

U.S. Department of Education Office for Civil Rights Withdraws 2011 Dear Colleague Letter, Confirms Intention to Issue New Title IX Regulations, and Issues Interim Guidance in the Form of a Q&A

Highlights for Campus Leaders¹

Title IX of the Education Amendments of 1972 and its implementing regulations prohibit sex discrimination in education programs and activities.² On Sept. 22, 2017, the U.S. Department of Education's (ED) Office for Civil Rights (OCR) released a *Dear Colleague Letter* (2017 Dear Colleague Letter)³ and an accompanying *Q&A on Campus Sexual Misconduct* (2017 Q&A).⁴

What's New?

These documents

- Rescind OCR's 2011 *Dear Colleague Letter on Sexual Violence*⁵ (and its 2014 *Questions and Answers on Title IX and Sexual Violence*⁶),
- Confirm that the Department will initiate a notice and comment rulemaking process leading to regulations, and
- Offer the 2017 Q&A as interim guidance to campuses, supplementing OCR's *2001 Revised Sexual Harassment Guide*.⁷

In its Sept. 22 press release,⁸ ED said, "[t]he withdrawn documents ignored notice and comment requirements, created a system that lacked basic elements of due process and failed to ensure

¹ This memorandum was prepared by ACE Vice President and General Counsel Peter McDonough and Associate Director of Government And Public Affairs Sarah Spreitzer (September 2017).

² 20 U.S.C. §1681 *et seq.*; 34 C.F.R. § 106.1 *et seq.*; *see also* 34 C.F.R. § 668.46(k) (implementing requirements of the Violence Against Women Act).

³ U.S. Department of Education, Office for Civil Rights, Dear Colleague Letter (Sept. 22, 2017) <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf>

⁴ U.S. <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf> Department of Education, Office for Civil Rights, Q&A on Campus Sexual Misconduct (Sept. 22, 2017)

⁵ <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>

⁶ <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>

⁷ <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>

⁸ <https://www.ed.gov/news/press-releases/department-education-issues-new-interim-guidance-campus-sexual-misconduct>

fundamental fairness.” The press release notes that ED “intends to engage in rulemaking on Title IX responsibilities arising from complaints of sexual misconduct,” and that it “will solicit comments from stakeholders and the public during the rulemaking process.”

The department will develop a proposed rule during the next several months and then issue a Notice of Proposed Rulemaking (NPRM) that will initiate a public comment period, which is likely to be 60-90 days. ACE plans to submit comments on the proposed rule. Published regulations are probably a year away.

The press release quotes Secretary of Education Betsy DeVos as saying that in the interim, “[s]chools must continue to confront these horrific crimes and behaviors head-on.” She says the 2017 Q&A is intended to “help schools as they work to combat sexual misconduct and will treat all students fairly.”

Main Takeaway

It is highly unlikely that OCR expects colleges and universities to alter the current Title IX policies and procedures they have spent six years writing and rewriting during the upcoming notice and comment rulemaking process. However, pending the issuance of regulations, institutions should be attentive to applying them as equally as possible to both the victim and the accused, while not retreating from their efforts to reduce, and ultimately eliminate, sexual misconduct on their campuses. (ACE looks forward to continuing to contribute to the policy discussion.)

Context

The Secretary previewed this agency action two weeks earlier. Speaking at George Mason University (VA) on Sept. 7, she expressed gratitude “to those who endeavored to end sexual misconduct on campuses,” which she described as “reprehensible,” “atrocious,” “disgusting,” and “unacceptable.”⁹ She said that educational institutions have a “responsibility to protect every student’s right to learn in a safe environment and to prevent unjust deprivations of that right.” However, referring to a “failed system,” she emphasized the need for “sustainable solutions,” noting a “moral obligation to get this right,” via a “workable, effective, and fair system” of dealing with sexual harassment on campus.

Sept. 22 Q&A Highlights

The 2017 Q&A covers nine topics (via 12 questions and answers).¹⁰ Thematically, they say to campuses that adherence to Title IX expectations requires fairness to both the survivor and the accused student and that there should not be any presumption of guilt at the start of an investigation into a sexual assault complaint. Whatever institutions do procedurally (allowing lawyers, providing interim measures, informing on outcomes, etc.) should be equitable and not favor either the accused or the survivor.

