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TOPIC:

Key Aspects of the 2017 Title IX Q&A: Practical Tips During the Interim Regulatory Period

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INTRODUCTION:

On September 7, 2017, in a speech at George Mason University, Betsy DeVos, Secretary of the U.S. Department of Education (“Department”), announced that the Department plans to publish a Notice of Proposed Rulemaking (“NPRM”) on Title IX and student sexual misconduct.^[2] The Secretary’s remarks emphasized a continued commitment to addressing and remedying sexual misconduct on campus, while signaling some of the Department’s concerns about campus policies and processes implemented in response to the Office for Civil Rights’ (“OCR”) 2011 “Dear Colleague” Letter on Sexual Violence^[3] and its 2014 “Questions and Answers on Title IX and Sexual Violence”^[4] (collectively, “2011 and 2014 Guidance”). Consistent with these remarks, on September 22, 2017, OCR withdrew the 2011 and 2014 Guidance^[5] and contemporaneously issued a companion document, in question-and-answer format, to guide colleges and universities as they endeavor to fulfill Title IX obligations during the interim regulatory period (“2017 Q&A”).^[6] The Department has indicated^[7] that the 2017 Q&A is not intended to be prescriptive but rather to highlight for institutions how OCR intends to evaluate an educational institution’s compliance with Title IX.

The Secretary’s remarks, withdrawal of the 2011 and 2014 Guidance, and issuance of the 2017 Q&A all suggest the Department will take a different approach in the new regulations on some aspects of Title IX enforcement than was taken in the 2011 and 2014 Guidance. Importantly, the 2017 Q&A affords increased flexibility to colleges and universities, for example, by eliminating

the requirement that Title IX investigations be concluded within 60 days, by permitting colleges and universities to use a higher standard of proof, by allowing colleges and universities to choose whether to limit the option for appeal to one party, and by permitting the use of mediation as a form of informal resolution in appropriate circumstances.^[8] Whether institutions revise policies and procedures to avail themselves of this increased flexibility is left solely within the discretion of each institution. OCR has indicated that until final regulations are issued, colleges and universities need not disturb existing policies and procedures, provided that they afford a fair process to all parties and are not otherwise inconsistent with the 2017 Q&A.

This NACUANOTE will identify key aspects of the 2017 Q&A, describe how this new guidance differs from the withdrawn 2011 and 2014 Guidance, and address questions that have been raised about the 2017 Q&A.

DISCUSSION:

A. Overview of Existing Laws, Regulations, and Guidance

Title IX and the Violence Against Women Reauthorization Act (“VAWA”) continue to impose on colleges and universities a legal obligation to address and remedy discrimination based on sex, including in the form of sexual harassment and sexual violence.^[9] The Department’s withdrawal of the 2011 and 2014 Guidance does not alter that obligation, nor does it absolve institutions of any contractual commitments made through campus policies. The existing Title IX regulations, implemented in 1975, continue to require, among other things, that educational institutions adopt and publish grievance procedures allowing for the prompt and equitable resolution of complaints of sex discrimination. Moreover, VAWA and its implementing regulations under the Clery Act (“VAWA and the Clery regulations”), impose additional obligations with respect to reports of sexual assault, dating violence, domestic violence, and stalking, including a duty to administer “prompt, fair, and impartial” disciplinary proceedings, offer and implement interim protective measures, and provide equal and timely access to information that will be used in informal or formal disciplinary proceedings or meetings. The Clery regulations also require written notification to the parties of the outcome of a proceeding, and offer parties the opportunity to be accompanied by an advisor of their choice to any disciplinary proceeding or related meeting.^[10] An institution’s Title IX obligations as set forth in the statute itself and its long-standing regulations, and the more specific obligations set forth through VAWA and the Clery regulations, remain intact.^[11]

In addition to statutory and regulatory requirements, OCR has identified additional sources of sub-regulatory guidance that will inform its enforcement posture during the interim regulatory period. In the 2017 Q&A, OCR affirmed that it will continue to rely on its 2001 *Revised Sexual Harassment Guidance*^[12] in its enforcement of Title IX, at least where the 2017 Q&A is silent on a given issue.^[13] This 39-page document, which underwent a notice-and-comment period prior to its publication in 2001, addresses institutional obligations with respect to on- and off-campus student sexual misconduct, lays out an institution’s responsibilities in addressing sexual harassment, provides instruction on how to respond to a complainant’s request for anonymity, and explores the intersection of the First Amendment with Title IX, among other topics.^[14]

Other sub-regulatory guidance that remains in place includes OCR’s August 24, 2015 Dear Colleague Letter on Title IX Coordinators,^[15] the April 24, 2013 Dear Colleague Letter on Retaliation,^[16] the October 26, 2010 Dear Colleague Letter on Harassment and Bullying,^[17] and the 2003 Guidance on the First Amendment and Title IX.^[18] The 2015 Guidance outlines

an institution's responsibility to designate and adequately train a Title IX Coordinator and also sets forth a Title IX Coordinator's responsibilities. While this guidance includes some expectations that institutions may have considered but elected not to operationalize (e.g. guidance specifying that the institution's Title IX Coordinator "should report directly to the recipient's senior leadership, such as the district superintendent or the college or university president"),^[19] most read this non-binding, sub-regulatory guidance to be consistent with the long-standing regulatory requirement that institutions "designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under [Title IX]."^[20]

OCR's 2003 Guidance on the intersection of the First Amendment and Title IX also remains intact, signaling the Department's intent to enforce Title IX consistent with the constitutional guarantees of the First Amendment, to the extent such guarantees are applicable.

