

Fact checking the 2017 Interim Guidance on Sexual Violence

On September 22, 2017, Education Secretary Betsy DeVos and Candice Jackson, head of the Department of Education's Office for Civil Rights announced the rescission of the 2011 Guidance on Sexual Violence and the 2014 Questions and Answers (together, the Guidance), and issued interim guidance in the form of a Questions and Answers document. Secretary Betsy DeVos had announced her intention to rescind the Guidance in a speech on September 7, 2017. In her September 7 speech, and then again in the September 22 announcement and the letter accompanying the interim guidance, Secretary DeVos makes numerous false and misleading claims and allegations about the Guidance, many of which are directly contrary to what the Guidance actually says.

The table below, organized by issue area: (1) quotes the claims and allegations made by Secretary DeVos and Candice Jackson; (2) cites to what the Guidance actually states and provides; and (3) quotes what the interim guidance includes, if anything, in that issue area.

For ease of reference:

9/7 refers to the September 7 Speech.

9/22 Ltr. refers to the Dear Colleague Letter issued on September 22, 2017 accompanying the Interim Guidance.

IG refers to the Interim Guidance issued on September 22, 2017 (in the form of a Questions and Answers document)

Q&A refers to the Questions and Answers on Sexual Violence and Title IX issued on April 29, 2014.

DCL refers to the Dear Colleague Letter on Sexual Violence, dated April 4, 2011.

Note: This table does not include all areas addressed by the interim guidance and/or all areas where there may be differences between the 2011 DCL and 2014 Q&A, and the interim guidance just issued. The table focuses on the specific claims and allegations made by Secretary DeVos and in the letter accompanying the interim guidance on September 22, 2017.

Issue Area	DeVos Claim/Allegation	Guidance Language	Interim Guidance
Legal Standard	<p>“The 2011 Dear Colleague Letter required schools to adopt a minimal standard of proof— the preponderance-of-the evidence standard— in administering student discipline, even though many schools had traditionally employed a higher clear-and-convincing-evidence standard.” (9/22 Ltr. at 1)</p> <p>“Schools must use the lowest standard of proof.” (9/7)</p>	<p>TRUE w/r/t Use of POE standard: “Thus, in order for a school’s grievance procedures to be consistent with Title IX standards, the school must use a preponderance of the evidence standard (i.e., it is more likely than not that sexual harassment or violence occurred). The “clear and convincing” standard (i.e., it is highly probable or reasonably certain that the sexual harassment or violence occurred), currently used by some schools, is a higher standard of proof. Grievance procedures that use this higher standard are inconsistent with the standard of proof established for violations of the civil rights laws, and are thus not equitable under Title IX. Therefore, preponderance of the evidence is the appropriate standard for investigating allegations of sexual harassment or violence. “ DCL at 11.</p>	<p>The findings of fact and conclusions should be reached by applying either a preponderance of the evidence standard or a clear and convincing evidence standard. The standard of evidence for evaluating a claim of sexual misconduct should be consistent with the standard the school applies in other student misconduct cases.</p> <p>IG at 5.</p>
Free Speech	<p>“Too many cases involve students and faculty who have faced investigation and punishment simply for speaking their minds or teaching their classes.</p> <p>Any perceived offense can become a full-blown Title IX investigation.</p> <p>But if everything is harassment, then</p>	<p>FALSE. “The DCL on sexual violence did not expressly address First Amendment issues because it focuses on unlawful physical sexual violence, which is not speech or expression protected by the First Amendment.” Through previous guidance, “OCR has made it clear that the laws and regulations it enforces protect students</p>	<p>In regulating the conduct of students and faculty to prevent or redress discrimination, schools 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. IG at 2.</p>

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	<p>nothing is.</p> <p>Punishing speech protected by the First Amendment trivializes actual harassment. It teaches students the wrong lesson about the importance of free speech in our democracy.”</p> <p>(9/7)</p>	<p>from prohibited discrimination and do not restrict the exercise of any expressive activities or speech protected under the U.S. Constitution. Therefore, when a school works to prevent and redress discrimination, it must respect the free-speech rights of students, faculty, and other speakers.</p> <p>Title IX protects students from sex discrimination; it does not 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 hostile environment under Title IX. “</p> <p>(Q & A at 44.)</p> <p>Note: DeVos provides no examples of Title IX investigations of “students and faculty who have faced investigation and punishment for speaking their minds or teaching their classes.”</p>	
<p>Definition of Assault</p>	<p>“Schools have been compelled by Washington to enforce ambiguous and incredibly broad definitions of assault and harassment.” (9/7)</p>	<p>FALSE. Sexual harassment is unwelcome conduct of a sexual nature. It includes unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature. Sexual violence is a form of sexual harassment prohibited by Title IX.</p>	<p>Does not address.</p>