⁹ “Transcript: Betsy DeVos’s remarks on campus sexual assault.” *The Washington Post* (Sept. 7, 2017) <https://www.washingtonpost.com/news/grade-point/wp/2017/09/07/transcript-betsy-devoss-remarks-on-campus-sexual-assault/>

¹⁰ The nine topics: institutional responsibility to address sexual misconduct, the Clery Act and Title IX, interim measures, grievance procedures and investigations, informal resolutions of complaints, decision-making as to responsibility, decision-making as to disciplinary sanctions, notice of outcomes and appeals, and existing resolution agreements.

The 2017 Q&A also suggests that ED recognizes the breadth and variety of the higher education landscape and the value of contextually appropriate policies and processes. Institutions can have some comfort that when OCR investigates complaints against a college or university alleging an institutional Title IX violation, it will take into account institutions' good faith and sensible, customized responses to individual situations.

The interim guidance offered by the 2017 Q&A includes:

A. Interim measures to be fairly apportioned, and not set in stone.

Under Question 3, the 2017 Q&A states that interim measures cannot favor one party over the other and caution against punitive action prior to full and final resolution of the proceeding. Interim measures should be decided based on the individual case and should not be set in a fixed rule by the school. The guidance states: "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." Signaling the appropriateness of flexibility, the guidance notes that "[i]nterim measures should be individualized and appropriate based on the information gathered by the Title IX Coordinator, making every effort to avoid depriving any student of her or his education."

The interim measures can also change over the course of the investigation, and the guidance cautions that the Title IX coordinator needs to keep both parties informed during the course of the investigation: "The measures needed by each student may change over time, and the Title IX Coordinator should communicate with each student throughout the investigation to ensure that any interim measures are necessary and effective based on the students' evolving needs."

B. The time frame for completing investigations depends upon the circumstances.

The presumption that an institution's investigation of a Title IX complaint will be completed within 60 days no longer exists. In its 2017 Q&A under Question 5, OCR says, "There is no fixed time frame under which a school must complete a Title IX investigation."

C. Institutional good faith will be a key determinant of Title IX compliance.

While incorporated within an answer to Question 5 pertaining to the pacing of investigations, OCR signaled that it will take into account institutional good faith when evaluating Title IX compliance: "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."

D. Informal resolutions can be OK.

The 2017 Q&A is clear that institutions may facilitate informal resolutions, including via mediation, without a full investigation and adjudication, if all parties voluntarily agree to participate. Under Question 7, it says, "If all parties voluntarily agree to participate in an informal resolution that does not involve a full investigation and adjudication after receiving a full disclosure of the allegations and their options for formal resolution and if a school determines that the particular Title IX complaint is appropriate for such a process, the school may facilitate an informal resolution, including mediation, to assist the parties in reaching a voluntary resolution."

E. Investigators must be trained, unbiased and not conflicted.

Under Question 6, the 2017 Q&A emphasizes the need for schools to utilize trained investigators. It also notes that an investigator must be "a person free of actual or reasonably perceived conflicts of

interest and biases for or against any party” Furthermore, the 2017 Q&A cautions schools to “ensure that institutional interests do not interfere with the impartiality of the investigation.”

F. No particular type of fact-finding model is required.

The guidance offered under Questions 6 and 8 (regarding investigations and decision-making) does not tilt toward a particular type of preferred investigator or presumptive form of fact-finding. Thus, a single investigator model, a hearing model or a hybrid should be acceptable to OCR. The 2017 Q&A encourages actual and perceptive fairness and equity, while seemingly affording flexibility.

G. Sex stereotypes and generalizations are taboo.

In response to Question 8, OCR indicates that it may look to the nature of training offered to campus investigators and tribunals, with a concern about bias or predisposition: “Training materials or investigative techniques and approaches that apply sex stereotypes or generalizations may violate Title IX and should be avoided so that the investigation proceeds objectively and impartially.”

H. An institution may choose its standard of proof.

OCR no longer requires that determinations be made by applying a preponderance of the evidence standard. In responding to Question 8, the 2017 Q&A says, “findings of fact and conclusions as to whether the facts support a finding of responsibility for violation of the school’s sexual misconduct policy... should be reached by applying either a preponderance of the evidence standard or a clear and convincing evidence standard.”

