

CLIENT NEWS BRIEF

Significant New Title IX Guidance on Handling Sexual Misconduct: What Schools Need to Know

New guidance on schools' responsibilities for addressing claims of sexual misconduct under Title IX places greater emphasis on the rights of those accused of sexual misconduct. The new guidance marks a significant departure from prior guidance but lacks details, creating the potential for many issues requiring legal consultation.

On September 22, the United States Department of Education issued [interim guidance](#) on schools' responsibilities in addressing sexual misconduct and rescinded a 2011 Dear Colleague Letter (DCL) and a 2014 Q&A document, which were both intended to provide more support for those making sexual misconduct complaints. The Department plans to go through a notice and comment period before putting new, permanent guidance in place.

Separately, California lawmakers are seeking to return to the standards laid out in the 2011 DCL in Senate Bill (SB) 169, which was approved by the Legislature and is awaiting Governor Jerry Brown's signature or veto. If the bill is signed, educational institutions may wish to consult with legal counsel regarding potential conflicts between federal guidance and state law.

Title IX and Sexual Misconduct

Title IX requires educational institutions, including school districts, county offices of education and community college districts, to do the following:

- Designate a Title IX coordinator to accept reports of sexual misconduct and to oversee Title IX compliance;
- Investigate and respond to allegations of sexual misconduct involving students;
- Prior to investigating a complaint, offer assistance to complainants such as counseling, medical services and class schedule modifications;
- Provide both parties with an equal opportunity to present evidence;
- Notify parties of the outcome of the complaint; and
- Take steps to prevent recurrence of sexual misconduct and to remedy its discriminatory effects.

What Does the Interim Guidance Do?

The interim guidance, released as a Q&A document (2017 Q&A), changes how the Department will evaluate whether schools' procedures satisfy Title IX's procedural requirements. For example, it could loosen the time frame for investigating sexual misconduct claims and raise the standard of evidence required to prove them. It may also provide new rights for the accused, including the right to interim measures (described below) and written notice of the accusations against them.

Interim Measures

The 2017 Q&A makes it clear that interim measures must be extended, as

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appropriate, to both accused and complainants. Interim measures are temporary measures that are put into place to stop sexual misconduct, protect involved parties and preserve the integrity of the investigation. The 2014 Q&A had emphasized interim measures that avoided impact to the complainant's educational environment. The 2017 Q&A states that interim measures should "avoid depriving any student of his or her education" and 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 does not provide specific examples for evaluating the appropriateness of interim measures, but the revised wording and enhanced focus on the rights of the accused suggest that the Department may be more critical of procedures that do not give equal consideration to the interim needs of the accused and the complainant.

Investigation Time Frame

The 2017 Q&A provides that there is no fixed time frame in which schools are expected to complete an investigation. As a result, the suggested 60-day "safe harbor" period contained in the withdrawn guidance will apparently no longer be the bar against which the promptness of investigations is measured. Instead, while schools must still establish reasonable timelines, whether an investigation was in fact conducted timely will be measured on a case-by-case basis. Schools should be mindful of timelines that may apply to sexual misconduct complaints under their internal policies and state law, including the Uniform Complaint Procedures and Title 5 of the California Code of Regulations.

Disclosure of Information and Confidentiality

The 2017 Q&A provides that initial disclosures regarding allegations of sexual misconduct should be made to the accused if an educational institution initiates an investigation. The disclosure should be in writing and should include:

- 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.

The 2017 Q&A does not include procedures that would allow a complainant to request confidentiality. However, the Department's [2001 Revised Sexual Harassment Guidance](#), which remains in effect, provides that the institution should consider a student's request for confidentiality and evaluate the request in conjunction with its duty to provide a safe environment for all students. Educational institutions should consult with legal counsel prior to issuing this type of written notice to a responding party in cases where a student has requested confidentiality.

Informal Resolution and Mediation

The 2017 Q&A clarifies that informal resolution of complaints, including through a mediation process, may be deemed appropriate by a school if the parties involved agree to such a voluntary resolution after receiving full disclosure of the allegations and options for formal resolution. The 2011 DCL had expressly stated that mediation was not appropriate in cases of alleged sexual assault. The new guidance appears to grant schools discretion, with the consent of both complainant and accused, to use mediation even in cases of alleged sexual assault.

Standard of Proof

The 2017 Q&A provides discretion to educational institutions regarding the standard of proof to use in making findings of fact. Educational institutions may choose to apply either a preponderance of the evidence standard (i.e.,

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more likely than not) or a more rigorous clear and convincing evidence standard (i.e., substantially more likely than not). While an educational institution has the discretion to apply either standard, the 2017 Q&A provides that the standard selected for Title IX investigations should be consistent with the standard the school applies in all other student misconduct cases.

Written Reports/Notice of Findings of Fact

The 2017 Q&A provides that a written report summarizing the relevant evidence should be completed at the conclusion of each Title IX investigation. No specific guidance is provided in the 2017 Q&A regarding notice to the parties of the factual findings resulting from the investigation, other than to state that notice is required and that parties must have timely and equal access to any information that will be used during disciplinary proceedings that follow.

Disciplinary Hearings

The 2017 Q&A makes it clear for the first time that the investigation report must be offered to both parties if it will be used during any informal or formal disciplinary meeting or hearing, and that the parties should be given the opportunity to respond to the report in writing in advance of the decision of responsibility or a hearing to decide responsibility. The Department had not previously issued any guidance related to the disclosure of an investigation report in Title IX matters.

Educational institutions still have the option to offer the right to appeal the decision on responsibility and/or any disciplinary decision to both the complainant and the accused, though the 2017 Q&A permits schools to limit the right to appeal only to the accused. Similar to prior guidance, the 2017 Q&A recommends that written notice of the outcome of disciplinary proceedings be issued to both parties concurrently.

Going forward, the Department has said that in addition to the 2017 Q&A, schools may continue to rely its 2001 Revised Sexual Harassment Guidance as well as its [2006 DCL on Sexual Harassment](#) as it solicits input on new, permanent guidance. Additionally, any existing resolution agreements that educational institutions entered into with the Department's Office for Civil Rights will not be impacted by the change in guidance and will continue to be binding.

For questions about the significant changes made by the new guidance or Title IX obligations to address sexual misconduct in general, please contact the authors of this Client News Brief or an attorney at one of our [eight offices](#) located statewide. You can also visit our [website](#), follow us on [Facebook](#) or [Twitter](#) or download our [Client News Brief App](#).

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