As institutions evaluate and implement their Title IX policies and procedures during this interim period pending further regulatory developments, they will be well-served to ensure they consider Title IX, VAWA and the Clery regulations, the 2017 Q&A, the 2001 Guidance, and the other Dear Colleague letters referenced in this NACUANOTE.

B. Key Aspects of the 2017 Q&A

In the wake of the 2017 Q&A, questions have been percolating on a range of topics with respect to the Department's position, such as the obligation to address off-campus misconduct, whether there is an obligation to administer all student conduct proceedings using a uniform standard of proof or even uniform processes, and the fair administration of interim measures. Drawing from the operative legal documents identified in Part A, as well as from content delivered through a September 28, 2017 NACUA Briefing by the Acting Assistant Secretary for the Office for Civil Rights, the remainder of this NACUANOTE addresses these questions.

1. What Triggers an Investigation?

a. What constitutes the start of an investigation under Title IX?

Preliminarily, it is important for institutions to understand not only what triggers an investigation but, in fact, what *constitutes* the start of an investigation under Title IX. In its 2017 Q&A, OCR states:

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**. 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.^[21]

Schools have different approaches to the question of under what circumstances students must receive notice of the allegations against them, balancing the need to provide appropriate notice with the desire to obtain relevant information. Institutions are encouraged to ensure they are clear as to when the "open investigation" obligation attaches under their specific policies.

b. When does conduct amount to sexual harassment under Title IX?

The 2017 Q&A does not define the term “sexual harassment,” but obligates colleges and universities to respond to a hostile environment arising from conduct that 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.”^[22] This obligation implies a shared understanding of what constitutes sexual harassment under longstanding Department of Education and U.S. Supreme Court precedent.

One can start by looking to the 2001 Guidance, which adopts the definition of sexual harassment set forth in *Davis v. Monroe County Bd. of Education*. In *Davis*, the U.S. Supreme Court defined sexual harassment as sex-based conduct that is “so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.”^[23] The 2001 Guidance specifies that the conduct must be evaluated “from the perspective of a reasonable person in the alleged victim’s position, considering all the circumstances,”^[24] and, relatedly, the conduct in question must be considered “from both a subjective and objective perspective.”^[25] “Whether gender-oriented conduct rises to the level of actionable ‘harassment’ . . . ‘depends on a constellation of surrounding circumstances, expectations, and relationships,’”^[26] including, but not limited to, the ages of the harasser and the complainant and the number of individuals involved.^[27] A single instance of severe misconduct may amount to a hostile environment.^[28]

Preliminarily, an institution must determine whether a report alleges conduct that would trigger legal obligations under Title IX. A routine roommate conflict, even if labeled by one student as “harassment” in a colloquial sense, may or may not implicate sex-based discrimination and therefore trigger institutional obligations under Title IX.^[29] Institutions should continue to make this preliminary assessment, consistent with the established legal definition of sexual harassment.^[30]

c. When does an institution have an obligation to address and remedy off-campus sexual misconduct?

The Department’s 2001 Guidance is instructive on when colleges and universities must address off-campus misconduct. It sets forth a two-pronged inquiry: (1) Does the conduct deny or limit a student’s ability to participate in or benefit from a program based on sex, and (2) if yes, what is the nature of the school’s responsibility to address the conduct?^[31]

As to the first prong, the 2001 Guidance reminds institutions that Title IX protects students from harassment in any “education program or activity,” a protection that extends broadly to all “academic, educational, extra-curricular, athletic, and other programs of the school whether they take place in the facilities of the school, on a school bus, at a class or training program sponsored by the school at another location, *or elsewhere*.”^[32] It is important to bear in mind that institutions remain responsible for addressing off-campus conduct when such conduct results in a hostile environment on campus.^[33] For example, if a student alleges that she was sexually assaulted by another student off-campus, the institution may have a duty under Title IX to take further action if the two students are in the same class or, depending on the size of the campus and other considerations, even just by virtue of the fact that they are both enrolled at the institution.

The second prong hinges on “the nature of the school’s responsibility to address that conduct,” which depends on both “the identity of the harasser and the context in which the harassment occurred.”^[34] By defining the scope of an institution’s obligation to act, the 2001 Guidance

acknowledges that colleges and universities may be limited in their ability to remedy harassment, where, for instance, the alleged harasser has no connection with the institution. To that end, the 2001 Guidance notes, “If the alleged harasser is not a student or employee of the recipient, OCR will consider the level of control the school has over the harasser in determining what response would be appropriate.”[\[35\]](#)

Even where a school does not have an affirmative obligation to act, it may nonetheless work with the complainant to implement protective measures. For example, a college may want to issue a no trespass order, barring from campus an accused individual who is otherwise unaffiliated with the institution. In this circumstance and in others, where a school voluntarily takes on a greater responsibility that it might not otherwise have under Title IX, the Department has indicated that it will not intrude on institutional discretion to adopt and enforce community standards that would otherwise fall outside the scope of the institution’s Title IX obligations. To the extent that an institution does so, it may be wise to document that the decision is not based on Title IX obligations, but rather on its voluntary commitment to more stringent community standards.

2. Prompt, Fair, and Equitable Investigations

a. How should an institution respond to requests for “confidentiality” from the complainant under the 2017 Q&A?[\[36\]](#)

The 2017 Q&A states that “[o]nce [an institution] 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 . . . [which] include the identities of the parties involved”[\[37\]](#) In light of this provision, which explicitly states that schools should identify the parties involved, and on the backdrop of the 2011 and 2014 Guidance that offered extensive instruction on complainants’ requests for confidentiality, a prevailing question has emerged regarding how institutions should respond to requests for “confidentiality.”[\[38\]](#)

Preliminarily, it is important to understand what the student is requesting. Is the student asking for true, legal confidentiality? If so, institutional officials should be prepared to refer the student to the counseling center, or to another on- or off-campus resource that can guarantee confidentiality pursuant to a statutory privilege. Such a referral must happen prior to any disclosure of misconduct that would trigger institutional legal obligations to investigate and remedy sex discrimination.

