

Title IX Update: U.S. Department of Education Withdraws 2011 and 2014 Title IX Guidance and Issues New Interim Guidance

September 23, 2017

On Friday, September 22, 2017, the U.S. Department of Education's Office for Civil Rights ("OCR") announced that it is rescinding 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 ("2011 Dear Colleague Letter"); and
- [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 ("2014 QandA on Title IX").

In rescinding the Obama-era directives, Candice Jackson, OCR's acting assistant secretary, stated that the regulations harmed both those accused of sexual assault and alleged victims. Jackson continued, "[t]he 2011 and 2014 guidance documents may have been well-intentioned, but those documents have led to the deprivation of rights for many students—both accused students denied fair process and victims denied an adequate resolution of their complaints."

In the same announcement, OCR issued an interim [QandA on Campus Sexual Misconduct](#) ("2017 QandA"), which it will now use to assess how effectively institutions investigate and adjudicate allegations of campus sexual misconduct in accordance with federal law. Department officials said the purpose of the 2017 QandA is "to help schools clarify their obligation" in a time of flux. The interim guidance will remain in effect until new federal regulations, which will follow a formal notice and comment period involving various stakeholders and the public, are finalized. In addition, the Department noted that during this time it "will continue to rely on its [Revised Sexual Harassment Guidance](#), which was informed by a public comment process and issued in 2001, as well as the Dear Colleague Letter on Sexual Harassment issued on January 25, 2006."

"This interim guidance will help schools as they work to combat sexual misconduct and will treat all students fairly," DeVos said in a written statement. "Schools must continue to confront these horrific crimes and behaviors head-on. There will be no more sweeping them under the rug. But the process also must be fair and impartial, giving everyone more confidence in its outcomes."

The Department's decision to scale back the Obama-era guidance on sexual assault was long expected. DeVos signaled changes were imminent in July 2017 when she met with three groups (survivors and advocates, university representatives and college administrators, and accused students) to discuss sexual violence on college

campuses in separate 90-minute roundtable discussions. Earlier this month, DeVos also delivered a major policy address on Title IX enforcement at George Mason University's Law School in Arlington, Virginia at an event described as "centered around equal opportunity and equal protection of all." At this event, DeVos also criticized the Obama-era policies and said the previous guidance created a "failed system" that encouraged violations of students' rights.

"As I said earlier this month, the era of rule by letter is over. The Department of Education will follow the proper legal procedures to craft a new Title IX regulation that better serves students and schools," said DeVos in a statement on Friday.

Overview

The following is a summary of the key provisions of the 2017 QandA.

As an initial matter, the 2017 QandA reaffirmed that regardless of whether a student files a complaint with an institution when campus officials know or reasonably should know of alleged sexual misconduct, they have an affirmative obligation to respond to these allegations. The new guidance also clarified that existing voluntary resolution agreements reached between OCR and institutions remain in effect during this interim period.

- **Standard of Proof**

The 2011 Dear Colleague Letter required institutions to adopt a minimal standard of proof, the preponderance of the evidence standard, in evaluating and investigating sexual misconduct complaints (as opposed to a "clear and convincing" evidence standard that some institutions had previously been using). A preponderance of the evidence (commonly referred to as the 51 percent test or the "feather test") means that it is "more likely than not" that the respondent violated the institution's policy and engaged in sexual misconduct.

Under the 2017 QandA, institutions now have discretion in determining which standard of proof to apply to cases of sexual misconduct. Specifically, the 2017 QandA states, in relevant part, that "[t]he findings of fact and conclusions should be reached by applying either a preponderance of the evidence standard or a clear and convincing evidence standard." Citing a key federal court ruling in a Brandeis University case, the administration advised, "[t]he standard of evidence for evaluating a claim of sexual misconduct should be consistent with the standard the school applies in other student misconduct cases."

- **Sixty (60) Day Time Frame**

In accordance with the 2011 Dear Colleague Letter, "a typical investigation takes approximately 60 calendar days following receipt of the complaint." Although OCR recognized that more complex cases could take longer, institutions were generally required, within 60 days of the institution receiving notice of the claim, to investigate, stop the behavior, take action to prevent the recurrence of such behavior, come to a final determination, and

implement any sanctions and/or remedial actions. This time frame did not include appeals.

Under the 2017 QandA, there is "no fixed time frame under which a school must complete a Title IX investigation. OCR will evaluate a school's good faith to conduct a fair, impartial investigation in a timely manner designed to provide all parties with resolution."

