



OCTOBER 2017

NO. 17-12

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## Title IX Guidance Issued by U.S. Dept. of Education

### New Guidelines for Schools to Address Sexual Misconduct Complaints

On September 22, 2017, the U.S. Department of Education's Office for Civil Rights ("OCR") issued a new Q&A on how local educational agencies, including K-12 school districts, must handle complaints of student sexual misconduct under Title IX. Concurrently, in a Dear Colleague Letter, OCR withdrew a 2011 Dear Colleague Letter and a 2014 Q&A issued during the Obama administration.

Overall, the new guidance relaxes previous standards for schools to investigate and respond to sexual misconduct allegations, with an apparent emphasis on strengthening the rights of those accused of sexual misconduct. Highlights of the new guidance include the following:

**No Investigation Timeframe:** Prior guidance required a 60-calendar-day investigation. Now, schools need only make a "good faith effort to conduct a fair, impartial investigation in a timely manner designed to provide all parties with resolution."

**Higher Standard of Proof:** Prior guidance required schools to apply the "preponderance of evidence" standard when determining if sexual misconduct occurred. Now, schools may decide whether to use that standard or the more rigorous "clear and convincing evidence" standard, which is met if "highly probable or reasonably certain that the sexual harassment or violence occurred." Although schools may use either standard, OCR cautions that the standard used should be consistent with that used in other types of student misconduct cases.

**Limited Appeals Rights:** Prior guidance required appeal rights—if provided at all—to be available to both parties. Now, schools may allow appeal rights to be available only to the accused.

**Informal Resolution Process Permitted:** Prior guidance prohibited the use of mediation to resolve sexual assault complaints. Now, schools may facilitate an informal process, including mediation, to assist parties in voluntary resolution if certain conditions are met, including that the school determines informal resolution is appropriate and all parties voluntarily agree to participate.

**Interim Measures Must be Specifically Tailored:** The new guidance clarifies that, while interim measures (e.g., counseling, extension of time or other course-related adjustments, modifications of work or class schedules, leaves of absences, etc.) may still be appropriate while an investigation is pending, schools "may not rely on fixed rules or operating assumptions that favor one party over another" when applying such measures. Rather, they must 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." They must also be available to both parties.

Notably, OCR issued this new guidance on an interim basis, while it begins the rulemaking process for developing formal regulations. In the interim, when investigating allegations of student sexual misconduct, schools may rely on the new Q&A, OCR's 2001 Revised Sexual Harassment Guidance, the 2006 Dear Colleague Letter on Sexual Harassment, and the Title IX statute and its implementing regulations.

In light of these changes, local educational agencies may need to review and revise their harassment policies and procedures to ensure compliance. If you have any questions regarding this new guidance or how your agency can ensure its policies are compliance, please call one of our six offices.

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