Alternatively, a student may desire to report misconduct anonymously, with or without an expectation that the institution launch a formal investigation. Here, the 2001 Guidance is instructive. In this or similar instances, where a complainant discloses misconduct but asks that his or her identity not be revealed to the respondent, the institution “should inform the student that a confidentiality request may limit the school’s ability to respond.”[\[39\]](#) At the same time, the school should inform the complainant that Title IX prohibits retaliation, and to the extent that the request is predicated on a fear of reprisals, the school should emphasize that it will “take steps to prevent retaliation and will take strong responsive actions if retaliation occurs.”[\[40\]](#) If, after that conversation, the complainant still desires to proceed anonymously, the institution should take reasonable, non-punitive steps to address the complaint without disclosing the identity of the complainant, provided that the university has determined there is no safety threat or other circumstance that would require the institution to go forward with an investigation.

The 2001 Guidance offers a number of suggestions, short of a formal disciplinary proceeding, that may allow the institution to honor the complainant's request for confidentiality while still remedying a hostile environment. For example, some allegations of sexual harassment may be remedied appropriately through mandatory sexual harassment training for a residential community or an academic department.^[41] Institutions can undertake these educational campaigns without running afoul of federal law. This response would also be consistent with OCR's enforcement posture, as OCR made clear in the 2001 Guidance that "if a student, who was the only student harassed, insists that his or her name not be revealed, and the alleged harasser could not respond to charges of sexual harassment without that information, in evaluating the school's response, OCR would not expect disciplinary action against an alleged harasser."^[42]

For more serious allegations, especially where the allegations suggest a history of harassment or otherwise implicate a continuing safety threat, an institution may not be able to honor the complainant's request to remain anonymous or forego disciplinary proceedings. Institutional policies should reflect these limitations, and those responsible for that decision should understand the factors the institution will use in determining how it will balance a complainant's request against the institution's Title IX obligations, and how the Title IX Coordinator will evaluate a request for confidentiality.

Institutions should ensure their policies differentiate among various reporting channels, such as responsible employees who are obligated to share reports with the Title IX Coordinator, and licensed therapists who are afforded a statutory privilege under state law and are not required to share reports or allegations with the Title IX Coordinator.

b. How can colleges and universities fulfill their obligation to conduct fair and equitable investigations when encountering a reluctant complainant, respondent, or witness?

The 2017 Q&A imposes the burden "on the school—not on the parties—to gather sufficient evidence to reach a fair, impartial determination as to whether sexual misconduct has occurred, and, if so, whether a hostile environment has been created that must be readdressed."^[43]

Colleges and universities may encounter complainants or witnesses who are reluctant to participate fully in the process, whether due to social pressures or other dynamics. Also, they may encounter respondents who elect not to participate, sometimes upon the advice of their attorneys due to possible criminal proceedings. When confronting a reluctant party, colleges and universities must endeavor to fairly and equitably carry out their Title IX obligations, neutralize ongoing safety threats, and uphold community standards.

Reluctant parties pose a challenge to institutions as they endeavor to administer fair proceedings. When faced with a reluctant complainant or respondent, the Title IX Coordinator or other designated official should clearly articulate how the party's disengagement may impact the outcome of the investigation: a complainant's declination to produce information or otherwise participate in the process may limit the university's ability to respond, and a respondent's declination to produce exculpatory information may result in omissions from the investigatory record that, if offered, could favor the respondent. Assuming the institution has determined that it must move forward despite a reluctant complainant, the institution should independently collect relevant information to which it has access, including statements from third parties, social media posts, time stamps for residence hall entries, video footage, and other sources that may corroborate or contradict narratives and focus events. A finding of responsibility must rest on sufficient information meeting the requisite standard of proof.

c. What is the timeline for a “prompt” review?

The 2017 Q&A moves away from the 60-day timeframe contemplated in the 2011 and 2014 Guidance and declares, “There is no fixed time frame under which a school must complete a Title IX investigation.”^[44] Rather, “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.”^[45] Some factors to consider when fashioning a prompt response include (1) the complexity of the allegations, (2) the number of parties and witnesses involved, (3) the academic calendar, (4) the parties’ reasonable requests for extensions, and (5) parallel criminal investigations. Although there no longer exists a fixed timeframe for conducting investigations, the 2017 Q&A continues to reinforce the requirement in the 2001 Guidance that institutions conduct a prompt investigation and designate time frames for the major stages in the resolution process (e.g. investigation, hearing/decision, and appeal).

This framework for determining what constitutes a prompt review, and which factors may delay resolution, aligns with VAWA and the Clery regulations, which require that institutions complete proceedings “within reasonably prompt timeframes designated by an institution’s policy, including a process that allows for the extension of timeframes for good cause with written notice to the accuser and the accused of the delay and the reason for the delay.”^[46] The only additional requirement imposed by VAWA and the Clery regulations, which have been in effect since 2014 and mirror the 2001 Guidance, is a requirement that colleges and universities describe anticipated timelines in institutional policies, as well as a process for extensions. As a good practice to demonstrate compliance, institutions may wish to maintain a working chronology of the investigation, document factors that impact the timing of the investigation, and provide periodic status updates to the parties during the course of the investigation.

