



FRANCZEK RADELET

ATTORNEYS & COUNSELORS



New President, New Policies: One Year In - Examining the Impact of the Trump Administration on K-12 and Higher Education

New President, New Policies: One Year In

Agenda

- The state of the Department of Education
- Changing practices and policies at the Office for Civil Rights
- New Guidance on Title IX and Sexual Violence on Campus
- Transgender Rights and Issues
- Immigration
- The Affordable Care Act



New President, New Policies: One Year In

The Department of Education



Ares Dalianis



Ellen Babbitt



History of the Department of Education

- Created in 1979 by Public Law 96-88
- Some level of office of education has existed at federal level since 1867
- 4,400 employees
- 145 political appointees



Ares Dalianis



Ellen Babbitt



Leadership Team at DOE

- 31 positions identified as ‘Senior Officials’
- Only ten of these positions filled
- Assistant Secretary positions all vacant
- General Counsel position also vacant
- Betsy DeVos confirmed by Senate on February 7, 2017 in 51-50 vote with VP Pence breaking the tie



Ares Dalianis



Ellen Babbitt

Secretary Betsy DeVos

- Born and raised in Holland, MI
- Attended private high school and Calvin College
- Daughter-in-law of Amway founder
- Husband Dick DeVos ran for MI governor in 2006
- Brother Erik Prince founded Blackwater and considering run for U.S. Senate in Wyoming
- Led the American Federation for Children



Ares Dalianis



Ellen Babbitt



Four Major Activities of the Department

- Establish policies relating to federal financial aid and administer distribution of funds
- Collect and disseminate data, oversee research and provide information to President and Congress
- Identify major issues in education & focus public attention on those issues
- Enforce federal anti-discrimination laws & ensure equal access



Ares Dalianis



Ellen Babbitt

General Impressions so Far...

- Seems committed to rulemaking process over ‘Dear Colleague’ letters
 - Campus sexual assaults and Transgender students
 - Rescission of 72 prior statements/guidances
- For-profit colleges coming back to life
- Supporting policies favoring charter schools; less knowledgeable about public education
- A lightning rod for criticism



Ares Dalianis



Ellen Babbitt



Ripped from the Headlines

Education Department Ends Student-Loan Cooperation With CFPB

Betsy DeVos Reverses Obama-era Policy on Campus Sexual Assault Investigations

DeVos Further Freezes Obama's For-Profit Fraud Protections

Betsy DeVos's Schedule Shows Focus on Religious and Nontraditional Schools

U.S. Putting \$253 Million Into Charter School Expansion

Interim Federal Guidance on Campus Sex Assault Stresses Equal Rights for Accused

FRANCZEK RADELET

ATTORNEYS & COUNSELORS



Change Is the New Normal

- K-12 and Higher Education are in a time of great and continuing change
- Highly regulated and increasingly in the public eye and regulators' sights
- Social media is an increasingly important factor
- Prioritize the ability to react in a timely and effective manner
- Commit to communicating with your constituencies about change



Ares Dalianis

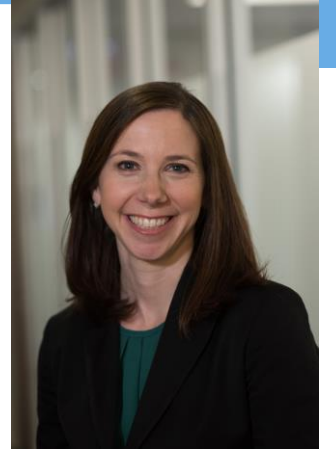


Ellen Babbitt



New President, New Policies: One Year In

Changing Practices and Policies at the Office for Civil Rights

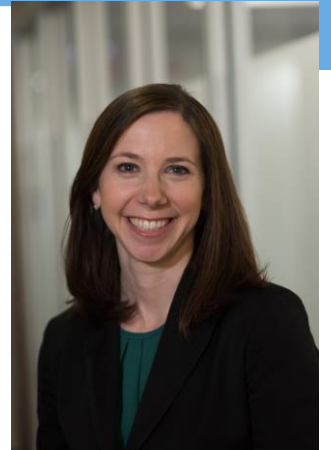


Amy Dickerson



Messages from OCR

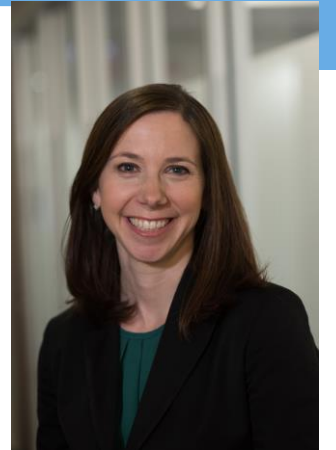
- New approach to non-regulatory guidance
- Neutral agency
- Swift resolution of complaints
- Use of Technical Assistance encouraged



