement (“VMI Resolution Agreement”), Complaint No. 11-08-2079, 6-7 (April 30, 2014); OSU Resolution Agreement at 4, 11-12; Princeton Resolution Agreement at 9-11; SMU Resolution Agreement at 13-14; and Harvard Law School Resolution Agreement (“Harvard Resolution Agreement”), Complaint No. 01-11-2002, 8 (Dec. 23, 2014).

34 See note 27, Questions and Answers on Title IX and Sexual Violence, 30, n. 30.

35 See Princeton Resolution Agreement at 3 and OCR Letter to Virginia Military Institute (“OCR Letter to VMI”), Complaint No. 11-08-2079, 13 (May 9, 2014). Though no prohibition was included in the final SMU Resolution Agreement, OCR’s Letter to SMU discusses OCR’s policy position. OCR Letter to Southern Methodist University (“OCR Letter to SMU”), Case Nos. 06-11-2126, 06-13-2081, 06-13-2088, 22 n.12 (Dec. 11.2014).

36 34 C.F.R. § 106.8(a).

37 34 C.F.R. § 106.8(b).

38 34 C.F.R. § 106.9.

39 See *supra* note 13.

