

## Higher Education

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## ALERT

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## BEWARE OF IMPLEMENTING 2017 Q&A SEXUAL MISCONDUCT GUIDANCE: VAWA AND CLERY ACT REMAIN THE LAW (FOR NOW)

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On September 22, the Department of Education issued [this announcement](#) formally withdrawing the statements of policy and guidance in its [2011 Dear Colleague Letter on Sexual Violence](#) and its [2014 Questions and Answers on Title IX and Sexual Violence](#).

The Department issued a new [Q&A on Campus Sexual Misconduct](#) (“2017 Guidance”) explaining its interim enforcement approach while new regulations are developed. The 2017 Guidance largely allows schools the leeway to keep the Title IX policies they adopted to comply with the 2011 guidance, or to revert to pre-2011 practices.

But, beware. The amendments to the Clery Act made by the Violence Against Women Reauthorization Act of 2013 (VAWA 2013), which carved out very specific special rules for sexual assault, domestic violence, dating violence, and stalking *have not been repealed* by Secretary of Education Betsy DeVos’ announcement nor by the Department’s 2017 Guidance. Because many, if not most, allegations of “sexual misconduct” will likely also fall within VAWA definitions of “sexual assault,” “domestic violence,” “dating violence” or “stalking,” institutions must remain cognizant of their obligations under VAWA. Likewise, the recent announcement does not roll back other

Department of Education Dear Colleague Letters (“DCLs”) addressing the same issue, such as the 2015 DCL regarding Title IX Coordinators. (See our [Alert](#) on this topic.)

The main point of Secretary DeVos’ letter is to urge institutions to treat both accusers and the accused the same. To this end, the September 22 Q&A document makes the following points, among others.

1. Duty to Investigate During Pending Criminal Investigation

In 2011, the Department mandated that schools conduct their own Title IX investigations regarding alleged incidents of sexual misconduct, even if a criminal investigation regarding the same incident was ongoing. Although the new guidance rolls back this mandate, it falls short of recommending that institutions defer to criminal investigations. The current guidance provides that a school should “take steps to understand what occurred and respond appropriately” when it “knows or reasonably should know of an incident of sexual misconduct.”

2. Burden of Proof

The 2011 guidance required schools to adopt the preponderance of the evidence standard in

administering student discipline. The new guidelines advise schools to apply “either a preponderance of the evidence standard or a clear and convincing evidence standard.”

“Clear and convincing evidence” is a higher standard than “preponderance of the evidence,” the standard in most civil cases. However, both standards are lower than the “beyond a reasonable doubt” standard used in criminal proceedings.

### 3. Cross-examination

The previous guidance discouraged cross-examination by the parties. The 2017 guidance walks this back, stating that any process made available to one party (including cross-examination) should be made equally available to the other party. Courts have been weighing in on this subject as well, most recently the Sixth Circuit in an opinion this week. The Court ruled that cross examination may be essential to due process when a violation rests on credibility determinations and fact finders must choose between believing the accuser or the accused. *Doe v. University of Cincinnati*, No. 16-4693 (6<sup>th</sup> Cir. Sept. 25, 2017), Slip op. at 16.

### 4. Appeals

The 2011 guidance required that schools with an appeals process allow complainants to appeal not-responsible findings. The new guidance removes this requirement and allows schools to reserve appeals for the responding party, to allow appeals from both parties or to have no appeal process at all. “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.”

#### A Note of Caution

VAWA 2013 amended the Clery Act to require higher education institutions to compile statistics on dating violence, domestic violence, sexual assault and stalking, and to describe their

disciplinary proceedings, protective measures, and other relevant policies pertaining to these incidents. In 2014, the Department issued regulations implementing the statutory changes. *These disclosure requirements remain in effect.* Institutions still must:

- Track incidents of dating violence, domestic violence, sexual assault and stalking which are reported to campus security authorities or to local police;
- Withhold victim names in campus security alerts issued due to threats to the campus;
- Maintain policies to prevent domestic violence, dating violence, sexual assault and stalking, including in policies:
  - the institution’s procedures to respond to reported incidents of domestic violence, dating violence, sexual assault and stalking;
  - a statement of the standard of evidence that the institution will use during any conduct proceeding arising from such a reported incident of domestic violence, dating violence, sexual assault or stalking;
  - a listing of potential sanctions and protective measures that the institution may impose through its disciplinary procedure;
  - information about confidentiality;
  - written information regarding community resources; and
  - information about how students can request academic and other accommodations, among other requirements.
- Maintain procedures for reporting a sex offense, or an incident of domestic violence, dating violence, sexual assault or stalking that:

- provide options for law enforcement involvement and campus authorities as well as the option to decline to notify such authorities;
  - provide a prompt, fair and impartial investigation, conducted by officials who receive training on issues related to domestic violence, dating violence, sexual assault and stalking;
  - offer the accuser and the accused the same opportunities to have others present during an institutional proceeding, by an adviser of their choice;
  - simultaneously notify the accuser and the accused of the outcome of any disciplinary hearings regarding domestic violence, dating violence, sexual assault or stalking.
- Offer educational programs:
    - to all new employees and incoming students;
    - addressing awareness of rape, acquaintance rape, domestic violence, dating violence, sexual assault and stalking;
    - providing notice that the institution prohibits domestic violence, dating violence, sexual assault and stalking;
    - providing the definitions of the prohibited conduct of domestic violence, dating violence, sexual assault and stalking;
    - providing the definition of consent used by the local jurisdiction;
    - providing examples of safe and positive options for bystander intervention; and
    - advising on risk reduction and warning signs of abusive behavior.

Institutions who seek to make changes to their procedures for responding to complaints of sexual misconduct should be cognizant of the VAWA requirements as well as the Title IX requirements enforced by the Department of Education. ◆

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