Amy Dickerson

Changing Practices and Policies

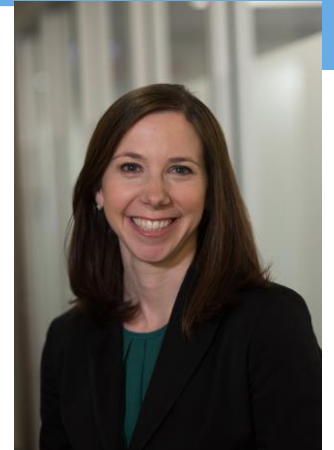
- Review of regulations
- Withdrawal of certain guidance documents
- New external and internal guidance issued



Amy Dickerson

Investigating Complaints

- Need for comparative data will be determined on a case-by-case basis
- Systematic approach will only be used in certain cases



Amy Dickerson



New President, New Policies: One Year In

New Guidance on Title IX and Sexual Violence on Campus



Scott Warner

OCR Guidance – Pre-September 2017

- 2001 Sexual Harassment Guidance
- April 2011 Dear Colleague Letter
 - Sexual harassment and sexual violence
- April 2014 Questions and Answers about Title IX and Sexual Violence
- April 24, 2015 Dear Colleague Letter
 - Title IX Coordinators



Scott Warner

OCR Guidance – Now

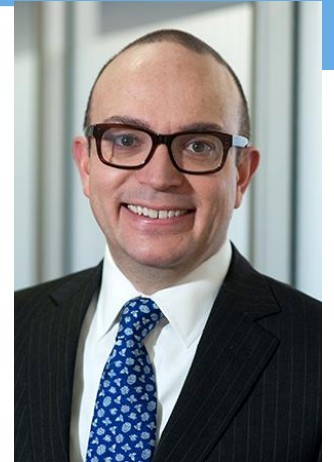
- 2001 Sexual Harassment Guidance
- ~~April 2011 Dear Colleague Letter~~
 - ~~Sexual harassment and sexual violence~~
- ~~April 2014 Questions and Answers about Title IX and Sexual Violence~~
- April 24, 2015 Dear Colleague Letter
 - Title IX Coordinators
- September 22, 2017 Dear Colleague Letter
- September 2017 Q&A on Campus Sexual Misconduct
- Coming soon: new regulations



Scott Warner

Title IX – Campus Sexual Misconduct

- Federal requirements are in flux
 - Either “preponderance of the evidence” standard OR “clear and convincing evidence” standard
 - Mediation may be appropriate
 - Appeals for just responding party permitted
 - “Timely manner” instead of fixed time frame

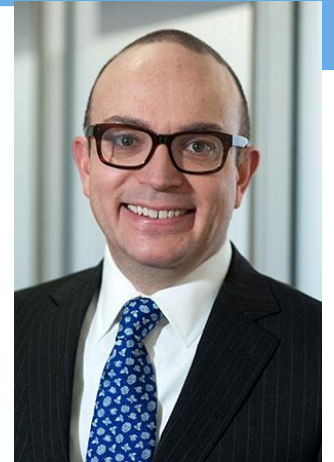


Scott Warner



Title IX

- Other issues in flux:
 - Interim measures: consider on individualized basis for both parties
 - Written notice of charges and basis to accused once decide to open investigation that could lead to disciplinary action
 - Written report that includes inculpatory and exculpatory evidence
 - Consider impact on separating student



Scott Warner

Title IX

- Other things remain unchanged
 - Title IX coordinator, grievance procedures, notification to both parties, and need to address sexual misconduct
 - Need to provide prompt, equitable, and impartial resolution
 - Can resolve with or without a hearing
 - Fact-finder and sanctioner can be the same
 - Higher education institutions need to comply with both the Clery Act/VAWA and Title IX



Scott Warner



What to Do Now?

- Refer to 2001 Guidance and 2017 Q & A
- Review existing policies and procedures
- Ensure compliance with any applicable state or local laws
- Await further guidance . . .



