

Impact of OCR's
2017 Directives on
Students accused of
Title IX Violations

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Today's Goal

- ▶ Present "*some*" nuts and bolts for navigating campus disciplinary proceedings in accordance with new – and newly important - directives from Dept. Of Ed.'s Office of Civil Rights (OCR).
 - ▶ Electronically provided reference materials
 1. OCR's Sept. 22, 2017 Dear Colleague Letter (2017 DCL);
 2. OCR's Sept. 22, 2017 Q&A on Campus Sexual Misconduct (2017 Q&A);
 3. OCR's Jan. 19, 2001 Revised Sexual Harassment Guidance (2001 Guidance); and
 4. Eric Rosenberg's accompanying paper (Paper).

Step One: In
university level
disciplinary
proceeding

- REVIEW COLLEGE'S POLICIES;
- IDENTIFY HELPFUL LAW AND/OR REGULATIONS;
- IDENTIFY VIOLATIONS OF CODES, LAWS AND/OR OCR GUIDANCE WITH FOCUS ON: 2017 DCL; 2017 Q&A AND 2001 GUIDANCE.

Can Title IX disputes be resolved informally under 2017 Q&A?

Page 4 of 2017 Q&A states: "[i]f all parties voluntarily agree to participate in an informal resolution that does not involve a full investigation and adjudication after receiving a full disclosure of the allegations and their options for formal resolution and if a school determines that the particular Title IX complaint is appropriate for such a process, the school may facilitate an informal resolution, including mediation, to assist the parties in reaching a voluntary resolution."

► *But see*, schools may reject requests for informal resolution because the 2001 Guidance states: "[i]n some cases, such as alleged sexual assaults, mediation will not be appropriate even on a voluntary basis."

Who has the burden of proof to establish a policy violation after the 2017 Q&A?

Page 4 of the 2017 Q&A notes: "[i]n every investigation . . . the burden is on the school—not on the parties—to gather sufficient evidence to reach a fair, impartial determination as to whether sexual misconduct has occurred"

► *But see*, 2001 Guidance do not identify who has the burden or proof in Title IX disciplinary proceedings.

How does the 2017 Q&A impact the standard of proof a school must apply?

Page 5 of 2017 Q&A requires: ". . . either a preponderance of the evidence standard or a clear and convincing evidence standard."

Moreover, footnote 19 prohibits schools from imposing a lower standard of proof for Title IX allegations by noting: "[t]he standard of evidence for evaluating a claim of sexual misconduct should be consistent with the standard the school applies in other student misconduct cases."

► *But see*, 2001 Guidance is silent regarding standard of proof issues.

Can schools discipline students based on complainant's subjective beliefs after the 2017 DCL?

Page 4 of 2017 Q&A requires colleges "objectively evaluate the credibility of parties and witnesses"

Page 5 of the 2001 Guidance states: "OCR considers a variety of related factors to determine if a hostile environment has been created . . . OCR considers the conduct from both a subjective and objective perspective. In evaluating the severity and pervasiveness of the conduct, OCR considers all relevant circumstances, i.e., "the constellation of surrounding circumstances, expectations, and relationships." Schools should also use these factors to evaluate conduct in order to draw commonsense distinctions between conduct that constitutes sexual harassment and conduct that does not rise to that level."

What due process or free speech protections are found in 2017 Q&A? Protections?

<p>2017 Q&A /page 2:</p> <ul style="list-style-type: none"> ▶ " . . . schools must . . . apply . . . rules in a manner that respects the legal rights of students . . . including . . . court precedents interpreting . . . free speech." 	<p>2001 Guidance/ page 22:</p> <ul style="list-style-type: none"> ▶ "The Constitution [] guarantees due process to students in public <u>and State-supported schools</u>. . . Title IX <u>must</u> be interpreted consistent with any federally guaranteed due process rights" ▶ "Title IX is [not] intended . . . to regulate the content of speech. OCR recognizes that the offensiveness of a particular expression as perceived by some students, standing alone, is not a legally sufficient basis to establish a sexually hostile environment under Title IX."
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How are interim measures (IM) addressed in 2017 Q&A?

