



BOARD OF REGENTS

SUMMARY OF ITEM FOR ACTION,
INFORMATION, OR DISCUSSION

TOPIC: USM Institutions and New Title IX Guidance

COMMITTEE: Education Policy and Student Life

DATE OF COMMITTEE MEETING: Tuesday, November 14, 2017

SUMMARY: On September 22, 2017, the Department of Education disseminated new guidance on campus sexual misconduct matters. In the attached memorandum, the Office of the Attorney General has summarized that guidance and highlighted likely future changes in Department policy and shifts in areas of Department focus suggested by the interim guidance. In light of this guidance, USM and the Office of the Attorney General will host a convening on November 20, 2017 during which the attorneys will review this guidance and update the group on legal developments regarding due process considerations in Title IX proceedings. Dr. Boughman is bringing this update to the Committee at this time.

ALTERNATIVE(S): This is an information item.

FISCAL IMPACT: This is an information item.

CHANCELLOR'S RECOMMENDATION: This is an information item.

COMMITTEE RECOMMENDATION: Information Only DATE: November 14, 2017

BOARD ACTION: DATE:

SUBMITTED BY: Joann A. Boughman 301-445-1992 jboughman@usmd.edu

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Privileged and Confidential

MEMORANDUM

TO: Institution General Counsel

FROM: Katherine Bainbridge 

SUBJECT: Sept. 22, 2017 Dear Colleague Letter and Q&A on Campus Sexual Misconduct

DATE: September 28, 2017

On September 22, 2017, the Department of Education's Office for Civil Rights ("OCR") issued a *Dear Colleague Letter on Campus Sexual Misconduct*, which withdrew two former statements of policy and guidance: (1) the April 4, 2011 *Dear Colleague Letter on Sexual Violence*; and (2) the April 29, 2014 *Questions and Answers on Title IX and Sexual Violence*.¹ The Department has indicated that it will no longer rely on the withdrawn documents in its enforcement of Title IX. The Department's stated reasons for doing so include concerns about due process for students, a lack of clarity for institutions, and the absence of notice and an opportunity for public comment prior to those documents' publications.

Contemporaneously with its withdrawal of the 2011 and 2014 guidance documents, OCR issued a Questions and Answers document, titled *Q&A on Campus Sexual Misconduct*.²

OCR intends eventually to issue new policy through a rulemaking process that responds to public comment. In the meantime, it stated that it will continue to rely on its 2001 *Revised Sexual Harassment Guidance* document, which was informed by a notice and comment process, and on the *Dear Colleague Letter on Sexual Harassment* issued January 25, 2006, which reaffirmed the 2001 *Guidance*. Other related Department publications, including the April 2015

¹ Office for Civil Rights, *Dear Colleague Letter on Campus Sexual Misconduct* (Sept. 22, 2017), at 1, available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf>.

² Office for Civil Rights, *Q&A on Campus Sexual Misconduct* (Sept. 22, 2017), available at <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>.

Title IX Resource Guide, have not been withdrawn, and those publications' guiding principles remain applicable.

Below is a summary of predicted substantive changes in Department policy and expected Department focus areas regarding how institutions should respond to sexual misconduct, based upon indications in the September 22, 2017 *Q&A on Campus Sexual Misconduct*.

I. Indications of Future Changes in Department Policy

Based on indications in the September 22, 2017 *Q&A on Campus Sexual Misconduct*, we can expect the following substantive changes in Department of Education policy:

A. Investigatory Time Frame

Future Department policy will likely reflect a less stringent time frame within which institutional investigations must be completed. The Department's withdrawn guidance advised that a typical investigation should take approximately sixty (60) calendar days following receipt of the complaint. The 2017 *Q&A* omits reference to this typical 60-day time frame, stating that there is no fixed time frame for completing a Title IX investigation, and that OCR will evaluate an institution's good faith effort to conduct a fair, impartial investigation in a timely manner designed to provide all parties with resolution. The 2001 *Guidance* provides that whether complaint resolutions are timely will vary depending on the complexity of the investigation and the severity and extent of the harassment, and that institutional grievance procedures should designate prompt time frames for the major stages of the complaint process.

B. Standard of Proof

Future Department policy will likely provide for flexibility as to the evidentiary standard an institution may apply when determining whether the facts support a finding of responsibility. The Department's withdrawn guidance stated that an institution must apply a preponderance of the evidence standard. The 2017 *Q&A* states that institutions may apply either a preponderance of the evidence standard or a clear and convincing evidence standard. The Department also advises that the applicable standard of evidence for evaluating a claim of sexual misconduct should be consistent with the standard the institution applies in other student misconduct cases.

C. Informal Resolution/Mediation

Future Department policy may provide for more flexibility as to the use of informal resolution of complaints, but it is unclear to what extent it will do so. The Department's withdrawn guidance indicated that in cases involving allegations of sexual assault, mediation was never appropriate. The 2017 *Q&A* states that an institution may facilitate an informal resolution, including mediation, to assist the parties in reaching a voluntary resolution, if all parties voluntarily agree to participate after receiving a full disclosure of the allegations and their options for formal resolution, and if the institution determines that the particular Title IX complaint is appropriate for such a process. The 2017 *Q&A* does not specifically prohibit the use of informal resolution in cases involving allegations of sexual assault.