Scott Warner

New President, New Policies: One Year In



Jennifer Smith

Transgender Rights and Issues



OCR and DOJ

- Policies have created significant uncertainty for schools
- 2015/2016 guidance: Transgender students are Title IX protected class
- 2017 Dear Colleague Letter withdrew guidance “to further and more completely consider the legal issues involved”



Jennifer Smith

OCR and DOJ

- 2017 Dear Colleague Letter:
 - Despite withdrawing previous guidance, OCR assured it will continue to protect all students, including LGBT students, from discrimination, bullying and harassment
- OCR/DOJ also withdrew participation in related transgender litigation
 - Resulted in Supreme Court’s decision to return *G.G. v. Gloucester County Sch. Bd.* case to 4th Circuit for “further consideration”



Jennifer Smith



Snapshot on Litigation

- *Whitaker v. Kenosha USD* (7th Cir. 2017)
 - Student was identified as female at birth and transitioned to identifying as male in 8th grade
 - In junior year, teacher reported his use of male bathroom to school administration
 - School directed student to use either its gender-neutral bathroom or girls' bathroom
 - Student sued for injunction, claiming violation of Title IX and Equal Protection



Jennifer Smith



Snapshot on Litigation

- *Whitaker v. Kenosha USD* (7th Cir. 2017)
 - 7th Circuit upheld District Court’s preliminary injunction allowing student’s use of boys’ bathroom during his senior year
 - Policy that requires individual to use bathroom that does not conform with his/her gender identity violates Title IX
 - Court said that student was also likely to succeed on Equal Protection claim



Jennifer Smith



Americans With Disabilities Act

- “Gender identity disorders not resulting from physical impairments” excluded from consideration as disability
- But recent decision in *Blatt v. Cabela’s Retail* (E.D. Pa. 2017) is noteworthy
 - Gender dysphoria

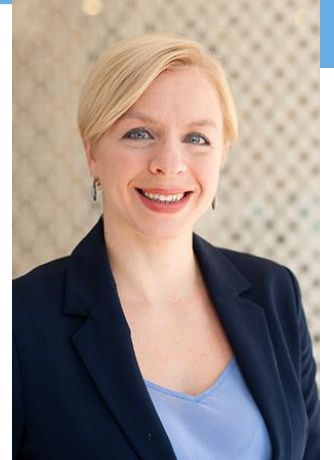


Jennifer Smith



New President, New Policies: One Year In

Immigration Policy Changes

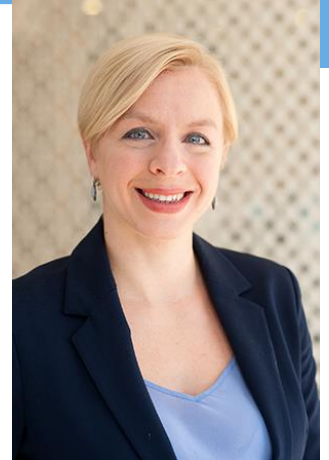


Karlie Dunsky



Termination of Deferred Action for Childhood Arrivals (DACA)

- AG Jeff Sessions announced termination on 9/5/17
- USCIS no longer accepting initial or renewal applications
- Adjudications to continue through 3/5/18 for cases already filed with expirations before 3/5/18
 - Unknown: impact on likelihood of approval
- Protections, work authorization will expire with document



Karlie Dunsky

DACA Replacement Possibilities?

- Dream Act (variations introduced since 2001); 2017 bi-partisan bill provides:
 - 13-year path to citizenship
 - Those who arrived before 18 years of age and have been present at least 4 years before the law's enactment
 - Includes immigrants in Temporary Protected Status as well (another Trump administration removal target)
- Recognizing America's Children (RAC) Act (R): Similar to Dream but:
 - Does not cover individuals under TPS, no eligibility for those with outstanding removal orders, requires high school diploma for those over 18, 10-year path to citizenship



Karlie Dunsky



DACA Replacement Possibilities?

