

## Department of Education Rescinds Obama-Era Title IX Guidance Documents, Introduces New Q&A on Campus Sexual Misconduct

October 9, 2017

On September 22, the U.S. Department of Education (ED) Office for Civil Rights (OCR) issued a [Dear Colleague Letter](#) (DCL) withdrawing the statements of policy and guidance reflected in two key documents about Title IX and sexual violence issued under the Obama administration: the [Dear Colleague Letter on Sexual Violence](#) dated April 4, 2011 (2011 DCL), and the [Questions and Answers on Title IX and Sexual Violence](#), dated April 29, 2014 (2014 Q&A). Stating a view that the previous guidance documents had “not succeeded in providing clarity for educational institutions or in leading institutions to guarantee educational opportunities on the equal basis that Title IX requires”, the DCL explains that ED intends to initiate a rulemaking process on the topic of institutions’ Title IX responsibilities concerning complaints of sexual misconduct, including peer-on-peer sexual harassment and sexual violence.

In the interim, ED will not rely on the withdrawn guidance documents in its enforcement of Title IX. ED has stated that it will continue to rely upon the [Revised Sexual Harassment Guidance](#) issued in 2001 and the [Dear Colleague Letter on Sexual Harassment](#) issued January 25, 2006. In addition, on September 22, ED issued a new set of [Questions and Answers on Campus Sexual Misconduct](#) (2017 Q&A), which ED has said “provide information about how OCR will assess a school’s compliance with Title IX” until the rulemaking process is complete. The new guidance follows a [speech](#) delivered by Secretary of Education Betsy DeVos earlier in September in which she announced the formal rulemaking process.

Here, we highlight selected aspects of the 2017 Q&A and identify ways in which this 2017 Q&A departs from the withdrawn guidance documents.

- **Interim measures:** The 2017 Q&A defines “interim measures” with respect to the respondent as well as the complainant. The 2017 Q&A describes interim measures as “individualized services offered as appropriate to either or both the reporting and responding parties involved in an alleged incident of sexual misconduct, prior to an investigation or while an investigation is pending.” (emphasis added; pg. 2) The 2011 DCL and 2014 Q&A focused on interim measures that would “protect” and “minimize the burden on the complainant.” (pp. 15-16; pp. 32-33, respectively) The 2017 Q&A notes instead that “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 Q&A also directs that in taking interim measures, an institution should make “every effort to avoid depriving any student of his or her education” and should monitor their implementation during an investigation to “ensure that any interim measures are necessary and effective based on the students’ evolving needs.” (pg. 3)

- **Time frame for prompt investigation:** The 2017 Q&A effectively removes the previous 60-day guideline for completion of a Title IX investigation. In the 2011 DCL, OCR noted that based on its experience, “a typical investigation takes approximately 60 calendar days following receipt of the complaint.” (pg. 12; see also 2014 Q&A at pp. 31-32). Although OCR acknowledged that whether it views complaint resolution to be timely “will vary depending on the complexity of the investigation and the severity and extent of the harassment”, the reference to a 60-day timeline had in effect created a presumption that investigations had to be completed in that timeframe. (2011 DCL at 12; see also 2014 Q&A at 32) In the 2017 Q&A, OCR eliminates any specific timeframe requirement: “There is no fixed time frame under which a school must complete a Title IX investigation. 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.” (pg. 3)
- **Informal resolution of complaints without full investigation and adjudication:** OCR previously had advised institutions that Title IX grievance procedures could include voluntary informal mechanisms (e.g., mediation) for resolving some types of harassment complaints. However, OCR had said that “mediation is not appropriate even on a voluntary basis” in cases of sexual assault. (2011 DCL at pg. 8) In the 2017 Q&A, OCR has removed that restriction, noting that “if all parties voluntarily agree” and “if a school determines that the particular Title IX complaint is appropriate for such a process,” an institution may facilitate informal resolution through mediation. (pg. 4)
- **An “equitable” investigation/procedures for adjudication:** The 2017 Q&A introduces several new concepts related to how OCR expects institutions to conduct Title IX investigations:
  - **Burden on the institution:** The 2017 Q&A puts “the burden . . . on the school—not on the parties—to gather sufficient evidence to reach a fair, impartial decision as to whether sexual misconduct has occurred and, if so, whether a hostile environment has been created that must be addressed.” (pg. 4)
  - **Conflict of interest:** OCR has long insisted that Title IX investigations should be impartial; the 2017 Q&A reemphasizes and strengthens that position. In the 2011 DCL, OCR stated that “any real or perceived conflicts of interest between the fact-finder or decision-maker and the parties should be disclosed.” (pg. 12) In the 2014 Q&A, OCR explained that a Title IX Coordinator could conduct an investigation, “provided there are no conflicts of interest.” (pg. 25) In addition, the Clery Act requires that institutional procedures in cases of dating violence, domestic violence, sexual assault, or stalking must be “conducted by officials who do not have a conflict of interest or bias for or against the accuser or the accused.” (34 C.F.R. 668.46(k)(3)(i)(C).) The 2017 Q&A requires that “[a] person free of actual or reasonably perceived conflicts of interest and biases for or against any party must lead the investigation on behalf of the school. Schools should ensure that institutional interests do not interfere with the impartiality of the investigation.” (pg. 4)
  - **Sex stereotypes and generalizations:** The 2017 Q&A states that “[t]raining materials or investigative techniques that apply sex stereotypes or generalizations may violate Title IX and should be avoided so that the investigation proceeds objectively and impartially.” (pg. 4) Similarly, “[d]ecision-making techniques or approaches that apply sex stereotypes or generalizations may violate Title IX and should be avoided so that the adjudication proceeds objectively and impartially.” (pg. 5)
  - **Written notice:** The 2017 Q&A presents OCR’s expectation that an institution should provide “written notice in advance of any interview or hearing with sufficient time to prepare for meaningful participation.” Such notice should identify “the allegations constituting a potential violation of the school’s sexual misconduct policy, including sufficient details”, such as “the identities of the parties involved, the specific section of the code of conduct allegedly violated, the precise conduct allegedly