The Department’s timeframe reflects an instance in which the 2017 Q&A affords increased flexibility to colleges and universities, such that they may wish to consider revising policies or procedures during the interim period if they had adopted a fixed 60-day timeframe. (Even policies with a 60-day timeframe, however, should include provisions allowing for extensions for good cause.) Regardless, it is important that institutions properly set reasonable expectations as to the timeliness with which a matter will be resolved.

d. How should institutions fashion interim measures under the 2017 Q&A, recognizing that some measures may burden one party more than another?

Interim measures are “individualized services offered as appropriate to either or both the alleged victim and respondent involved in an alleged incident of sexual misconduct, prior to an investigation or while an investigation is pending.”^[47] Interim *support* measures, which should be available to both parties, may include, for example, academic flexibility and access to a counseling center.^[48] Interim *protective* measures involve actions taken or restrictions imposed against a respondent, such as removing the respondent from a class, a residence hall, or campus.^[49] The 2017 Q&A urges institutions to “mak[e] every effort to avoid depriving any student of his or her education” when implementing interim measures, a caution that again seems to reflect the Department’s concerns about punitive measures implemented prior to the full and final resolution of disciplinary proceedings.^[50] The 2017 Q&A also provides, “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.”^[51] Institutions may struggle with how to reconcile that expectation with the 2001 Guidance instructing institutions that such measures “should be designed to minimize, as much as possible, the burden on the student who was harassed.”^[52]

It would not be uncommon for an interim protective measure to burden one student more than another, especially at smaller institutions with limited residential space or course sections.

The Department has indicated that in narrow instances, in order to preserve access to education for the alleged complainant, an institution may need to implement certain interim protective measures that impose disparate burdens on the parties. The 2017 Q&A does not preclude the use of interim protective measures that place a disparate burden on one party; rather, the emphasis is on the need to avoid “fixed rules or operating assumptions that favor one party over another.”^[53] In other words, educational institutions may continue to impose protective measures that burden the respondent, such as interim suspension or removal from a class in which the alleged victim is enrolled, provided that those measures are arrived at after careful consideration of the available information specific to the situation at hand, rather than a predisposition that favors one party over another.^[54]

3. Informal Resolution

a. Is it ever appropriate to informally resolve allegations of sexual assault?

The 2017 Q&A permits parties to resolve allegations of sexual misconduct, including allegations of sexual assault if an institution deems it appropriate, through informal mechanisms. In contrast to the 2001 Guidance^[55], the 2017 Q&A now allows educational institutions to use mediation as a permissible form of informal resolution for sexual assault. The 2017 Q&A provides:

If 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 voluntary resolution.^[56]

This provision has three separate and distinct prongs: (1) the parties must voluntarily participate in the process; (2) the institution must fully disclose all allegations and the parties’ options for formal resolution; and (3) the institution must deem the matter appropriate for informal resolution.

i. The parties must voluntarily participate.

To proceed with informal resolution, each party must voluntarily agree to participate in the informal process, without pressure from institutional officials. As described above, this entails ensuring that the parties are fully informed of the various procedural options available under the policy. The most challenging aspect of this provision is ascertaining whether the parties are truly electing to resolve the matter through an informal process, or whether social or other pressures (family, friends, teams, communities), including fear of harassment or retaliation, influence the decision such that acquiescence to informal proceedings is not truly voluntary. The Title IX Coordinator or another designated university official should be mindful of social dynamics and other pressures in assessing parties’ requests for informal resolution and be alert to issues of harassment or retaliation before making a good faith determination as to each party’s volition.

ii. The institution must fully disclose all allegations and the parties’ options for formal resolution.

To ensure that the parties' decision to pursue informal resolution is voluntary, the parties must be fully informed of the circumstances of the report and the potential policy violations that are implicated by the reported conduct. The parties must also be informed of the procedural options for resolution, including the fact that the parties can change their minds at any time in the process and elect to pursue formal resolution.

Additional policy violations are sometimes identified during the course of a Title IX investigation. Based on the language of the 2017 Q&A, if new information comes to light or if new charges are brought against the respondent in the course of an informal process, institutions will need to reconsider whether the matter continues to be appropriate for informal resolution, and if it is, the Title IX Coordinator or other designated official will need to reaffirm that both parties desire to proceed via an informal process in light of the new information.

iii. The institution must deem the matter "appropriate" for informal resolution.

The 2017 Q&A affords flexibility to institutions to resolve a broad range of conduct through informal mechanisms, provided that the parties voluntarily elect to proceed informally and provided that the institution deems the matter to be "appropriate." OCR does not, however, define the term "appropriate" or provide guidance as to what factors an institution should consider.

Schools may want to consider, in advance, what types of circumstances, if any, they would deem appropriate for informal resolution. Some factors to consider in determining whether the matter is "appropriate" for informal resolution are (1) the nature of the offense (e.g. unwanted touching versus forcible penetration), (2) the dynamics of power or control commonly associated with such an offense, (3) whether the respondent has been identified as a repeat offender; (4) whether there exists a continuing safety threat; (5) the relationship of the parties (i.e. a professor/advisee relationship or other power differential); (6) whether multiple parties are involved; (7) community standards, and (8) whether the proposed form of informal resolution will be sufficient to eliminate, prevent, and address the reported misconduct.