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		<p>DCL at 3.</p> <p>Note: The definition of sexual harassment has long been “unwelcome conduct of a sexual nature.” Secretary DeVos does not cite any examples of cases that raise concerns about the breadth and ambiguity of that definition.</p>	
<p>Presentation of Witnesses</p>	<p>“Whatever witnesses - if allowed to be called - may or may not be cross-examined.” (9/7)</p>	<p>FALSE. Throughout a school’s Title IX investigation, including at any hearing, the parties must have an equal opportunity to present relevant witnesses and other evidence. DCL at 11.</p> <p>“Title IX requires that a school adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints of sex discrimination, including sexual violence. In evaluating whether a school’s grievance procedures satisfy this requirement, OCR will review all aspects of a school’s policies and practices, including the following elements that are critical to achieve compliance with Title IX: provisions for adequate, reliable, and impartial investigation of complaints, including the opportunity for both the complainant and alleged perpetrator to</p>	<p>“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.” IG at 4.</p> <p>A school must adopt and publish grievance procedures that provide for a prompt and equitable resolution of complaints of sex discrimination, including sexual misconduct. OCR has identified a number of elements in evaluating whether a school’s grievance procedures are prompt and equitable, including whether the school . . . (iii) ensures an adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence.</p>

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		<p>present witnesses and evidence.” Q&A at 12.</p> <p>(Cross-Examination point addressed below]</p>	
Cross-Examination	<p>The Letter discouraged cross-examination by the parties, suggesting that to recognize a right to such cross-examination might violate Title IX. 9/22 Ltr. at 1)</p> <p>“Whatever witnesses - if allowed to be called - may or may not be cross-examined.” (9/7)</p>	<p>SCHOOL DECISION/FALSE. “OCR does not require that a school allow cross-examination of witnesses, including the parties, if they testify at the hearing. But if the school allows one party to cross-examine witnesses, it must do so equally for both parties. OCR strongly discourages a school from allowing the parties to personally question or cross-examine each other during a hearing on alleged sexual violence. Allowing an alleged perpetrator to question a complainant directly may be traumatic or intimidating, and may perpetuate a hostile environment. A school may choose, instead, to allow the parties to submit questions to a trained third party (e.g., the hearing panel) to ask the questions on their behalf. OCR recommends that the third party screen the questions submitted by the parties and only ask those it deems appropriate and relevant to the case.”</p>	<p>“Any 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 in an interview or hearing; the right to cross-examine parties and witnesses or to submit questions to be asked of parties and witnesses).” IG at 4.</p>

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Presentation of Evidence	“Whatever evidence is presented may or may not be shown to all parties.” (9/7)	FALSE. “The complainant and the alleged perpetrator must be afforded similar and timely access to any information that will be used at the hearing.” DCL 10.	“The decision-maker(s) must offer each party the same meaningful access to any information that will be used during informal and formal disciplinary meetings and hearings, including the investigation report.” IG at 4.
Training of Title Campus Officials	“[T]his campus official - who may or may not have any legal training in adjudicating sexual misconduct - is expected to render a judgment.” (9/7)	FALSE. “All persons involved in conducting a school’s Title IX investigations must have training or experience in handling complaints of sexual violence and in the school’s grievance procedures.” Q & A 25.	“An equitable investigation of a Title IX complaint requires a trained investigator to analyze and document the available evidence to support reliable decisions, 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.” IG at 4.
Notice of Complaint	“The accused may or may not be told of the allegations before a decision is rendered.”	FALSE. The DCL does not specifically address what information must be provided to the alleged perpetrator before a decision is rendered. The DCL does provide that “[t]he complainant and the alleged perpetrator must be afforded similar and timely access to any information that will be used at the hearing.” DCL 10. In addition, the DCL and Q&A both indicate that an investigation may not be	“Once it decides to open an investigation that may lead to disciplinary action against the responding party, a school should provide written notice to the responding party of the allegations constituting a potential violation of the school’s sexual misconduct policy, including sufficient details and with sufficient time to prepare a response before any initial interview.