Of particular note for institutions that have lowered their evidentiary standard since 2011 for sexual misconduct cases, but not for cases in which other sorts of misconduct are alleged (such as, for example, racially motivated harassment or assault), the 2017 Q&A says in a footnote that “the standard of evidence for evaluating a claim of sexual misconduct should be consistent with the standard the school applies in other student misconduct cases.” According to OCR, “when a school applies special procedures in sexual misconduct cases, it suggests a discriminatory purpose and should be avoided.” However, in this interim period ahead of issuing regulations, it is highly unlikely that OCR will find a school to have violated Title IX by lowering its sexual misconduct standard per the 2011 Dear Colleague Letter’s expectations, while maintaining its traditional standard of proof for other matters.

Furthermore, OCR should appreciate, and take into account, that some institutions are subject to state law that now mandates the lower standard for sex assault. Thus, if an institution maintains a longstanding higher standard for other offenses, it seems unlikely that OCR will interpret and apply Title IX as requiring a standard mandated by the state for some offenses to be used for all offenses.

I. Appeals are not required; they may be made available only to the accused; but if they are offered to both the accuser and the accused, they must be equally available to both parties.

In response to Question 11, OCR notes that institutions are not required to offer appeals, but they can make them available to either the responding party or to both parties: “If a school chooses to allow appeals from its decisions regarding responsibility and/or disciplinary sanctions, the school may choose to allow appeal (i) solely by the responding party; or (ii) by both parties, in which case any appeal procedures must be equally available to both parties.” In a footnote, OCR references prior determination letters it has issued wherein it has concluded that “there is no requirement under Title IX [for] a victim’s right of appeal;” even though “appeal rights are not necessarily

required by Title IX,” they are a standard component of campus disciplinary processes; and “it is permissible to allow an appeal only for the responding party because ‘he/she is the one who stands to suffer from any penalty imposed and should not be made to be tried twice for the same allegation.’”

J. Prior resolution agreements will remain binding on the schools that signed them.

Although the 2017 Q&As rescind the 2011 and 2014 guidance, ED expects schools to abide by existing resolution agreements with OCR because they were entered into voluntarily. Under Question 12, the guidance states “Existing resolution agreements remain binding upon the schools that voluntarily entered into them.”

However, the guidance also invites institutions with “questions about an existing resolution agreement” to contact OCR. This may be relevant, for instance, to institutions that, as a condition of resolving a complaint, were required by OCR to make changes to policies or procedures to align with specific aspects of the now-withdrawn 2011 Dear Colleague Letter.

K. Resolution agreements do not set standards applicable to other schools.

Question 12 also states that while an existing resolution between an individual institution and OCR remains binding, the department does not expect other institutions to consider those resolution agreements as dictating OCR’s expectations of them: “Such agreements are fact specific and do not bind other schools.”

Conclusion

In the short run, not much is likely to happen to how institutions handle campus sexual assault cases. Our country’s colleges and universities have given intense and sustained attention to sexual misconduct on their campuses. No institution will back off its commitment to preventing sexual harassment and assault from occurring in the first place, and to handling cases that do occur with compassion for the survivor and fairness to both parties.

Indeed, OCR has not signaled that it expects schools to make interim adjustments to align with the 2017 Q&A, and it is highly unlikely that OCR will enforce to the letter of the interim guidance. ED is signaling its recognition that one size does not fit all when it comes to dealing with sexual misconduct on our nation’s campuses, and that context matters. As institutions await the issuance of new Title IX regulations, it is equally unlikely that many will feel compelled to change policies that they spent the last six years writing—and sometimes rewriting, except perhaps to tweak them in a continuing effort to improve campus attentiveness to preventing, and decisively responding to, sexual misconduct

The bottom line is this: Replacing unclear guidance with clear and legally binding regulations, and soliciting input from all impacted constituencies while doing so, is a good idea. A “sustainable solution” is needed. The new regulations will not be an end in themselves. But they should aid our nation’s institutions in molding policies and practices to the context in which they will be applied, in a continued effort to achieve Title IX’s promise that sex discrimination will not exclude any person from participation in, or denial of the benefits of, any education program or activity offered by an institution receiving federal aid.