By permitting the use of various informal resolution mechanisms, including mediation, the 2017 Q&A reflects a departure from the withdrawn 2011 and 2014 Guidance, as well as the 2001 Guidance, all of which prohibited the use of mediation as a form of informal resolution of matters involving sexual assault. To be clear, OCR is not encouraging or mandating informal resolution; it is merely permitting informal resolution as a viable option in appropriate circumstances. While institutions need not change policies or procedures from a compliance perspective, the 2017 Q&A affords increased flexibility to colleges and universities, such that they can adjust policies and procedures to offer this additional resolution tool should they elect to do so.^[57] Finally, institutions that offer informal resolution as a means of remedying some instances of sex discrimination should ensure that those who are administering informal resolution procedures have been sufficiently trained on the process and further understand the dynamics of sexual harassment and sexual violence.

4. Hearing

a. Must colleges and universities adopt uniform procedures and uniform standards of proof for all forms of disciplinary proceedings in order to comply with Title IX?

The 2017 Q&A allows colleges and universities to apply either a "preponderance of the evidence" standard or a "clear and convincing evidence" standard when determining whether

alleged sexual misconduct amounts to a violation of the institution’s code of conduct.^[58] Footnote 19 elaborates, “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.”^[59]

In raising the possibility that a uniform standard of review and uniform procedures should be used for all student misconduct matters, OCR cites a 2016 Massachusetts federal district court case that explored whether Brandeis University breached a contract with the plaintiff in administering its sexual misconduct proceedings.^[60] The footnote hones in on a specific aspect of the case--that Brandeis University, having generally applied a “clear and convincing” standard of evidence to most student disciplinary matters, lowered the standard of proof to “preponderance of the evidence” for sexual misconduct proceedings as a result of OCR’s directive in the 2011 Guidance. The court concluded that this change reflected “an effort to tilt the playing field against accused students.” Notably, there was no Title IX claim in the case; yet the 2017 Q&A cites this case as possible support for the proposition that “[w]hen a school applies special procedures in sexual misconduct cases, it suggests a discriminatory purpose and should be avoided.”^[61]

Perhaps not surprisingly, this footnote has generated much conversation on the scope of OCR’s jurisdiction. Practically speaking, one of the most urgent questions in the wake of this footnote is whether colleges and universities must adopt uniform procedures and standards of proof for all disciplinary proceedings. For now, the answer is no. The Department has indicated that the 2017 Q&A is not intended to be prescriptive, an instruction that is even more relevant for a single footnote of a 7-page document. If an institution can demonstrate that its sexual misconduct procedures, including its standards of proof, are designed to lead to the fair and impartial resolution of complaints – despite being different from those applied in other instances of misconduct – the institution does not need to change those procedures at this time. If OCR were to adopt the position that all student conduct processes, from academic integrity to sexual misconduct, have to be consistent, it is likely some or most institutions would question whether OCR had exceeded its jurisdiction to enforce Title IX. The Department has indicated that it remains open to continued conversations about the impact of this footnote.

b. Does the presence of university counsel “interfere” with campus sexual misconduct proceedings?

The 2017 Q&A cautions schools to “ensure that institutional interests do not interfere with the impartiality of the investigation.”^[62] Some have questioned whether this caution extends to the presence or participation of university counsel in sexual misconduct proceedings (particularly where neither party has legal counsel serving in an advisor role). The Department has indicated that the presence of university counsel would not amount to a *per se* finding of interference. It has reserved the question for further consideration, however, with the caveat that in all instances—irrespective of the institutions’ financial interests, reputation, or other pressures—findings of responsibility must be supported by information satisfying the requisite standard of proof.^[63] Accordingly, university counsel may continue to provide legal advice, but should be careful not to appear to step into the province of the fact-finder or impact the integrity of the proceedings. Rather, institutional counsel should consistently reflect their role as legal advisor in support of the institution’s policies and proceedings.

5. Sanctions

a. What does it mean that an institution must “consider the impact of separating a student from her or his education” when imposing sanctions?

The 2017 Q&A states that “[d]isciplinary sanction decisions must be made for the purpose of deciding how best to enforce the school’s code of conduct *while considering the impact of separating a student from her or his education.*”^[64] Presumably, the Department intended for this statement to reaffirm already-existing institutional commitments to impose thoughtful and measured sanctions that are proportionate to the offense. Indeed, OCR states that any disciplinary decision must be made as a proportionate response to the violation, but does not provide examples or further discussion of what is proportionate.^[65] Regardless, the Department’s position, as stated, reflects the first instance of which the authors are aware of a circumstance in which the federal government has weighed in on the appropriateness of a sanction for a violation of an institution’s community standards. It is possible that OCR is cautioning against situations where an institution has strict “guidelines” that do not leave room for the institution to consider various factors that might aggravate or mitigate circumstances in order to warrant a greater or lesser sanction.

This is an issue where the Department may benefit from additional institutional input. Until then, institutions should continue to align practice with the Clery Act regulations, which obligate colleges and universities to “[l]ist . . . all of the possible sanctions that the institution may impose following the results of any institutional disciplinary proceeding for an allegation of dating violence, domestic violence, sexual assault, or stalking” and simultaneously notify the accused and the accuser, in writing, of the result of any institutional disciplinary proceeding that arises from an allegation of dating violence, domestic violence, sexual assault, or stalking, *including the rationale for any sanctions imposed.*^[66] Especially with respect to that last piece of communicating the rationale for any sanctions imposed, and mindful of the Department’s treatment of sanctions in the 2017 Q&A, institutions would be well served to continue the standard practice of thoughtfully reviewing each finding, with an eye towards considering the nature of the offense, the institution’s community standards, and any mitigating or aggravating circumstances, to fashion an appropriate sanction.

6. Appeals

a. How does the 2017 Q&A impact institutional procedures involving appeals?