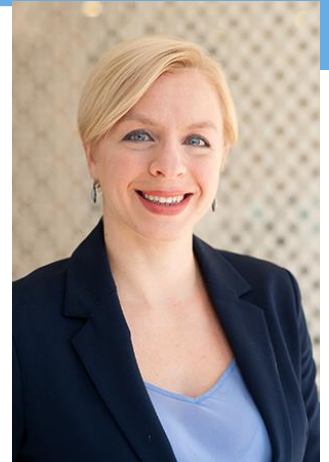
- Bridge Act (bipartisan): continues DACA program for 3 more years, no path to citizenship
 - “Kick the can down the road”
- American Hope Act (D):
 - 5-year path to citizenship
 - Does not cover TPS individuals
 - No education or military requirements
 - Applicants must have been in U.S. continuously since 12/31/2016



Karlie Dunsky

ICE Enforcement on School Property

- *Plyler v. Doe*, 457 U.S. 202 (1982) still applies; public schools may not restrict entry based on citizenship or inquire about status
- FERPA and state law governs student record confidentiality (ISSRA in Illinois)
 - No legal obligation to report a student's undocumented status to Federal officials
- ICE Policy: Schools as sensitive locations (does not specify K-12 versus higher education) still stands; subject to change as it is not codified

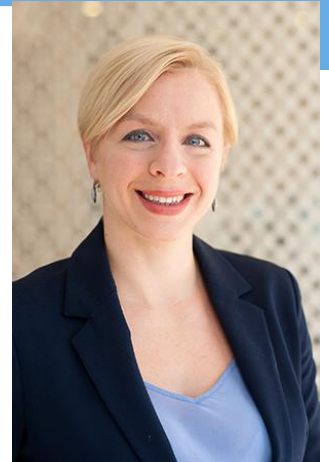


Karlie Dunsky



What is not prohibited by ICE's internal policy?

- Enforcement in “exigent circumstances”
- Does not cover actions such as:
 - Obtaining records, documents and materials from officials or employees;
 - Providing notice to officials or employees;
 - Serving subpoenas;
 - Engaging in Student and Exchange Visitor Program (SEVP) compliance and certification
 - Participating in official functions or community meetings.
- Policy does not specifically apply to areas surrounding schools or even bus stops

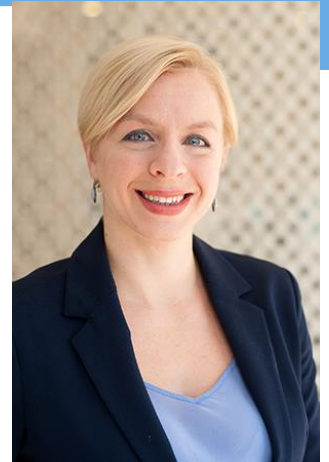


Karlie Dunsky



When Must a School District Comply with Immigration Enforcement Requests?

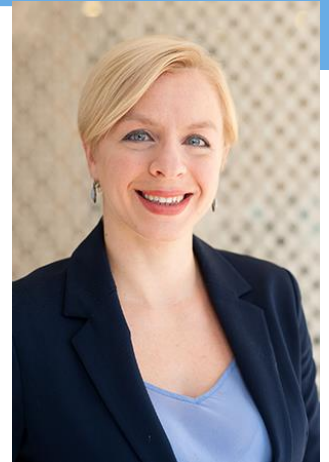
- Agents arrive with a valid criminal arrest warrant issued by a judge; or
- Agents are conducting compliance for SEVP (only relevant to schools with F-1 visa exchange students enrolled)



Karlie Dunsky

Administrative v. Judicial Warrants

- Judicial warrants: signed by a judge
 - Authorizes entry of dwelling and private property — including schools
 - Usually issued if detention is sought due to reasons beyond immigration violations
- Administrative warrants: signed by AG, DHS officer, agency supervisor, Immigration Judge
 - Used to request records or solicit info regarding specific target, can compel appearance in immigration court or production of documents
 - Can authorize arrest but not enforceable where “reasonable expectation of privacy” (private property)

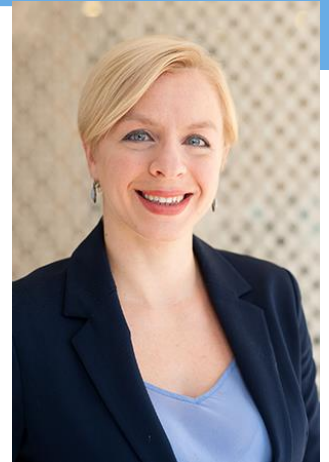


Karlie Dunsky



Sanctuary Statements

- Sanctuary definition: none, borrowed from sanctuary jurisdictions but that is not clearly defined either
 - Sanctuary jurisdictions generally limit use of law enforcement for immigration purposes, limit information sharing between local police authorities and ICE
- Related terms: safe haven, safe zone or welcoming district
- Less public option: No public nomenclature or announcement, but internal policies focus on protecting undocumented students
- State/local movements