However, the 2001 *Guidance* states that in some cases, such as alleged sexual assaults, mediation will not be appropriate even on a voluntary basis. The 2001 *Guidance* also includes language found in the withdrawn guidance providing that it is not appropriate for a student who is complaining of harassment to be required to work out the problem directly with the individual alleged to be harassing him or her, and certainly not without appropriate involvement by the institution.

D. Cross-Examination

It is likely that future Department policy will provide for flexibility regarding an institution's use of cross-examination in disciplinary proceedings. In its withdrawn guidance, OCR strongly discouraged institutions from allowing parties to personally question or cross-examine each other during a hearing, but stated that if an institution permitted cross-examination, it had to do so equally for both parties. In the 2017 *Q&A*, the Department states that any process made available to one party in the adjudication procedure should be made equally available to the other party, including the right to cross-examine parties and witnesses or to submit questions to be asked of parties or witnesses.

E. Appeals

Under the Department's withdrawn guidance, institutions were advised to provide an appeals process. If an institution provided for appeal of the findings or remedy, it was required to do so for both parties, using the same type of review regardless of which party filed the appeal. In contrast, the 2017 *Q&A* states that if an institution chooses to allow appeals from its decisions regarding responsibility and/or disciplinary sanctions, the institution may choose to allow appeal solely by the responding party, and if the institution allows appeals by both parties, any procedures must be equally available to both parties. It is likely that future Department policy will permit institutions to allow appeal solely by the responding party or by both parties.

II. Indications of Heightened Department Focus Areas

Based on indications in the September 22, 2017 *Q&A on Campus Sexual Misconduct*, we can expect the following areas to be of heightened concern to the Department of Education:

A. Impartiality

Department guidance has consistently reflected the need for investigations to be impartial. The Department's withdrawn guidance stated that Title IX Coordinators should not have job duties that create a conflict of interest (e.g., serving as general counsel may create a conflict of interest). The Department has also stated that any real or perceived conflicts of interest between the fact-finder or decision-maker and the parties should be disclosed. The 2017 *Q&A* addresses impartiality concerns more broadly and in more detail than does prior guidance. Specifically, the *Q&A* focuses on decision-making techniques and approaches, investigative techniques and approaches, and training materials that apply sex stereotypes or generalizations, and states that these may violate Title IX and should be avoided so that the investigation and adjudication remain objective and impartial. It is likely that these concerns will also be addressed in future Department policy.

B. First Amendment and Free Speech Protections

The withdrawn Department guidance gave some attention to free speech concerns, stating that when an institution works to prevent and redress discrimination, it must respect the free speech rights of students, faculty, and other speakers. The *Q&A* indicates a heightened concern for First Amendment and free speech protections, stating that institutions must formulate, interpret, and apply their rules in a manner that respects the legal rights of students and faculty, including those court precedents interpreting the concept of free speech, when regulating the conduct of students and faculty to prevent or redress discrimination. This is consistent with the 2001 *Guidance*, which highlighted the need to protect academic freedom and free speech rights. It is likely that future Department policy will reflect and address these concerns.

C. Notice of Investigation

The 2017 guidance reflects more of a focus upon due process rights of respondents. The 2017 *Q&A* states that once an institution decides to open an investigation that may lead to disciplinary action against the responding party, the institution should provide written notice to the responding party of the allegations constituting a potential violation of the institution's sexual misconduct policy, including sufficient details and with sufficient time to prepare a response before any initial interview. The Department considers sufficient details to 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. Similar notice requirements are not found in prior Department guidance, and it is likely that this type of notice will be required in future Department policy.

D. "Gag Orders"

The *Q&A* provides new guidance regarding restrictions or "gag orders" on the ability of either party to discuss the investigation. The *Q&A* states 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 is therefore likely inequitable. It is possible that future Department policy will limit the use of such restrictions.

III. Conclusion

The September 22, 2017 *Dear Colleague Letter on Campus Sexual Misconduct* and *Q&A on Campus Sexual Misconduct* do not require institutions to depart from current USM and institutional policies and procedures. Although the *Q&A* creates more flexibility for institutions in some areas, USM BOR VI-1.60 University System of Maryland Policy on Sexual Misconduct remains in effect. That Policy requires that institutions:

- Generally complete investigations within 60 calendar days from the time a report is brought to the institution's attention;
- Apply a "preponderance of the evidence" standard of proof;
- Not require parties to attempt to resolve any sexual misconduct matter informally, and not require or allow mediation in sexual assault cases;
- Not allow a party to personally cross-examine another party; and

- Provide an appeal process that is equally available to both parties.

The above provisions, and all other provisions of USM BOR VI-1.60, remain consistent with currently applicable Department of Education guidance.

USM and the constituent institutions may wait until further Department policy is issued, following the Department's notice and comment process, to consider any changes to System or institutional policy. USM and the constituent institutions may participate in the notice and comment process. Any System or institutional policy changes should go through appropriate shared governance processes. In the meantime, institutions should be aware of the areas of heightened focus and continue to ensure that they are affording due process protections to all parties involved in Title IX matters.