1. IM's "include counseling, extensions of time or other course-related adjustments . . . and other similar accommodations."
2. IM are "appropriate . . . [both] prior to an investigation or while an investigation is pending."
3. In implementing IM, "a school may not . . . favor one party over another, nor . . . make such measures available only to one party."
4. In employing IM, a school shall "mak[e] every effort to avoid depriving any student of her or his education."
 - ▶ But see, 2001 Guidance silent on IM for accused students

What "notice" requirements exist in the 2017 Q&A?

Page 4 of 2017 Q&A notes once school: "decides to open an investigation that may lead to disciplinary action against the responding party, a school should provide . . . sufficient details . . . [which] 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."

- ▶ *But see*, the supporting 2001 Guidance cited by the 2017 Q&A only discuss the "the rights of the accused individual to receive information about the accuser and the allegations if a formal proceeding with sanctions may result."

How does the 2017 Q&A address an accused's time to prepare for encounters with the school?

Page 4 of the 2017 Q&A states that once a school: "decides to open an investigation that may lead to disciplinary action against the responding party, a school should provide . . . sufficient details and [] sufficient time to prepare a response before any initial interview."

- ▶ *But see*, supporting 2001 Guidance cited by 2017 Q&A do not address an accused's time to prepare for encounters with the school.

Can schools restrict the accused's gathering of evidence after the 2017 Q&A?

2017 Q&A notes: "[r]estricting the ability of either party to discuss the investigation (e.g., through 'gag orders') is likely to deprive the parties of the ability to obtain and present evidence or otherwise to defend their interests and therefore is likely inequitable."

- ▶ *But see*, supporting 2001 Guidance cited in 2017 Q&A does not explicitly prohibit a school's restrictions of a party's ability to obtain and present evidence.

How does the 2017 Q&A address the accused's response to allegations of misconduct?

Page 5 of 2017 Q&A states: "parties should have the opportunity to respond to the report in writing in advance of the decision of responsibility and/or at a live hearing to decide responsibility."

See also page 20 of 2001 Guidance which note: "Investigations must be adequate, reliable and impartial, including the opportunity for both parties to present witnesses and other evidence."

What type of investigation is required by 2017 Q&A?

Page 4 of 2017 Q&A mandates: "[a]n equitable investigation" by "a trained investigator" who must "objectively evaluate the credibility of parties and witnesses, synthesize all available evidence—including both inculpatory and exculpatory evidence—and take into account the unique and complex circumstances of each case."

- ▶ 2001 Guidance provides some guidance for the 2017 Q&A "credibility" and "exculpatory" mandates.

What does the 2017 Q&A have to say about the relevance of criminal investigations?

Page 1 of 2017 DCL noted the 2011 DCL: "forbade schools from relying on investigations of criminal conduct by law-enforcement authorities to resolve Title IX complaints."

But this limitation no longer exists because the 2001 Guidance states: "[p]olice investigations or reports may be useful in terms of fact gathering. However . . . police investigations or reports may not be determinative of whether harassment . . . and do not relieve the school of its duty to respond promptly and effectively."

What is the status of cross-examination and attorney participation after 2017 DCL?

Page 1 of the 2017 DCL took raised concerns about the 2011 DCL's Letter "discourage[ing] cross-examination by the parties"

As a result, page 5 of the 2017 Q&A gives the accused the right to cross-examination if the school allows the accuser to engage in cross-examination.

Similarly, page 5 notes: "[a]ny process made available to one party in the adjudication procedure should be made equally available to the other party (for example, the right to have an attorney or other advisor present and/or participate . . . or to submit questions to be asked of parties and witnesses)."

How must schools document evidence under the 2017 Q&A?

2017 Q&A states: "[t]he investigation should result in a written report summarizing the relevant exculpatory and inculpatory evidence." - AND - "The investigator(s), or separate decision-maker(s), with or without a hearing, must make findings of fact and conclusions . . . [i]f the complaint presented more than a single allegation of misconduct, a decision should be reached separately as to each allegation of misconduct."

► *But see*, neither 2001 Guidance nor C.F.R. mandate reports summarize exculpatory evidence and/or contain findings of fact and conclusions. For example, 34 C.F.R. 668.46(k)(3)(iv) requires schools to issue findings with a "the result [that] must also include the rationale for the result and the sanctions."

What information can the accused expect under the 2017 Q&A?

Page 4 of 2017 Q&A states: "[t]he reporting and responding parties and appropriate officials must have timely and equal access to any information that will be used during informal and formal disciplinary meetings and hearings."