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		<p>able to be pursued if the complainant is seeking to keep information about the allegations confidential, as that information should be shared with the alleged perpetrator.</p> <p>Both parties must be notified of the outcome of any complaint: “Title IX requires both parties to be notified, in writing, about the outcome of both the complaint and any appeal. OCR recommends that a school provide written notice of the outcome to the complainant and the alleged perpetrator concurrently.” Q&A 36.</p>	<p>Sufficient details 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. Each party should receive written notice in advance of any interview or hearing with sufficient time to prepare for meaningful participation.” The 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. IG at 5.</p>
<p>Right to Appeal</p>	<p>“The Letter insisted that schools with an appeals process allow complainants to appeal not-guilty findings, even though many schools had previously followed procedures reserving appeal for accused students.” (9/22 Ltr. at 1)</p> <p>“Right to appeal may or may not be available to either party.” (9/7)</p>	<p>SCHOOL DECISION/FALSE. “While Title IX does not require that a school provide an appeals process, OCR does recommend that the school do so where procedural error or previously unavailable relevant evidence could significantly impact the outcome of a case or where a sanction is substantially disproportionate to the findings. If a school chooses to provide for an appeal of the findings or remedy or both, it must do so equally for both parties.” Q&A 37.</p>	<p>If a school chooses to allow appeals from its decisions regarding responsibility and/or disciplinary sanctions, the school may choose to allow appeal (i) solely by the responding party; or (ii) by both parties, in which case any appeal procedures must be equally available to both parties. IG at 7.</p>

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<p>Relationship to Law Enforcement</p>	<p>“The Letter forbade schools from relying on investigations of criminal conduct by law-enforcement authorities to resolve Title IX complaints, forcing schools to establish policing and judicial systems while at the same time directing schools to resolve complaints on an expedited basis.” (9/22 Ltr. at 1)</p>	<p>FALSE. “OCR recommends that a school work with its campus police, local law enforcement, and local prosecutor’s office to learn when the evidence gathering stage of the criminal investigation is complete. A school may also want to enter into a memorandum of understanding (MOU) or other agreement with these agencies regarding the protocols and procedures for referring allegations of sexual violence, sharing information, and conducting contemporaneous investigations.” Q&A 28.</p> <p>“Of course, criminal investigations conducted by local or campus law enforcement may be useful for fact gathering if the criminal investigation occurs within the recommended timeframe for Title IX investigations; but even if a criminal investigation is ongoing, a school must still conduct its own Title IX investigation.” Q&A 27.</p>	<p>Does not address.</p>
<p>Speed of Resolution</p>	<p>The Letter provided that any due-process protections afforded to accused students should not “unnecessarily delay” resolving the charges against them. (9/22 Ltr. at 1)</p>	<p>TRUE. OCR will evaluate whether a school’s grievance procedures specify the time frames for all major stages of the procedures, as well as the process for extending timelines. Grievance procedures</p>	<p>“There is no fixed time frame under which a school must complete a Title IX investigation. OCR will evaluate a school’s good faith effort to conduct a fair, impartial investigation in a timely manner designed to provide all parties with resolution.” IG at 3.</p>

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		<p>should specify the time frame within which: (1) the school will conduct a full investigation of the complaint; (2) both parties receive a response regarding the outcome of the complaint; and (3) the parties may file an appeal, if applicable. Both parties should be given periodic status updates. Based on OCR experience, a typical investigation takes approximately 60 calendar days following receipt of the complaint. Whether OCR considers complaint resolutions to be timely, however, will vary depending on the complexity of the investigation and the severity and extent of the harassment. For example, the resolution of a complaint involving multiple incidents with multiple complainants likely would take longer than one involving a single incident that occurred in a classroom during school hours with a single complainant. DCL at 12-13.</p>	
<p>Access to Counsel</p>	<p>“If there is a hearing, both the survivor and the accused may or may not be allowed legal representation.” (9/7)</p>	<p>SCHOOL DECISION/FALSE. “OCR does not require schools to permit parties to have lawyers at any stage of the proceedings.” DCL 11. “If the school permits one party to have lawyers or other advisors at any stage of the</p>	<p>“Any 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</p>