The Department has afforded increased flexibility to colleges and universities in administering the appeals process, if any. As before, institutions can determine whether or not they want to offer the option of appeal under Title IX.^[67] However, reflecting a departure from the now-withdrawn 2011 and 2014 Guidance, “the school may choose to allow an 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.”^[68] Institutions will need to consider whether they wish to avail themselves of the increased flexibility afforded by the Department’s new position on appeals. Bear in mind, however, that at least with respect to allegations of sexual assault, domestic violence, dating violence, and stalking, the Clery regulations require “simultaneous notification, in writing, to both the accuser and the accused, of . . . [t]he institution’s procedures for the accused and the victim to appeal the result of the institutional disciplinary proceeding, if such procedures are available.”^[69]

7. Other Issues

a. Can speech ever amount to sexual harassment under Title IX?

The 2017 Q&A cautions that institutions should fashion policies and apply rules “in a manner that respects the legal rights of students and faculty, including those court precedents interpreting the concept of free speech.”^[70] This caution echoes the Secretary’s remarks, in

which she expressed her concern over the perception that some institutions were administering their Title IX policies in a manner that punished protected speech and “trivialize[d] actual harassment.”^[71]

When a public college or university punishes an individual solely for speech that it deems to have created a hostile environment, the First Amendment may be implicated. This does not mean, though, that the First Amendment automatically shields the alleged offender from an adverse finding under the institution’s code of conduct. Speech may amount to harassment if it is so “severe, pervasive, and objectively offensive [that it] undermines and detracts from the complainants’ educational experience, that the complainant-students are effectively denied equal access to an institution’s resources and opportunities.”^[72] Institutions should ensure that personnel involved in Title IX investigations and proceedings recognize the intersection of the First Amendment and Title IX so that the institution carries out its Title IX obligations in a manner consistent with constitutional guarantees related to protected speech.^[73]

b. How will OCR treat existing resolution agreements and pending enforcement actions during the interim regulatory period?

The 2017 Q&A confirms that “[e]xisting resolution agreements remain binding upon the schools that voluntarily entered into them.”^[74] Notwithstanding that statement, the Department has indicated that it is open to discussing resolution agreement provisions that derive solely from the now withdrawn 2011 and 2014 Guidance. Institutions that wish to revisit terms of existing resolution agreements should contact the OCR regional office that is tasked with monitoring the agreement. Institutions that are currently the subject of enforcement actions may be able to rely on content from the 2001 Guidance and the 2017 Q&A in order to negotiate more favorable terms in resolution agreements.

CONCLUSION:

Though it is likely that the Department will revisit various aspects of college and university sexual misconduct proceedings as it prepares new regulations, the 2017 Q&A requires no immediate changes to existing policies and procedures, provided that these policies and procedures afford a fair process to all parties and do not otherwise conflict with the 2017 Q&A or the 2001 Guidance. For those institutions that avail themselves of the increased flexibility afforded by the 2017 Q&A by enacting policy changes, they will want to be mindful of the best time to implement new policy language, the manner in which such changes should be communicated, and any institutional practices governing the adoption of new policies. Either way, as institutions think about their policies and practices during the interim regulatory period, they should read the 2017 Q&A in conjunction with the Department’s 2001 Guidance, and in all instances, proceed in good faith to uphold community standards and continue efforts to address and remedy the very serious issue of campus sexual misconduct in a manner that is fair to all constituencies.

RESOURCES:

1. Pamela Bernard, Jerry Blakemore, and Amy Foerster, [“Developments in Title IX Part 1: Release of New Information by the Department of Education.”](#) (NACUA Briefing, Sept. 26, 2017).

2. Candice Jackson and Kathleen Santora, [“Developments in Title IX Part 2: A Conversation with OCR Acting Assistant Secretary Candice Jackson,”](#) (NACUA Briefing, Sept. 28, 2017).
3. U.S. Dep’t of Educ. Office for Civil Rights, [“Dear Colleague” Letter Withdrawing 2011 and 2104 Guidance](#) (Sept. 22, 2017).
4. U.S. Dep’t of Educ., Office for Civil Rights, [“Q&A on Campus Sexual Misconduct,”](#) (Sept. 22, 2017).
5. U.S. Dep’t of Educ. Office for Civil Rights, [“Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties,”](#) (Jan. 19 2001).
6. U.S. Dep’t of Educ. Office for Civil Rights, [“Dear Colleague Letter on “Revised Sexual Harassment Guidance”](#) (Jan. 25, 2006).
7. U.S. Dep’t of Educ. Office for Civil Rights, [“Dear Colleague Letter on the First Amendment”](#) (July 28, 2003).
8. U.S. Dep’t of Educ. Office for Civil Rights, [“Dear Colleague Letter on Title IX Coordinators,”](#) (Apr. 24, 2015).

END NOTES:

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[2] The Hon. Betsy DeVos, [“Prepared Remarks on Title IX Enforcement”](#) (Sept. 7, 2017). The Department has not explicitly defined the term “sexual misconduct,” but appears to use the term collectively to refer to sexual harassment and sexual violence. In April 2011, the term sexual violence was defined by the Office for Civil Rights (OCR) as “physical sexual acts perpetrated against a person’s will or where a person is incapable of giving consent due to the victim’s use of drugs or alcohol.” U.S. Dep.’t of Educ. Office for Civil Rights, [“Dear Colleague Letter on Sexual Violence,”](#) (Apr. 4, 2011) at 1. The Dear Colleague Letter on Sexual Violence has since been withdrawn.

[3] U.S. Dep.’t of Educ. Office for Civil Rights, [“Dear Colleague Letter on Sexual Violence,”](#) (Apr. 4, 2011).

