



Detailed, Annotated Summary of OCR’s “Q&A on Campus Sexual Misconduct” (September 2017)

Below is a detailed, itemized summary of OCR’s Interim Guide, “Q&A on Campus Sexual misconduct.” Each *italicized* section represents a change in OCR’s stance or, in some cases, a new stance not previously articulated in guidance.¹

Actual or Constructive Notice

- OCR Maintains an actual or constructive notice standard (“knew or should have known”) as triggering an institution’s obligations under Title IX.

Hostile Environment

- Maintains definition of a hostile environment, “when sexual misconduct is so severe, persistent, or pervasive as to deny or limit a student’s ability to participate in or benefit from the school’s programs or activities, a hostile environment exists and the school must respond.”

Title IX Coordinator

- Schools “must designate at least one employee to act as a Title IX Coordinator to coordinate its responsibilities in this area.”
- 2015 DCL to Coordinators is still in place.

Responsible Employees

- OCR provides little information other than that employees may be designated as such.

Consistent with Laws

- Schools “must formulate, interpret, and apply their rules” in a manner consistent with laws, court decisions and the First Amendment.

Clery/VAWA

- Schools must uphold Clery/VAWA and Title IX (if applicable) when addressing issues of dating violence, domestic violence, sexual assault and stalking.

¹ While OCR’s Interim Guide did not address all of the substantive guidance provided in the 2011 DCL, schools should be aware that with the rescission of that guidance, many other issues may be in limbo or in play, even if not specifically mentioned by OCR in the Interim Guide. Additionally, this document is provided as a service to ATIXA members and does not represent legal advice. Individuals and institutions should consult with their attorney prior any changes in policies, procedures or practices.

Interim Measures

- *“Interim measures” are “individualized services” provided to BOTH reporting party and responding party prior to resolution of an allegation.*
- *Key elements regarding interim measures:*
 - *Institutions cannot “rely on fixed rules or operating assumptions that favor one party over another.”*
 - *Institutions cannot make “measures available only to one party.”*
 - *Should be “individualized and appropriate” for the circumstances.*
 - *May change over time.*
 - *Schools should make “every effort to avoid depriving any student of his or her education.”*
 - *The Coordinator should communicate regularly with the parties to ensure any interim measures are “necessary and effective.”*

Prompt and Equitable

- *“A school must adopt and publish grievance procedures that provide for a prompt and equitable resolution of complaints of sex discrimination, including sexual misconduct.”*

Prompt and Equitable procedures:

- *Provide “notice of the school’s grievance procedures, including how to file a complaint, to students, parents of elementary and secondary school students, and employees.”*
- *Apply “the grievance procedures to complaints filed by students or on their behalf alleging sexual misconduct carried out by employees, other students, or third parties.”*
- *Ensure “an adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence.”*
- *Designate “and follows a reasonably prompt time frame for major stages of the complaint process.”*
- *Notify “the parties of the outcome of the complaint.”*
- *Provide “assurance that the school will take steps to prevent recurrence of sexual misconduct and to remedy its discriminatory effects, as appropriate.”*

Prompt

- *“Prompt” is shifted from a 60-day time limit to providing “no fixed time frame.”*
- *OCR will examine a school’s response to see if the school used a “good faith effort” to provide a prompt, fair and impartial resolution in a timely manner.*

Equitable

- *School has the burden of gathering evidence and information, not the parties.*
- *Investigation must be led by someone who is “free of actual or reasonably perceived conflicts of interest and biases for or against any party.”*
- *Ensure institutional interests do not interfere with the impartiality of the investigation*
- *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.*
- *Rights afforded to the parties should be on “equal terms.”*

- *Gag orders and similar actions restricting the parties from discussing the investigation with others are likely inequitable because they may inhibit ability of the parties to obtain and present evidence and defend their interests.*

Sex stereotypes and generalizations:

- *Are improper and possibly inequitable in training materials or investigative techniques or approaches.*
- *Decision-making techniques or approaches that apply sex stereotypes or generalizations may infringe on objectivity and impartiality and therefore violate Title IX.*