Page 6 requires colleges provide "the results of the disciplinary proceeding" to "both parties" and "any changes to the result . . . notification must include any initial, interim, or final decision . . . and the rationale for the result and the sanctions."

Can the accuser appeal an adverse decision after 2017 Q&A?

Page 7 of 2017 Q&A states: ". . . . the school may choose to allow appeal (i) solely by the responding party; or (ii) by both parties"

- ▶ *But see*, page 5 notes: "[a]ny process made available to one party in the adjudication procedure should be made equally available to the other party."

What impact does the 2017 Q&A have on sanctions?

Page 6 of 2017 Q&A requires sanction factor in "the impact of separating a student from her or his education . . . [and] must be made as a proportionate response to the violation."

and

Put students on notice of possible sanctions by publishing the "sanctions that the institution may impose" with regard to Title IX offenses

- ▶ These sanction guidelines substantially similar to CFR and 2001 Guidance citations in 2017 Q&A.

Does 2017 Q&A void the 2011 DCL's 30-60 day suggestion for completing Title IX proceedings?

Page 3 of 2017 Q&A states: "There is no fixed time frame under which a school must complete a Title IX investigation . . . [rather schools should engage in a] good faith effort to conduct a fair, impartial investigation in a timely manner"

- ▶ *But see*, schools to continue to impose 30-60 day deadlines because the 2001 Guidance does not provide guidance on how many days schools should take to complete a Title IX proceeding.

Evidence gathering with eye towards litigation and rights afforded under OCR's 2017 directives

- FACT WITNESS AFFIDAVITS;
- INSTITUTIONAL AND KEY PLAYER GENDER BIAS EVIDENCE; AND
- GENDER BIAS WITNESS AFFIDAVITS.

Common Title IX Claims

- ▶ Erroneous outcome;
- ▶ Selective enforcement/hostile; environments; and/or
- ▶ Retaliation.

Raising bias and/or conflict of interest challenges after 2017 Q&A

2017 Q&A notes: "[a] person free of actual or reasonably perceived conflicts of interest and biases for or against any party must lead the investigation on behalf of the school. Schools should ensure that institutional interests do not interfere with the impartiality of the investigation."

Similarly, on page 5, OCR cautions schools "to avoid conflicts of interest and biases in the adjudicatory process and to prevent institutional interests from interfering with the impartiality of the adjudication. Decision-making techniques or approaches that apply sex stereotypes . . . may violate Title IX . . ."

- ▶ *But see*, schools may reject parties' conflict of interest or bias challenges because the 2001 Guidance does not address these issues.

Does the 2017 Q&A contemplate review of Title IX training materials and investigation techniques?

Page 4 of 2017 Q&A states: "[t]raining materials or investigative techniques and approaches that apply sex stereotypes or generalizations may violate Title IX and should be avoided so that the investigation proceeds objectively and impartially."

- ▶ *But see*, supporting C.F.R. cited in 2017 Q&A does not require the production of these materials.
- ▶ Similarly, the 2001 Guidance are silent on the production of training materials and/or investigative techniques.

Defensive odds and ends – part 1

- ▶ Goal: finding of innocence – or fall back position – discipline that College will agree to expunge at a later date.
- ▶ Develop strategy for how advisor will: (a) assist during interviews and/or hearings; (b) get documents into record.
- ▶ Support arguments with cites to code(s), law(s), and/or court decisions.
- ▶ Caution: If college refuses to correct major substantive and procedural errors, consider lawsuit seeking a restraining order stopping disciplinary procedure until errors are remedied.
- ▶ Drafting questions for investigators and/or hearing panel to ask complainant and witnesses.

Defensive odds and ends – part 2

- ▶ Pitfalls of using text messages and social media;
- ▶ Weigh benefits of limited disclosures when complaint alleges incapacitation caused accuser not to remember what happened;
- ▶ Research college codes and state laws regarding recording meetings and phone calls between respondent and third-parties without notifying third-party of recording.
- ▶ Consider polygraphs and/or SANE nurse to review medical records.
- ▶ Address intoxication vs. incapacitation disputes with third party affidavits or toxicologists when possible

Defensive odds and ends – part 3

- Criminal charge concerns;
- Disclose facts after allegations are presented to accused;
- Remember to request interim measures when necessary and request information on interim measures provided to accuser;
- bias or conflict challenges;
- Move to excluding inappropriate evidence;
- Create paper trial.

Questions / and Contact Information

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