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OF AMERICA

Understand the Changing
Legal Landscape Under the
Trump Administration
MSA Policy Training Conference

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Objectives

- ❑ Understand education-related priorities of the Trump Administration and U.S. Department of Education (ED)
- ❑ Review recent actions taken by ED to implement priorities
- ❑ Look ahead to issues that may be addressed by ED

Ripped from the Headlines

Recent ED actions

Ripped from the headlines

POSTED ON JANUARY 19TH, 2018 BY MICHELLE TELLOCK

U.S. Department of Education Publishes List of Schools Under Civil Rights Investigation

U.S. Department of Education Launches New English Learner Data Story

Site features updated and expanded information, interactive maps and graphics

JANUARY 29, 2018

Feds Say Texas Illegally Excluded Disabled Students

KELSEY JUKAM January 11, 2018



Civil Rights Groups Sue DeVos Over Title IX Policies

By Andrew Kreighbaum // January 26, 2018

Who's Who: ED Staffing

Political appointees to ED

15 positions

- 4 nominees confirmed
 - Secretary
 - Chief financial officer
 - Assistant secretary for legislation and congressional affairs
 - Assistant secretary for special education and rehabilitative services
- 6 pending nominations
- 5 vacant positions (i.e., no nominee)

Political appointees to ED (Confirmed/Nominated/Vacant)

Who's Who



SECRETARY

Betsy DeVos



CHIEF FINANCIAL OFFICER

Douglas Webster



ASST. SECRETARY FOR LEGISLATION AND CONGRESSIONAL AFFAIRS

Peter Louis Oppenheim



ASST. SECRETARY FOR SPECIAL EDUCATION AND REHABILITATIVE SERVICES

Johnny Collett



DEPUTY SECRETARY

Mitchell (Mick) Zais



GENERAL COUNSEL

Carlos G. Muñiz



ASST. SECRETARY FOR CIVIL RIGHTS

Kenneth L. Marcus



ASST. SECRETARY FOR ELEMENTARY AND SECONDARY EDUCATION

Frank T. Brogan



ASST. SECRETARY FOR PLANNING, EVALUATION AND POLICY DEVELOPMENT

James (Jim) Blew

Political appointees to ED (Confirmed/Nominated/Vacant)

Who's who



**DIRECTOR OF THE INSTITUTE OF
EDUCATIONAL SCIENCES**

Mark Schneider



UNDERSECRETARY



**ASST. SECRETARY FOR
COMMUNICATIONS AND OUTREACH**



**ASST. SECRETARY FOR POSTSECONDARY
EDUCATION**



**ASST. SECRETARY FOR CAREER,
TECHNICAL AND ADULT EDUCATION**

Withdrawn: Timothy Kelly



**COMMISSIONER, REHABILITATION
SERVICES ADMINISTRATION**

Earlier this week, Secretary DeVos said the vetting process for nominees has taken “inordinately long.” And, once nominees are through the vetting process, “they’re sitting there waiting for months with still no vote.” As a result, members of Congress and schools aren’t getting answers to their questions because ED lacks key leaders to provide those answers, she said.

ED's operating structure, senior officials

Office of the Secretary

- 11 senior staff positions, of which...
- 5 are currently filled

Office of the Deputy Secretary

- 8 senior staff positions, of which...
- 5 are currently filled

Office of the Under Secretary

- 9 senior staff positions, of which...
- 2 are currently filled

Trump Administration and ED Priorities

Trump Administration stated priorities

1. Improving school choice (also referred to by DeVos as “personalized learning” or “innovation” as a means of “finding solutions”)
2. Maintaining support for the nation’s most vulnerable students
3. Preparing students and simplifying funding for postsecondary education
4. Building evidence around innovation
5. Streamlining existing programs

**Major Initiatives
shared in FY18
proposed budget**

Trump Administration stated priorities

- “Federally mandated assessments. Federal money. Federal standards. *All* originated in Washington, and *none* solved the problem.”
 - Bush: NCLB and accountability
 - Obama: “Race to the Top” and Common Core
- “[W]hen it comes to education – and any other issue in public life – those closest to the problem are *always* better able to solve it.”
 - ESSA “takes important steps to return power where it belongs by recognizing states – not Washington – should shape education policy around their own people.”
 - States should provide flexibility and empower teachers and parents.

