



## Question and Answers

### “Facing the Challenges of DOE’s Recent Title IX ‘Interim Guidance’” Webinar

**1. What if you do not have a defined standard for other cases of student misconduct?**

You should at least consider whether to formally adopt a standard for all cases. Because the new guidance indicates that institutions must apply the same standard of evidence (either a “preponderance of the evidence” or “clear and convincing” standard) to all cases of student misconduct, colleges and universities should consult with experienced counsel to consider whether to clearly identify the standard of evidence to be applied to all cases of student misconduct.

**2. Do you think that "Clear and Convincing" will eventually lead to turning everything over to the police and taking Title IX/HR out of the process? Should the campus police be involved?**

No. Regardless of whether the “clear and convincing” evidence standard is applied, the Department of Education’s Office for Civil Rights (the “OCR”) still envisions a role for colleges and universities in investigating campus sexual misconduct under Title IX. There does seem to be a growing sense that schools cannot effectively adjudicate all aspects of matters related to sexual misconduct. But it is not likely that schools will be completely removed from the process.

Yes. There certainly is a role for campus police to play in the process.

Finally, the criminal justice system will always have a role in these cases, to the extent that a victim chooses to make a criminal complaint. Schools are well-advised to avoid any actions that could reasonably be perceived as interfering with the proper functioning of the criminal justice system.

**3. What concerns do you see with imposing a legal standard on an administrative process? I'm concerned about using these threshold terms when we are not lawyers.**

Title IX has imposed legal standards before this recent change, so this concern is not entirely new. Nonetheless, these recent changes highlight the need for colleges and universities to train those who will be investigating and adjudicating these claims and to seek guidance from legal professionals.

**4. If the college is only allowing an appeal to the responding party, how is that creating equal rights to both parties throughout the case?**

It may not. But recall that under the interim guidance, colleges and universities do not have to allow appeals at all. If they chose to allow appeals, they can decide either to permit both parties to appeal, or to permit only the accused to appeal.



**5. When federal law and state laws differ, which one out rules the other?**

When there is a direct conflict between a federal and state law, the school should consult with legal counsel to determine how best to resolve that conflict. It may be that federal and state laws do not directly conflict. Sometimes each law has different (though not conflicting) standards, such that an institution would have to comply with both state and federal requirements. In some cases, federal law may “preempt” state law. Accordingly, this issue of the interaction between state and federal law can be complex, and to the extent the institution believes there is a potential conflict, the institution should consult legal counsel.

**6. Doesn't VAWA incorporate much of what was promulgated under Title IX and the initial guidance?**

The interim guidance is temporary and subject to further clarification. However, the interim guidance does not change the requirement that colleges and universities must comply with the Violence Against Women Act (“VAWA”). Thus, institutions must continue to comply with VAWA.

**7. The new Q&A states that the respondent should receive written notice, in advance of the interview, the precise conduct allegedly constituting the violation. Do you interpret this to be the precise conduct code charge or the specific allegations?**

Both. The Q&A explains that details provided to the responding party should 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.”

**8. Should we be removing any reference to the 2011/2014 guidance from our policy?**

The priority should probably be to review your institution’s current policies in light of the interim guidance and in conjunction with advice from legal counsel. As the policies are updated, the references to outdated guidance should be removed.

**9. With regard to limiting the choice of advisors, we currently require that college employees who want to serve as advisors be trained on our process. Is that no longer allowed under the new guidance?**

Under the interim guidance, both the accused and the accuser must have the “same opportunity 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.” There is nothing that explicitly limits the ability of institutions to require that advisors be trained.



**10. We have students on our campus that were in Special Education in K-12. Is there any additional guidance available for the application of Title IX for Students with Intellectual Disabilities?**

The interim guidance does not include any additional guidance regarding the application of Title IX for students with intellectual disabilities, so colleges and universities should contact legal counsel to discuss whether their policies should be modified to accommodate students with intellectual disabilities.

**11. What if the institution could change the class section number? Same class, but different section if possible?**

All decisions regarding interim measures and disciplinary action should be handled on a case-by-case basis with the understanding that the new interim guidance highlights the issue of balancing the protections afforded to the accuser and the accused.

**12. Do you think there should be any differences in how a school handles a complaint of sexual harassment (a faculty member offering quid pro quo for a grade) vs. sexual assault involving students?**

While Title IX applies in both contexts, sexual harassment *by an employee* would likely implicate different policies and concerns, as compared to sexual assault *by a student*. Arguably, only one scenario would implicate potential criminal behavior. Also, different sets of policies (faculty v. student) would likely apply. For example, faculty misconduct could implicate the faculty code of conduct, and perhaps a collective bargaining agreement, etc.