

US Department of Education Issues New Interim Guidance on Campus Sexual Misconduct

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Education Law Alert

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On September 22, 2017, the Department of Education released a new Q&A on Campus Sexual Misconduct to serve as an interim guideline governing investigation and resolution of sexual misconduct allegations, pending "conclusion of notice and comment rulemaking." The Department also announced the withdrawal of the April 4, 2011 *Dear Colleague Letter on Sexual Violence* along with the *Questions and Answers on Title IX and Sexual Violence* issued in 2014. The Department stated in a press release announcing its actions that "[t]he withdrawn documents ignored notice and comment requirements, created a system that lacked basic elements of due process and failed to ensure fundamental fairness." The new Q&A further explains that "these [new] questions and answers—along with the Revised Sexual Harassment Guidance previously issued by the Office for Civil Rights [66 Fed. Reg. 5512, January 19, 2001]—provide information about how the OCR will assess a school's compliance with Title IX."

Colleges and universities must consider the impact of these newly issued interim guidelines on their current procedures and determine compliance with Title IX, and responsiveness to complaints of sexual misconduct on their college campuses. In its Answer to Question 1 of the 2017 Q&A, the Department explains that

"[w]hether or not a student files a complaint of alleged sexual misconduct or otherwise asks the school to take action, where the school knows or reasonably should know of an incident of sexual misconduct, the school *must take steps to understand what occurred and to respond appropriately.*" (Emphasis added.) The Department further explains that circumstances involving sexual misconduct on college campuses may constitute a hostile environment requiring the school to respond.

The 2017 Q&A key provisions include:

- **Interim Measures** – There are no fixed rules or operating assumptions; interim measures are individualized services and may not favor one party over another.
- **Prompt Investigation** – There is no fixed time that a school must complete a Title IX investigation. A school must engage in a good faith effort to conduct a fair, impartial investigation in a timely manner.
- **Written Notice** – Once a school decides to open an investigation that may lead to disciplinary action, sufficient written details should be provided to the responding party about the allegation, including the identities of the parties, the specific section of the disciplinary code allegedly violated, the precise conduct allegedly constituting the violation and the date/location of the alleged incident; sufficient time should be provided to the responding party to prepare a response before any initial interview.
- **Equitable Investigation** – Any rights or opportunities that a school makes available to one party during the investigation should be made available to the other party on equal terms.
- **Informal Resolution of Complaints** – If all parties voluntarily agree to participate in an informal resolution and a school determines that the particular complaint is appropriate for such a process, the school may facilitate an informal process, including mediation.
- **Standard of Proof** – Schools will have the option to continue to use the preponderance of evidence standard or a higher standard, the clear and convincing evidence standard, in the decision-making process for all claims of student misconduct.
- **Notice of Outcome and Appeals** – Written notice of the outcome of disciplinary proceedings should be provided to the parties concurrently and schools may set an appeals process that allows appeals by both parties or by the responding party.

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The 2017 Q&A signals a clear and unmistakable change in how the OCR will assess a school's compliance with Title IX. The Q&A provides interim guidelines and the OCR has reported that it will "craft new Title IX regulation[s] that better serve students and schools." Whenever a government agency issues a revision in how it approaches matters, institutions must undertake efforts to consider the impact of the new approach on its policies and procedures. That certainly is the case here. Consequently, until the regulations are issued, schools should review the interim guidelines in conjunction with their Title IX policies, identify changes and confirm that their policies and procedures are consistent with the guidelines, provide fundamental fairness for all parties, and ensure a safe and responsive environment for all students.

We will continue to monitor Title IX developments and will provide updates as more information is released. Please contact Nancy Conrad (conradn@whiteandwilliams.com; 610.782.4909), Linda Perkins (perkinsl@whiteandwilliams.com; 215.864.6866) or any member of our Education Law Group for further assistance and information, including guidance on how to respond to the Department of Education's interim guidelines.

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