**Secretary DeVos’s
January 2018 address at
American Enterprise
Institute conference,
“Bush-Obama School
Reform: Lessons
Learned”**

Trump Administration stated priorities

- “Parents have the greatest stake in the outcome of their child’s education. Accordingly, they should also have the power to make sure their child is getting the right education.”
 - School choice as a mechanism to achieve equal access to a quality education
- “[I]f America’s students are to be prepared, we must *rethink* school.”
 - “Rethink’ means we question everything to ensure nothing limits a student from pursuing his or her passion, and achieving his or her potential. So each student is prepared at every turn for what comes next.”

**Secretary DeVos’s
January 2018 address at
American Enterprise
Institute conference,
“Bush-Obama School
Reform: Lessons
Learned”**

Trump Administration stated priorities

- Why do we group students by age?
- Why do schools close for the summer?
- Why must the school day start with the rise of the sun?
- Why are schools assigned by your address?
- Why do students have to go to a school building in the first place?
- Why is choice only available to those who can buy their way out? Or buy their way in?
- Why can't a student learn at his or her own pace?
- Why isn't technology more widely embraced in schools?
- Why do we limit what a student can learn based upon the faculty and facilities available?

**Secretary DeVos's
January 2018 address at
American Enterprise
Institute conference,
"Bush-Obama School
Reform: Lessons
Learned"**

At the U.S. Supreme Court: *Andrew F.*

Andrew F. v. Douglas County School District

Facts

- Andrew's parents withdrew him from public school and placed him in a private school that specialized in education of children with autism because they believed his proposed IEP was not rigorous enough
- Andrew's parents brought a court case after they were unable to obtain tuition reimbursement from the school district for the cost of the private school placement
- The case was appealed all the way to the U.S. Supreme Court
- The Court held in favor of the parents on a unanimous 8-0 decision (written by Justice Roberts)

Andrew F. v. Douglas County School District

- The Court held that to meet its substantive obligation under the IDEA, a school must develop an IEP that is “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”
 - This standard applies to all students, regardless of whether they perform at grade level
 - This standard is higher than some other standards that lower courts had used in the past
 - “[E]very child should have the chance to meet challenging objectives”
- In December 2017, ED issued a guidance document to describe the standard for determining FAPE in light of the Court’s decision
 - School personnel should make decisions that are informed by their own expertise, the progress of the child, the child’s potential for growth, and the view of the child’s parents
 - The court case does not change parents’ due process rights under the IDEA

Recent ED Actions

Recent ED actions

What has ED done so far to achieve its priorities?



Approving ESSA state plans

- To date, ESSA state plans have been approved for 33 states, D.C. and Puerto Rico
- At first, ED challenged some state plans as not being “ambitious” enough, but now has stepped back from that approach



Rolling back Obama Administration regulations and guidance

- Transgender guidance rescinded (February 2017)
 - Allowed students to use bathrooms that correspond with their gender identity (not biological sex)
- ESSA accountability provisions repealed through Congressional Review Act (March 2017)
 - Ground rules for how states rate schools, as well as other indicators



Scrapping other subregulatory guidance

- 72 policy documents outlining rights of students with disabilities (October 2017)
 - “outdated, unnecessary, or ineffective”
- Less than a week later, 600 pieces of “outdated” subregulatory guidance
 - “Each item has been either superseded by current law or is no longer in effect”
- Task force to identify regulations that limit local control (in response to April 2017 executive order)