[4] U.S. Dep.’t of Educ. Office for Civil Rights, [“Questions and Answers on Title IX and Sexual Violence,”](#) (Apr. 29, 2014).

[5] U.S. Dep.’t of Educ. Office for Civil Rights, [“Dear Colleague” Letter Withdrawing 2011 and 2014 Guidance](#) (Sept. 22, 2017).

[6] U.S. Dep.’t of Educ. Office for Civil Rights, [“Q&A on Campus Sexual Misconduct”](#) (Sept. 22, 2017).

[7] Throughout this NACUANOTE, where the authors note that “the Department has indicated,” the content either references remarks delivered through NACUA’s September 28, 2017 Briefing with Acting Assistant Secretary for Civil Rights Candice Jackson or information relayed over the course of several listening sessions with OCR.

[8] See 2017 Q&A at Questions 5, 6, 7, and 11.

[9] Title IX, 20 U.S.C. §1681(a); 34 C.F.R., Part 106. While non-violent sexual harassment and sexual violence both are forms of sexual harassment, they will be labeled separately where helpful for clarity in this NACUANOTE.

[10] 34 C.F.R. §668.46(k).

[11] *Id.* See also 2017 Q&A at Question 2.

[12] U.S. Dep't. of Educ., [Revised Sexual Harassment Guidance](#) (Jan. 25, 2001) (hereinafter "2001 Guidance").

[13] U.S. Dep't of Educ. Office for Civil Rights, ["Dear Colleague" Letter Withdrawing 2011 and 2014 Guidance](#), at 2 (Sept. 22, 2017).

[14] The 2001 Guidance replaced the *1997 Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*. 62 Fed. Reg. 12,034 (Mar. 13, 1997). The 1997 guidance was "the product of extensive consultation with interested parties, including students, teachers, school administrators, and researchers" and the document was made available for public comment. The 2001 Guidance was also published in the Federal Register, at 62 Fed. Reg. 66,092 (Jan. 16, 2001).

[15] U.S. Dep't of Educ. Office for Civil Rights, ["Dear Colleague Letter on Title IX Coordinators,"](#) (Apr. 24, 2015).

[16] U.S. Dep't of Educ. Office for Civil Rights, ["Dear Colleague Letter on Retaliation,"](#) (April 24, 2013).

[17] U.S. Dep't of Educ. Office for Civil Rights, ["Dear Colleague Letter on Harassment and Bullying,"](#) (October 26, 2010).

[18] U.S. Dep't of Educ. Office for Civil Rights, ["Dear Colleague Letter on the First Amendment"](#) (July 28, 2003).

[19] See, e.g., U.S. Dep't of Educ. Office for Civil Rights, ["Dear Colleague Letter on Title IX Coordinators,"](#) at 2 (Apr. 24, 2015) ("The Title IX coordinator should report directly to . . . the college or university president.")

[20] 34 C.F.R. §106.8(a). See also [2001 Guidance](#) at 21 ("A school must designate at least one employee to coordinate its efforts to comply with and carry out its Title IX responsibilities. The school must notify all of its students and employees of the name, office address, and telephone number of the employee or employees designated.")

[21] 2017 Q&A at Question 6 (emphasis added).

[22] 2017 Q&A at Question 1.

[23] *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 650 (1999).

[24] 2001 Guidance at 30, n. 39.

[25] 2001 Guidance at 5 (citing Supreme Court and other rulings indicating that, in the employment context, a victim of harassment must subjectively perceive the conduct to be abusive for the conduct to actually alter the terms of employment and that conduct should be considered from the point of view of a reasonable person in the victim's position to determine whether conduct constitutes harassment).

[26] *Id.* at iv (quoting *Oncale v. Sundowner Offshore Services Inc.*, 523 U.S. 75, 82 (1998)). The 2001 Guidance also provides a detailed discussion of factors to consider in evaluating whether a hostile environment exists.

[27] *Id.* at 7.

[28] See *Milward v. Shaheen*, No. 6:15-cv-785-Orl-31TBS (M.D. Fla. Aug. 4, 2017) (finding that requiring students to undergo a mandatory transvaginal ultrasound as part of class instruction was so severe that it could be deemed sexual harassment); U.S. Equal Employment Opportunity Commission, N-915-050, [Policy Guidance on Current Issues of Sexual Harassment](#) (1990) (“a single, unusually severe incident of harassment may be sufficient to constitute a Title VII violation; the more severe the harassment, the less need to show a repetitive series of incidents”) (Title VII and IX interpreted similarly as stated by *Yusaf v. Vassar College*, 35 F.3d 709 (2nd Cir. 1994)).

[29] See, e.g. *Rosenwasser v. John Carroll Univ.*, 2017 NY Slip Op 32392 (May 12, 2017) (concluding that Plaintiff filed a general harassment complaint, not a sexual harassment complaint, thus absolving the institution of any obligation to follow its sexual harassment policy).

[30] OCR has indicated that its actions in withdrawing the 2011 and 2014 Guidance and issuing the 2017 Q&A are not intended to disrupt this long-standing precedent.

[31] [2001 Guidance](#) at 5.

[32] *Id.* at 2-3 (emphasis added).

[33] 2017 Q&A at Question 1, n. 3.

[34] [2001 Guidance](#) at 5. With respect to the identity of the harasser, OCR has stated that an institution’s delay, inappropriate response or inaction in response to a report of sexual or gender-based harassment or violence *by a student or a third party* may subject the complainant to a hostile environment and require the institution to remedy the effects of the hostile environment that could reasonably have been prevented had the institution responded promptly and appropriately. *Id.* at 12. Because Title IX obligates a recipient of federal funds to provide services in a nondiscriminatory manner, and because an institution typically provides services through its employees, harassment carried out in the context of an employee’s responsibilities in relation to students that denies or limits a student’s ability to participate in or benefit from the institution’s program on the basis of sex represents prohibited discrimination *by the institution. Id.*

[35] *Id.* at 16.