Notice of Investigation

- *Written, detailed notice of investigation should be provided to the responding party once a school has decided to pursue an investigation.*
- *The Notice of Investigation should include sufficient details, including:*
 - *Identity of the parties involved.*
 - *Specific policies allegedly violated.*
 - *Precise misconduct alleged.*
 - *Date of the alleged incident.*
 - *Location of the alleged incident.*

Notice of Interview

- *Provide parties advanced, written notice of any interview “with sufficient time to prepare for meaningful participation.”*

Notice of Hearing

- *Provide parties advanced, written notice of any hearing “with sufficient time to prepare for meaningful participation.”*

Investigation Report

- *“Investigation should result in a written report summarizing the relevant exculpatory and inculpatory evidence.”*

Access to information

- *School must provide the reporting party, the responding party and appropriate officials with “timely and equal access to any information that will be used during informal or formal disciplinary meetings and hearings.*
- *Decision-maker must provide the parties with “the same meaningful access to any information that will be used during informal and formal disciplinary meetings and hearings, including the investigation report.”*

Informal Resolution

- *Defined as a process that reaches a mutually voluntary resolution that “does not involve a full investigation and adjudication...including mediation.”*
- *Informal resolution is permissible if:*
 - *All parties voluntarily agree to engage in informal resolution.*
 - *Parties have received a full disclosure of the allegations.*
 - *Parties have received a full disclosure of their resolution options.*
 - *School determines the complaint is appropriate for informal resolution.*

Decision-Maker

- Can be an investigator or a separate decision-maker.
- Finding need not come from a formal hearing (investigation-based decision is permissible).
- Should focus on whether the conduct violated school's policies.
- Should make a decision on each of the alleged violations.
- No formal hearing is necessary.

Standard of Proof

- *School may use either Preponderance of the Evidence OR Clear and Convincing.*
- *Whatever standard is used, the school must use the same standard for all other student misconduct cases.*

Right to Respond to the Investigation Report

- *Parties should be provided the opportunity respond in writing to the investigation report before a finding is made and/or before a hearing.*

Equal Rights in the Process

- Parties should have equal rights in the resolution process (e.g.: right to have an attorney present, cross-examination of parties and witnesses, participate in an interview or hearing, submit questions to be asked of parties and witnesses).

Advisors

- Must allow the parties equal rights in terms of advisors in the process.
- OCR restates VAWA-based requirement for allegations of dating violence, domestic violence, sexual assault and stalking, to provide parties the opportunity to have advisor of their choice in all meetings and hearings. The school cannot limit who that advisor is, but can limit their level of participation in the proceedings.

Sanctioning

- *The decision-maker can also determine the sanction, or sanction can be determined by someone else.*
- *Sanctioning should "be made for the purpose of deciding how best to enforce the school's code of conduct."*
- *Sanctioning should also account for the impact of "separating a student from his or her education."*
- *Sanctions must represent a "proportionate response to the violation"*
- OCR restates the VAWA requirement that a college or university list all possible sanctions for dating violence, domestic violence, sexual assault and stalking in its Annual Security Report.

Notice of Outcome

- OCR recommends that written notice of outcome is provided currently to the reporting party and the responding party.
- Content of the notice of outcome may vary based on the nature of the allegations, the institution, and the age of the parties.

- OCR restates the Clery requirement for colleges and universities to provide the parties with:
 - Simultaneous, written notification of the disciplinary proceeding.
 - Institution’s procedures for appeal (if any).
 - Any change “to the result when it becomes final.”
 - Must include “any initial, interim or final decision”
 - Any sanctions imposed.
 - Rationale for the results.
 - Rationale for the sanctions.
- For non-Clery-based allegations (harassment, K-12, etc.), “the school should inform the reporting party:
 - *Whether it found that the alleged conduct occurred,*
 - *Any individual remedies offered to the reporting party, or*
 - *Any sanctions imposed on the responding party that directly relate to the reporting party,*
 - *Other steps the school has taken to eliminate the hostile environment (if the school found one to exist).”*
 - *In K-12, notice should be provided to parents if the student is <18 yrs. old and to the student if <18 yrs. old.*

Appeals

- Are not required
- *A school does NOT need to provide the parties the same rights to appeal.*
- *A “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.”*

Existing Resolution Agreements

- Remain in full effect