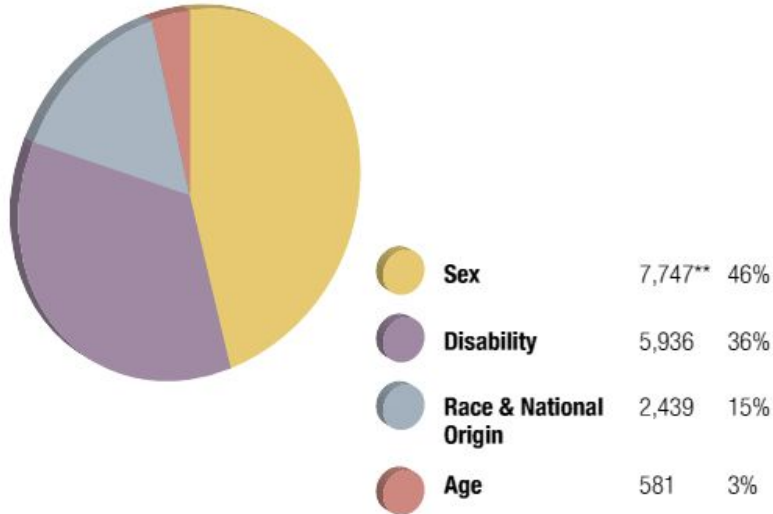


Revising/issuing guidance

- Revised Title IX guidance on sexual harassment/sexual assault (September 2017)
 - Changed approach to interim measures; standard of proof; timeline for resolution; more
- Issued new guidance on IEPs post-*Endrew* (December 2017)
 - IEP must be reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances

What is OCR? What does it do?

Figure 3: Percentage of Complaints Received by Type of Alleged Discrimination* (FY 2016)



* The numbers above do not reflect the total number of complaints received in FY 2016 because some complaints cover more than one statute and because a small percentage of complaints received in FY 2016 have not yet been categorized by statute.

** 6,157 of these are multiple complaints from an individual.

- Complaints and compliance reviews (FY 2016) by the numbers:

- 16,720 complaints received
- 13 compliance reviews (proactive investigations)
- 8,625 cases resolved
 - “Resolved”: dismissal, administrative closure, finding of no violation, early complaint resolution, or resolution agreement
 - Includes cases received prior to FY2016
 - 1,116 resolutions

ED Office for Civil Rights

- Nomination for Assistant Secretary for Civil Rights (Kenneth Marcus) in progress
 - Held the position under the Bush Administration
 - Senate HELP Committee voted along party lines (12-11) to advance nomination; now heads to full Senate for a vote
 - In the interim, Candice Jackson is Acting Assistant Secretary for Civil Rights



ED Office for Civil Rights

- New list of pending cases currently under investigation
- All non-discrimination laws enforced by OCR (not just Title IX sexual harassment and sexual assault; not just higher ed institutions)
- Sortable and searchable
- Updated each week to reflect active investigations
- As of 2 Feb. 2018, # of cases:
 - 1,772 race/national origin
 - 1,676 sex
 - 4,709 disability
 - 147 age
 - 2 Boy Scouts of America Equal Access

State	Institution	Institution Type	Type of Discrimination	Open Investigation Date
AK	KENAI PENINSULA BOROUGH SD	ESE	Title VI - English Language Learners	11/15/2017
AL	ALABASTER CITY	ESE	Title VI - Discipline	5/21/2014
AL	AUBURN CITY SCH DIST	ESE	Title VI - Denial of Benefits	7/22/2016
AL	AUBURN CITY SCH DIST	ESE	Title VI - Others	5/28/2014
AL	AUBURN CITY SCH DIST	ESE	Title VI - Racial Harassment	3/30/2016
AL	AUTAUGA COUNTY SCH DIST	ESE	Title VI - Denial of Benefits	3/10/2017
AL	AUTAUGA COUNTY SCH DIST	ESE	Title VI - Discipline	7/8/2016
AL	AUTAUGA COUNTY SCH DIST	ESE	Title VI - Discipline	11/2/2017
AL	AUTAUGA COUNTY SCH DIST	ESE	Title VI - Racial Harassment	7/8/2016

Title IX

- In September 2017, OCR withdrew the statements of policy and guidance reflected in:
 - 2011 Dear Colleague Letter on Addressing Sexual Harassment/Sexual Violence (April 4, 2011) and
 - Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities (December 1, 2014).
- ED announced that it intends to engage in a rulemaking process to develop new regulations related to Title IX.
- In the interim, ED issued a new Q&A on Campus Sexual Misconduct (Sept. 22, 2017) and said that it would continue to rely on previous guidance (2006 DCL, 2001 Revised Sexual Harassment Guidance).

