

Title IX Litigation Alert

September 27, 2017

Key Points:

- On September 22, 2017, the Department of Education's Office for Civil Rights (the OCR) issued a new *Dear Colleague* Letter officially withdrawing the April 4, 2011 *Dear Colleague* Letter on Sexual Violence and the April 29, 2014 Questions and Answers (Q&A) on Title IX and Sexual Violence. At the same time, the OCR issued a new Q&A on Campus Sexual Misconduct document. The OCR will continue to rely on the 2001 Revised Sexual Harassment Guidance and the 2006 *Dear Colleague* Letter on Sexual Harassment.
- In light of the 2017 interim guidance, colleges and universities should examine their existing Title IX policies and procedures to ensure that they do not afford rights or opportunities to complainants that are not available to respondents. They should also review confidentiality obligations that are imposed on parties to Title IX proceedings to ensure that all parties have adequate opportunity to obtain and present evidence.
- Colleges and universities now have more flexibility in key aspects of their Title IX procedures such as the applicable standard of proof, the timing of complaint resolution, and the potential for increased use of informal resolution methods in cases of sexual assault.

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The Department of Education Issues New Guidance For Title IX Proceedings

A new *Dear Colleague* Letter, issued on September 22, 2017 by the OCR withdraws the previous 2011 *Dear Colleague* Letter on Sexual Violence and the 2014 Q&A on Title IX and Sexual Violence. The 2017 *Dear Colleague* Letter asserts that the withdrawn guidance "ignored notice and comment requirements, lacked basic elements of due process, and failed to ensure fundamental fairness." Secretary of Education Betsy DeVos previewed these concerns in her Title IX speech at George Mason University on September 7, 2017. The 2017 *Dear Colleague* Letter also confirms Secretary DeVos' prior announcement that the OCR will engage in new Title IX rulemaking, which will include the opportunity for public comment.

The 2017 *Dear Colleague* Letter lists five significant reasons for withdrawing the former guidance, all of which feature prominently in the new Q&A document.

- The 2011 *Dear Colleague* Letter required schools to adopt the minimal “preponderance of the evidence” standard when many schools had previously used the more stringent “clear and convincing evidence” standard. The 2017 interim Q&A allows schools to use either standard, provided that the standard on sexual misconduct cases is not lower than the standard used to evaluate other forms of misconduct.
- The 2011 *Dear Colleague* letter required schools to allow complainants to appeal findings of no responsibility, when many schools only allowed the respondent to appeal. The 2017 interim Q&A allows a school to choose whether to allow both parties to appeal or to allow only respondents to appeal.
- The 2011 *Dear Colleague* letter “discouraged cross-examination” by the parties, suggesting that to recognize a right to such cross-examination might violate Title IX by exposing a complainant to threatening or intimidating behavior. The 2017 interim Q&A requires that any right or opportunity available to one party be available to the other, including the right to cross-examine parties/witnesses.
- The 2011 *Dear Colleague* letter forbade schools from relying on investigations of criminal conduct by law enforcement authorities to resolve Title IX complaints. This standard forced schools to establish policing and judicial systems, while at the same time directed schools to resolve complaints on an expedited basis. While the 2017 interim Q&A does not directly address parallel law enforcement proceedings, it declines to impose a time limit, or even a suggested time frame, on the school’s investigation.
- The 2011 *Dear Colleague* letter provided that any due process protections afforded to accused students should not “unnecessarily delay” resolving the charges against them. The 2017 interim Q&A contains several provisions requiring that complainants and respondents be afforded identical rights and opportunities and states that schools may not rely on fixed rules that favor one party over another.

While colleges and universities now have more flexibility in how Title IX proceedings should be conducted, there is actually less practical guidance about what future OCR policy is likely to include with respect to critical aspects of the process. These include the standard of proof, the appropriateness of informal resolution methods such as mediation, and the role of law enforcement authorities in the investigation of campus sexual assault. The OCR’s continued reliance on 2001 guidance also creates a potential conflict with the interim Q&A because, while the 2017 interim Q&A seemingly allows the use of informal resolution methods in all cases as long as the parties consent, the 2001 guidance deems even voluntary mediation inappropriate in cases of alleged sexual assault.

At minimum, colleges and universities should review their existing Title IX policies and procedures to ensure they do not afford rights or opportunities to complainants that are not available to respondents.

With respect to confidentiality obligations, the interim guidance also cautions that “restricting 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 likely is inequitable.”

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