constituting the potential violation, and the date and location of the alleged incident.” (pg. 4) OCR has indicated that where a complainant has requested that his or her name not be revealed, an institution should still provide meaningful notice within the context of a particular investigation.

- **“Gag orders”:** The 2017 Q&A notes that “[r]estricting the ability of either party to discuss the investigation . . . is likely to deprive the parties of the ability to obtain and present evidence or otherwise to defend their interests and therefore is likely inequitable.” (pg. 4)
- **Written report:** The 2017 Q&A also presents OCR’s expectation that “[t]he investigation should result in a written report summarizing the relevant exculpatory and inculpatory evidence.” (pg. 4) In preparing the report, the investigator should “analyze and document the available evidence to support reliable decisions, objectively evaluate the credibility of parties and witnesses, synthesize all available evidence—including both inculpatory and exculpatory evidence—and take into account the unique and complex circumstances of each case.” (pg. 4)
- **Opportunity to respond to written report:** The 2017 Q&A presents OCR’s expectation that 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.” (pg. 5)
- **Equal participation, cross-examination:** The 2017 Q&A emphasizes that “[a]ny process made available to one party in the adjudication procedure shall be made equally available to the other party (for example, the right to have any 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).” (pg. 5) This approach generally is not a departure from the now-withdrawn guidance documents; however, both the 2011 DCL and 2014 Q&A had noted that “OCR strongly discourages a school from allowing the parties to personally question or cross-examine each other.” (pg. 12 and pg. 31, respectively). The 2017 Q&A does not retain that guidance.
- **Findings of fact and conclusions:** The 2017 Q&A indicates that the investigator or separate adjudicators “must make findings of fact and conclusions as to whether the facts support a finding of responsibility.” (pg. 5) Further, if the complaint presented multiple allegations of misconduct, “a decision should be reached separately as to each allegation of misconduct.” (pg. 5)
- **Standard of evidence:** The now-withdrawn 2011 DCL and 2014 Q&A provided that “in order for a school’s grievance procedures to be consistent with Title IX standards, the school must use a preponderance of the evidence standard (i.e., it is more likely than not that sexual harassment or violence occurred).” (pp. 10-11 and pp. 26, respectively) In contrast, the 2017 Q&A provides that “[f]indings of fact and conclusions should be reached by applying either a preponderance of the evidence standard or a clear and convincing evidence standard.” (pg. 5) In a footnote, OCR references a judicial decision for the principle that the standard used for evaluating a claim of sexual misconduct “should be consistent with the standard the school applies in other student misconduct cases.” (pg. 5, n.19).

- **Disciplinary sanctions:** The 2017 Q&A cautions that “[d]isciplinary sanctions must be made for the purpose of deciding how best to enforce the school’s code of conduct while considering the impact of separating a student from her or his education.” (pg. 6)
- **Right to appeal:** Title IX does not require that an institution provide a mechanism for appeal, but in the now-withdrawn guidance documents, OCR has recommended that institutions provide an appeals process. Further, in the 2011 DCL and 2014 Q&Q, OCR stated that if an institution allows for appeals, “it must do so for both parties.” (pg. 12 and pg. 37, respectively) In the 2017 Q&A, OCR reverts to a previously-held OCR position, stating that if an institution chooses to allow appeals from its decisions regarding responsibility and/or disciplinary sanction, it may choose to allow appeal “(i) solely by the responding party; or (ii) by both parties, in which case any appeal procedure must be equally available to both parties.” (pg. 6).

### Next steps

As noted in the 2017 Q&A, existing resolution agreements remain binding upon the institutions that entered into them. (pg. 7) However, according to the 2017 Q&A, those agreements are fact-specific and do not bind other institutions.

Following issuance of the new DCL and the 2017 Q&A, OCR officials have indicated that OCR does not expect institutions to make immediate or significant changes to existing institutional policies and procedures in response to the new guidance. OCR has acknowledged that implementation of Title IX policies and procedures requires substantial time and effort on behalf of institution leaders, and OCR has emphasized that the interim guidance is intended to highlight OCR’s concern that institutional policies and procedures are fair and impartial and to provide institutions with additional flexibility with respect to certain aspects of those procedures. Review of Title IX policies and grievance procedures in light of these developments may nevertheless be warranted based on an institution’s particular circumstances and because the 2017 Q&A highlights areas that OCR has identified as potentially subject to regulation in the upcoming rulemaking process. The precise timeline for that formal rulemaking process is uncertain.

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