[36] While OCR uses the term “confidentiality,” that term typically refers to statutorily-protected conversations based on a defined privilege (e.g., attorney-client, doctor-patient, licensed mental health professional-client). The more accurate framing of this question may be: How should an institution respond when the complainant requests anonymity, that the respondent not be informed of the complainant’s identity, or that no investigation be pursued?

[37] 2017 Q&A at Question 6.

[38] Faculty and staff who are responsible for reporting should also be trained to disclose their obligation to report so that expectations are appropriately managed.

[39] 2001 Guidance at 17. Note that Responsible Employees must still report sexual misconduct to the institution’s Title IX Coordinator, whether or not a student has asked for confidentiality.

[40] *Id.*

[41] See, e.g., *id.* at 18.

[42] *Id.* at 17.

[43] 2017 Q&A at Question 6.

[44] *Id.* Question 4.

[45] *Id.*

[46] 34 C.F.R. §668.46 (k)(3)(i)(A).

[47] 2017 Q&A at Question 3.

[48] Such support measures should be provided to an alleged victim, if deemed appropriate, even if the alleged victim is not willing to move forward with an investigation at that time.

[49] Protective measures that burden the respondent (e.g. removal from a class in which the alleged victim is also enrolled), should be imposed, subject to the limitations discussed in this section, only if the institution is moving forward with an investigation to determine responsibility. If the alleged victim does not wish to move forward with an investigation at that time, the institutions should consider offering commensurate flexibility to the alleged victim (i.e., permitting the alleged victim to withdraw from a class in which the respondent is enrolled or move to another residence hall).

[50] 2017 Q&A at Question 3.

[51] *Id.*

[52] [2001 Guidance](#) at 16.

[53] 2017 Q&A at Question 3. While this section focuses on interim *protective* measures, an example of an interim supportive measure that may be deemed to arise out of “fixed rules or operating assumptions” would be a counseling center that offers free services to an alleged victim, but does not offer commensurate services to a respondent experiencing anxiety arising from an alleged victim’s allegations.

[54] An example of an interim protective measure that may be deemed to arise out of “fixed rules or operating assumptions” would be an institutional default policy of always moving the respondent to a different residential space whenever there is an allegation of sexual misconduct.

[55] 2001 Guidance at 21 (“In some cases, such as alleged sexual assaults, mediation will not be appropriate even on a voluntary basis.”)

[56] 2017 Q&A at Question 7.

[57] As institutions contemplate whether to enact a policy change, they may wish to consider whether offering informal resolution may encourage more people to come forward.

[58] *Id.* at Question 8. Notably, it does not permit a “beyond a reasonable doubt” standard, which prior to 2011 was still used by some institutions.

[59] *Id.*, n. 19.

[60] *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561 (D. Mass. 2016).

[61] 2017 Q&A at Question 8, n. 19.

[62] 2017 Q&A at Question 6. *See also id.* at Question 8 (“Schools are cautioned to avoid conflicts of interest and biases in the adjudicatory process and to prevent institutional interests from interfering with the impartiality of the adjudication.”)

[63] *See id.* at Question 8.

[64] *Id.* at Question 9 (emphasis added).

[65] *See id.*

[66] 34 C.F.R. §668.46(k) (emphasis added).

[67] 2017 Q&A at Question 11.

[68] *Id.*

[69] 34 C.F.R. §668.46(k).

[70] *Id.* at Question 1.

[71] The Hon. Betsy DeVos, [“Prepared Remarks on Title IX Enforcement”](#) (Sept. 7, 2017) (“Too many cases involve students and faculty who have faced investigation and punishment simply for speaking their minds or teaching their classes. Any perceived offense can become a full-blown Title IX investigation. But if everything is harassment, then nothing is. 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.”)

[72] *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999) (finding persistent sexual advances by plaintiff’s classmate was harassment and defendants could be held responsible under Title IX); *see also Trahanas v. Northwestern Univ., et al.*, No. 15-CV-11192 (N.D. Ill. July 6, 2017) (finding frequent derogatory remarks about plaintiff’s sexual orientation was sufficient for a hostile work environment claim to proceed to discovery); *Hayut v. State Univ. of New York*, 352 F.3d 733, 746 (2nd Cir. 2003) (finding that comments made by a professor to plaintiff were sufficiently pervasive to create a hostile work environment); *Barrett v. Applied Radiant Energy Copp.*, 240 F.3d 262, 280 (4th Cir. 2001) (a supervisor’s single use of odious epithets can be severe enough to create a hostile work environment); *Nzabondora v. Univ. of Virginia*, No. 3:17-CV-00003 (W. D. Va. Oct. 24, 2017) (same); *Jew v. Univ. of Iowa*, 749 F. Supp. 946, 958 (S.D. Iowa 1990) (finding that false rumors of a sexual relationship between plaintiff and her supervisor over the course of thirteen years was pervasive and constituted sexual harassment).

[73] Although private institutions are not subject to the requirements of the First Amendment, they may have incorporated similar principles into handbooks or other documents that might form the basis for a contract claim. For more information on the intersection of Title IX and the First Amendment, see U.S. Dep’t of Educ. Office for Civil Rights, [“Dear Colleague” Letter on the First Amendment](#) (July 28, 2003).

[74] 2017 Q&A at Question 12.

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