

New Title IX Guidance: Here's What You Need to Know

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[Title IX of the Education Amendments Act of 1972 \(Title IX\)](#) is an important statute that prohibits sex discrimination in educational institutions that receive federal financial assistance. Despite its simple purpose, navigating the legal complexities of Title IX can be confusing. This is especially the case in the context of complaints regarding sexual violence.

Sexual violence generally refers to physical sexual acts taken against a person's will. It includes acts such as rape, sexual assault, sexual battery, and sexual coercion. Over the past several years, incidents of sexual assaults in educational institutions, in particular on college campuses, have garnered significant attention and spawned an evolving conversation about how to achieve an educational environment free from sexual violence.

While there is no doubt that sexual violence is a form of sex discrimination prohibited under Title IX, recent guidance from the U.S. Department of Education Office for Civil Rights (OCR), the agency that enforces Title IX, has created ambiguity around the scope of students' rights and universities' obligations regarding sexual violence under Title IX. In particular, on September 22, 2017, U.S. Secretary of Education Betsy DeVos rescinded the two OCR legal guidances on sexual violence under Title IX, namely the [2011 Dear College Letter \(2011 DCL\)](#) and [2014 Questions and Answers on Title IX and Sexual Violence \(2014 Q&A\)](#), and replaced them with an interim document, the [2017 Q&A on Campus Sexual Misconduct \(2017 Q&A\)](#).

Compared to the comprehensive 2011 DCL and 2014 Q&A, which totaled more than 70 pages, the 2017 Q&A is a brief seven-page document that provides a cursory discussion of the rights and obligations of students and schools regarding sexual violence (now referred to as "sexual misconduct") under Title IX.

On October 12, 2017, in response to Secretary DeVos's rollback of prior OCR guidance on sexual violence under Title IX, a group of Democratic lawmakers unveiled proposed legislation, the [Title IX Protection Act](#), that would codify the 2011 DCL and 2014 Q&A, as well as the [Revised Sexual Harassment Guidance \(2001 Guidance\)](#) OCR issued on January 19, 2001.

What's the Status of Title IX Today?

The rescission of old rules, introduction of interim rules, and injection of proposed counter-legislation have created understandable confusion around the current scope of students' rights and universities' obligations regarding sexual violence under Title IX.

Here is what you need to know about sexual misconduct and Title IX at educational institutions today.

Sexual misconduct is a form of sex discrimination prohibited under Title IX.

Schools covered under Title IX must adopt and enforce grievance procedures that are designed to promptly and equitably

resolve complaints of sexual misconduct and ensure that no student is denied the ability to participate in or benefit from the educational program based on sex.

There is no specific formula schools must use to develop a set of “prompt and equitable” grievance procedures, but some elements OCR identified in its 2001 Guidance, upon which the 2017 Q&A relies, as important considerations in assessing a school’s grievance procedures include whether the grievance procedures:

- Provide notice to students of the procedure, including where to file a complaint;
- Provide for the adequate, reliable, and impartial investigations of complaints;
- Provide for identified and reasonably prompt timeframes for the major stages of the complaint; and
- Provide notice to the parties of the outcome of the complaint.

Once a school has notice of possible sexual harassment of a student, it must take steps to determine what occurred and respond appropriately.

Typically, the school’s response to a complaint of sexual harassment will involve an investigation into the student’s claims. Although OCR previously directed schools to apply a “preponderance of the evidence” standard to determine whether sexual misconduct had occurred, the 2017 Q&A now permits schools to choose whether to apply a “preponderance of the evidence” standard or “clear and convincing” evidence standard in determining whether sexual misconduct has occurred.

- The **preponderance of the evidence** standard requires a showing that more than 50 percent of the evidence supports a finding that sexual misconduct occurred.
- The **clear and convincing evidence** standard requires a showing that it is substantially more likely than not that sexual misconduct occurred.

After the school opens up an investigation, it may facilitate an informal resolution of the complaint if both parties agree to do so. Although OCR previously said that mediation was an inappropriate resolution mechanism in sexual misconduct cases, the 2017 Q&A now identifies mediation as an appropriate informal resolution forum, even in sexual misconduct cases.

Upon resolution of the student’s complaint of sexual misconduct, the school must notify the student who brought the complaint of the outcome, i.e., whether or not harassment was found to have occurred. Under the 2017 Q&A, OCR recommends that the school provide written notice of the outcome of disciplinary proceedings to both parties at the same time.

Additional Options for Victims

It is important to note that students who believe they are victims of sexual misconduct at educational institutions covered under Title IX are not limited to adjudicating their claims internally within the university. If a student believes that his or her school failed to meet its [obligations under Title IX](#) by failing to promptly resolve his or her complaint of sexual misconduct, the student may file an administrative complaint with OCR asking it to investigate the school’s conduct and requesting that the school rectify the violation. Individuals seeking to file an administrative complaint with the OCR should be cognizant of [OCR filing requirements](#), in particular OCR’s requirement that complaints alleging Title IX discrimination or retaliation must be filed within 180 calendar days of the last act of discrimination or retaliation.

In addition to administrative relief, students may also pursue a private right of action in court seeking monetary damages for sexual harassment, including sexual misconduct. Title IX, nor its implementing regulations, provide for a private right of action, but the Supreme Court of the United States has implied such a right. Under this precedent, “a school can be liable for monetary damages if a teacher sexually harasses a student, an official who has authority to address the harassment has actual knowledge of the harassment, and that official is deliberately indifferent in responding to the harassment.” U.S. Department of Education Office for Civil Rights, [Revised Sexual Harassment Guidance: Harassment of Students By School Employees, Other Students, or Third Parties](#) (66 Fed. Reg. 5512, Jan. 19, 2001) (citing *Gesber v. Lago Vista Independent School District*, 524 U.S. 274 (1998)).

Similarly, a school may also be liable for monetary damages if “one student sexually harasses another student in the school’s program and the conditions of *Gesber* are met.” *Id.* Like administrative actions, an individual must file his or her Title IX action in court within a certain time period from the last act

of discrimination or retaliation. The statute of limitations for filing a private right of action varies by jurisdiction.

Students Deserve a Harassment-Free Environment

Sex discrimination in any form has a profound impact on students. Sexual misconduct is a uniquely harmful form of sex discrimination that violates a student's physical autonomy and right to be free from discrimination based on sex. Secretary DeVos's rescission of the 2011 DCL and 2014 Q&A undermined important rights previously afforded to victims of sexual misconduct and created confusion around the current scope of rights for students. But the introduction of legislation like the Title IX Protection Act serves an important reminder that the conversation around sexual misconduct against students is an evolving one, and one that we should continue to take a part in to ensure that students have access to an educational experience free from sexual misconduct.