Title IX: interim guidance

- Announces “interim” approach to various issues, including:
 - **Interim measures:** Describes interim measures as “individualized services offered to either or both the reporting and responding parties”; a school should make “every effort to avoid depriving any student of his or her education”
 - **Time frame for prompt investigation:** Effectively removes previous 60-day guidance for completion of a Title IX investigation
 - **Informal resolution of complaints:** Removes restriction on mediation in cases of sexual assault, permitting it “if all parties voluntarily agree”
 - **Right to appeal:** Reverts to previously-held OCR position that if an institution allows appeals from its decisions, it may choose to allow appeal solely by the responding party, or by both parties
 - **Equitable investigation/procedures:** Explains ED’s expectation that a school should provide “written notice in advance of any interview or hearing with sufficient time to prepare for meaningful participation”

Title IX: transgender students

- The legal obligations of schools for accommodating and protecting transgender students is in flux
- Timeline of federal transgender policy developments over the last 2.5 years:

January 2015
OCR Public Letter to Private Citizen
Instructed school to follow students' gender identity, not sex assigned at birth



May 2016
OCR DCL
Detailed obligations rooted in deference to gender identity (accommodations, no requirement of medical diagnosis, how to address discrimination)



February 2017
OCR DCL
Previous OCR Letter and OCR DCL **repealed**



June 2017
OCR Internal Memo
OCR issues internal memo explaining that discrimination, bullying, and harassment of transgender students are still covered by Title IX

OCR internal memo on transgender students

OCR Instructions to the Field re Complaints Involving Transgender Students

- Issued June 6, 2017
- Summary:
 - OCR should rely on Title IX and its implementing regulations in evaluating complaints of sex discrimination
 - Specified that OCR may assert subject matter jurisdiction over:
 - Failure to promptly and equitably resolve a complaint of sex discrimination
 - Failure to assess whether sexual or gender-based harassment (including not using preferred pronouns)
 - Retaliation against a transgender student after discrimination concerns raised
 - Different treatment based on sex stereotyping
- Also provided script for dismissing claims from transgender students

Legal events following revocation of OCR DCL (Feb. 2017)

- March 3, 2017: 13 states dropped their suit against the 2016 DCL
 - Were arguing that it improperly redefined sex discrimination under Titles VII and IX
 - Suit dismissed 9 days after revocation of OCR letters
- March 6, 2017: Supreme Court vacated and remanded Gloucester Cty. School Bd. v. G.G.
 - Sent transgender bathroom case back to 4th Circuit for reconsideration in light of withdrawal of DCL; the 4th Circuit in turn remanded the case to the federal district court
- May 2017: *Whitaker v. Kenosha Unified School District*
 - 7th Circuit upheld a preliminary injunction that will prevent school district from forcing the plaintiff, a transgender student, to use the bathroom of his sex assigned at birth rather than his gender identity
 - Court found plaintiff could suffer irreparable harm if forced to use other bathroom and that his chances to succeed on the merits are “better than negligible”
 - Argued and decided after the revocation of the Obama administration transgender guidance

Legal events following revocation of OCR DCL (Feb. 2017)

- June 2017: OCR's Sparta, Ohio OCR investigation closed
 - Elementary school case involving transgender student's access to the bathroom of their gender identity
 - Case closed because the student settled with the school district
 - Earlier OCR findings that a student had suffered discrimination at school withdrawn, citing revocation of the 2016 DCL
 - Unusual to withdraw a federal investigator's legal conclusion
- August 25, 2017: *Doe v. Boyertown Area School District*
 - School district implemented a policy to allow transgender students to use facilities consistent with their gender identities
 - Parents of cisgender students objected to having to share facilities with transgender students
 - Third Circuit rejected the families' request for a preliminary injunction, finding no violation of Title IX

Looking Ahead

Looking Ahead: What issues may be addressed?

- Transgender students
- Deferred Action for Childhood Arrivals (“DACA”)
- Other Obama Administration guidance
 - 2014 school discipline guidance
 - Ensure discipline policies don’t have a disproportionate impact on students from certain racial/ethnic groups
 - 2016 “Equity in IDEA” rule
 - Standard approach to compare racial/ethnic groups, monitoring to determine whether there are disparities in special education and, if so, taking appropriate action

Wrap Up

Revisiting our Objectives

- ✓ Understand education-related priorities of the Trump Administration and U.S. Department of Education (ED)
- ✓ Review recent actions taken by ED to implement priorities
- ✓ Look ahead to issues that may be addressed

Questions? Reach out to us.



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