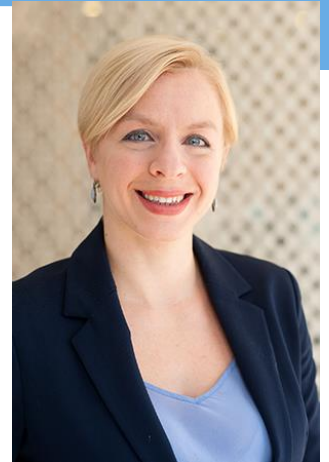


Karlie Dunsky



Our Recommendations

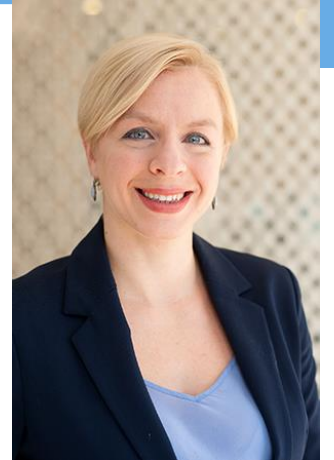
- Clearly communicate the school's policies (e.g. letters to students/parents & press releases)
- Communicate changes in federal, state, or local law or policies
- Avoid unnecessary concern, but confirm that the school is aware of increased enforcement and has a plan if ICE comes to school
- Remind parents/staff about state guardianship requirements



Karlie Dunsky

Consular and Port of Entry issues for International Students (F-1/M-1)

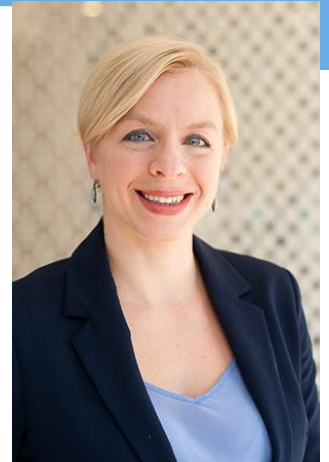
- Higher scrutiny for visa applications:
 - F-1 Student visas require nonimmigrant intent — intent to return to home country after temporary stay
 - Also applies to M-1 vocational students
 - Make sure students know they must demonstrate to the consulate and potential Customs and Border Protection their ties to home country and intent to return through documentation
- 90-day rule—presumption of misrepresentation if act counter to representations made at consulate within 90 days of entering the U.S.



Karlie Dunsky

Consular and Port of Entry issues for International Students

- Social media accounts will be part of immigration file now
 - Impacts permanent residents and naturalized citizens as well
 - Includes handles, aliases, associated identifiable information and search results
- Customs and Border Protection (CBP) search of technology/devices increased
 - includes information that is *physically resident* on an electronic device transported by the international traveler (not remote server data)
 - CBP does not inform of right to refuse social media or email account or device password/PIN, does not believe consent is required for inspection of devices



Karlie Dunsky



New President, New Policies: One Year In

The Affordable Care Act



Trevor Holmes



Affordable Care Act

- New administration vowed to repeal the ACA after election
- Some legislative proposals included:
 - Repeal of penalties associated with employer mandate
 - Expansion of Health Savings Accounts
 - Delays on implementation “Cadillac Tax”
- Congress failed to pass a repeal bill for President’s signature
- ACA is intact for foreseeable future
- Executive orders
 - Little impact on employers; agencies need time to write rules
 - Nothing until 2018 at the earliest



Trevor Holmes

Affordable Care Act

- Employer obligations have not meaningfully changed
- Employer mandate still in place and will be enforced
 - Large employers must offer coverage to full-time employees or pay penalty
- Employers need to prepare IRS information reports (1095-C) in early 2018 for coverage offered to employees in 2017
 - No more “good faith compliance standard” for errors
- IRS has signaled that it may issue first employer mandate penalty notices for failure to offer coverage in 2016
 - Notices may be sent in late 2017



Trevor Holmes





FRANCZEKRADELET

ATTORNEYS & COUNSELORS



Thank you for joining us!

- Link to a feedback survey made available after webinar
- For CLE credit please complete the feedback survey
- Annual School Law Seminar
 - Friday, February 9, 2018
 - Email Morgan Coakley at mcc@franczek.com for details