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		<p>proceedings, it must do so equally for both parties. Any school-imposed restrictions on the ability of lawyers or other advisors to speak or otherwise participate in the proceedings must also apply equally.” Q & A 26.</p>	<p>present and/or participate in an interview or hearing; the right to cross-examine parties and witnesses or to submit questions to be asked of parties and witnesses). When resolving allegations of dating violence, domestic violence, sexual assault, or stalking, a postsecondary institution must “[p]rovide the accuser and the accused with the same opportunities to have others present during any institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice.” In such disciplinary proceedings and any related meetings, the institution may “[n]ot limit the choice of advisor or presence for either the accuser or the accused” but “may establish restrictions regarding the extent to which the advisor may participate in the proceedings.: IG at 4.</p>
<p>Interim Measures</p>	<p>Interim measures are imposed as punishment upon the accused. “While a Title IX complaint is pending, schools usually make academic accommodations. . . But there is a fundamental difference from making these sorts of accommodations for accusers - and schools which seek to</p>	<p>MISLEADING. “Title IX requires a school to take steps to ensure equal access to its education programs and activities and protect the complainant as necessary, including taking interim measures before the final outcome of an investigation.” Q & A 32.</p>	<p>“Interim measures are individualized services offered as appropriate to either or both the reporting and responding parties involved in an alleged incident of sexual misconduct, prior to an investigation or while an investigation is pending. Interim measures include counseling,</p>

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	<p>punish the accused before a fair decision has been rendered” (9/7)</p> <p>Note: Devos appears to suggest that no measures should be taken against the accused until the investigation is completed, even if the accused or others are retaliating against the complainant after the complaint is filed.</p>	<p>The interim measures are focused on the complainant and are not unilaterally imposed on the accused.</p> <p>Interim measures can include: “providing support services to the complainant; changing living arrangements or course schedules, assignments, or tests; and providing increased monitoring, supervision, or security at locations or activities where the misconduct occurred.” Q & A 33</p>	<p>extensions of time or other course-related adjustments, modifications of work or class schedules, campus escort services, restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of campus, and other similar accommodations.</p> <p>It may be appropriate for a school to take interim measures during the investigation of a complaint. In fairly assessing the need for a party to receive interim measures, 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. Interim measures should 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. The measures needed by each student may change over time, and the Title IX Coordinator should communicate with each student throughout the investigation to ensure that any interim measures are necessary and effective based on the students’ evolving needs.”</p>

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Process Used to Issue Guidance	“The Department imposed these regulatory burdens [i.e. the Guidance] without affording notice and the opportunity for public comment.”	FALSE. The Department issued the Guidance in response to requests from school administrators and from students for clarification of responsibilities under Title IX and its implementing regulations. The Department, along with other federal agencies, coordinated dozens of listening sessions and campus meetings to hear the concerns of stakeholders. The Guidance draws from dozens of investigations and reflects the input of students, faculty, administrators, staff, attorneys, sexual assault response teams, counselors, student advocates, medical personnel, parents, law enforcement, prosecutors and campus police.	
Responsibility of Schools	“Washington has insisted that schools step into roles that go beyond the mission of these institutions.” (9/7)	FALSE. In Secretary DeVos’s own words, in the same speech: Title IX has helped to make clear that educational institutions have a responsibility to protect every student’s right to learn in a safe environment and to prevent unjust deprivations of that right. (9/7)	
Burden on Schools	“Burdened schools with increasingly elaborate and confusing guidelines.” (9/7)	FALSE: The 2011 Letter is 19 pages long, and succinctly covers the multiple areas of schools’ responsibility under Title IX. The more extensive Q & A was issued in response to schools’ questions and requests for assistance, and served in primary part to clarify how the Department of Education would be conducting its own investigations of complaints under Title IX; the Q & A clarified but did not add any additional guidelines.	
Making of New Law.	“These guidance documents interpreted Title IX to impose new mandates related to the procedures by which educational institutions investigate, adjudicate, and resolve allegations of student on student sexual misconduct. “	FALSE: The Guidance did not make new law nor did it change the legal standards.	