- **Informal Resolution**

The 2011 Dear Colleague Letter stated that mediation was not appropriate "even on a voluntary basis," in cases of alleged sexual assault. In stark contrast, the 2017 QandA now states that institutions may facilitate informal resolutions, such as mediation if all parties agree to participate in that process and the institution determines that the particular Title IX complaint is appropriate for such a process.

- **Appeals**

The previous Obama-era directives encouraged institutions to maintain an appeal process and insisted that institutions with an appeal process allow complainants to appeal not guilty findings. Critics argued that this was unfair to accused students, as it effectively permitted accused students to be retried for a second time at the institutional level.

The 2017 QandA now provides institutions with discretion as to whether to maintain an appeal process. Specifically, "[if] a school chooses to allow appeals from its decisions regarding responsibility and/or disciplinary sanctions, the school may choose to allow appeal solely by the responding party; or by both parties, in which case any appeal procedures must be equally available to both parties."

- **Cross-Examination**

The 2011 Dear Colleague Letter discouraged cross-examination of alleged victims. As set forth in the 2011 guidance, "OCR strongly discourages schools from allowing the parties personally to question or cross-examine each other during the hearing. Allowing an alleged perpetrator to question an alleged victim directly may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment."

As per the 2017 QandA, "[a]ny process made available to one party in the adjudication procedure should be equally made available to the other party (for example, the right to have an attorney or other advisor present and/or participate in an interview or hearing; the right to cross-examine parties and witnesses or to submit questions to be asked of parties and witnesses.)"

- **Additional Equities**

“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 2017 QandA continues, the “investigation should result in a written report summarizing the relevant exculpatory and inculpatory evidence.” Further, “[t]he decision-maker(s) must offer each party the same meaningful access to any information that will be used during informal and formal disciplinary meetings and hearings, including the investigative report. The parties should have the opportunity to respond to the report in writing in advance of the decision of responsibility and/or at a live hearing to decide responsibility.”

- **Levels of Impartiality**

Past OCR guidance encouraged bright lines of separation at stages of the complaint resolution process. Multiple roles played by one person over the course of the complaint process created the appearance of a conflict of interest in violation of Title IX.[1] Different individuals were advised to be involved at the various stages of the resolution process so as to minimize any potential conflict of interest in accordance with Title IX. Alternatively, the 2017 QandA indicates, in relevant part, that “the decision as to any disciplinary sanction imposed after a finding of responsibility may be the same or different from the decision-maker who made the finding of responsibility.”

Impact on Colleges and Universities

OCR specifically indicated that the 2017 QandA is a “significant guidance document under the Federal Bulletin for Agency Good Guidance Practices of the Office of Management and Budget, 72 Fed. Reg. 3432 (Jan. 25, 2007)” and that the 2017 QandA “does not add requirements to the applicable law.”

Despite the new administration’s announcement, several experts predict that many of the Obama administration’s directives are likely to remain in place regardless of DeVos’s attempt to rewrite the rules on investigating campus sexual assault. In this regard, many institutions are of the opinion that, just because DeVos revoked or rescinded the Obama-era guidance, they are not going to cease their current practices or change policies that they spent the last six years drafting and implementing and disrupt the cultural shift, especially since a binding regulation from the Department is forthcoming.

Terry Hartle, senior vice president for government and public affairs at the American Council on Education, said the new guidelines will likely not affect the way institutions address campus sexual assault. “There are some things where institutions will have to take a careful look at their own practices relative to what the new guidance requires,” he said. “The default setting on this for most institutions will continue to be to do what we have been doing.”

Most critically, despite DeVos's attempt to unwind the focus on campus sexual misconduct, many institutions are bound by federal and state laws apart from federal guidance. To be clear, the potential rollback of the Obama-era guidance does not change or in any way affect an institution's obligation under state law, particularly New York State Education Law Article 129-B (also referred to as the "Enough is Enough" law), to recognize, investigate, and prevent sexual misconduct on campus.

It behooves colleges and universities too, once again, review their existing policies and procedures in order to confirm that they are in compliance with the current law and guidance and/or make any necessary changes as soon as practical. Institutions should also provide Title IX training to students, educators, and all members of the school community as to how to properly recognize, prevent, and respond to allegations of sexual misconduct. Institutions are advised to pay close attention to this area of the law, as it has the potential to have significant practical as well as legal implications.

For more information on how to develop, implement, and maintain legally compliant policies, procedures, and training programs, please contact any of the following attorneys in our Higher Education Practice Group:

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[1] <https://www2.ed.gov/documents/press-releases/university-virginia-agreement.pdf> and <https://www2.ed.gov/documents/press-releases/university-virginia-letter.pdf>.