



## The Network for Victim Recovery of DC's Position on the U.S. Department of Education's Issuance of the 2017 Interim Guidelines on Title IX and its Rescission of the 2014 and 2011 Guidance—October 26, 2017

Quickly after taking her role as the new U.S. Secretary of Education, Betsy DeVos espoused many of the criticisms of Title IX guidance under the Obama Administration. These criticisms resulted in the Department of Education's September 7, 2017 [interim guidelines](#) for schools "on how to investigate and adjudicate allegations of campus sexual misconduct under federal law."<sup>1</sup> The same announcement included the Department of Education's decision to rescind the 2011 Dear Colleague Letter and the 2014 Q&A,<sup>2</sup> which were issued during the Obama Administration. In support of the rescission, the Department of Education claimed that the Obama-era guidance "ignored notice and comment requirements, created a system that lacked basic elements of due process and failed to ensure fundamental fairness."<sup>3</sup>

NVRDC believes that *all* students deserve fair and equal Title IX proceedings, and acknowledges there is room for growth in its applications in institutions around the country. However, NVRDC is concerned that the interim guidelines are attempting to over-correct concerns about Title IX being unfair to accused students, by weakening the protections for survivors and exposing all students to inconsistent proceedings.

The rights of either party do not have to be at the cost of another's—no one wins when institutions are encouraged to create inconsistent, impartial, and unjust Title IX policies. As an organization that represents victims of crime, including student-survivors in Title IX-based grievance proceedings, NVRDC encourages the Department of Education, and the media, to first familiarize themselves with Title IX, the Clery Act, and other existing federal laws. An agency cannot improve a system it does not understand. The following changes that were included in the Department of Education's September 7, 2017 interim guidelines are of particular concern:

### Standard of Evidence

Prior to the September 7, 2017 guidelines schools were instructed to use the preponderance of the evidence standard.<sup>4</sup> The new guidelines now allow schools the discretion to use either the clear and convincing standard or the preponderance of the evidence standard. Many Title IX critics characterized the preponderance standard as a watered-down approach implemented by the Obama administration in the Dear Colleague Letters. This dismissal ignores several considerations. First, it dismisses the credibility of the preponderance standard because it is not "as high" as standards in criminal cases. This criticism misses the essence of why many students choose to engage in the Title IX process in the first place—they do not want the accused to be convicted and sentenced in a criminal court, but rather just want to feel safe at school. The criminal justice system is an intimidating world of law enforcement, attorneys, and judges that is often alienating and further traumatizing to student-survivors. There are very few people in the world that find police departments or courthouses to be approachable or welcoming environments. As a result, it is understandable why so many students choose to turn to their schools

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<sup>1</sup> U.S. Department of Education, Department of Education Issues New Interim Guidance on Campus Sexual Misconduct (September 22, 2017), <https://www.ed.gov/news/press-releases/department-education-issues-new-interim-guidance-campus-sexual-misconduct>.

<sup>2</sup> Q&A refers to the Questions and Answers on Sexual Violence and Title IX issued on April 29, 2014.

<sup>3</sup> U.S. Department of Education, Department of Education Issues New Interim Guidance on Campus Sexual Misconduct (September 22, 2017), <https://www.ed.gov/news/press-releases/department-education-issues-new-interim-guidance-campus-sexual-misconduct>.

<sup>4</sup> 2011 Dear Colleague Letter.



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instead of the judicial system. Campuses serve as a student's temporary home—it feels safe and familiar. When a sexual assault threatens that sense of safety, a student does not want to turn to an unfamiliar stranger, they want to stay within a system that doesn't feel overwhelming. To a survivor, familiarity can create a sense of safety among the chaos of sexual violence. However, by heightening the pressure of Title IX processes, and treating them as a quasi-criminal system, the Department of Education will cause for students to feel like they're in a courtroom—not a campus. By alienating students from a system that seems more navigable than the justice system, the Department of Education heightens the likelihood of a chilling effect on survivors that ultimately may result in less reporting of sexual violence. Institutions should not become mini-criminal courts—they are meant to educate students and keep them safe.

Furthermore, regardless of the Department's final decision regarding an evidentiary standard, allowing schools to choose one of two standards during the interim period is negligent management of the Department of Education's responsibilities. One would hope that a federal agency would propagate uniform standards to ensure consistent and equitable results in schools throughout the country, thereby ensuring that survivors and the accused can expect a relatively similar experience from institution to institution. However, the lack of uniformity during the interim period will result in disparate methodologies and results in Title IX hearings across the country. How can the Department of Education monitor institutions for Title IX compliance if everyone uses a different standard? This chaos and unpredictability negatively affects all parties involved.

### **Time Frame for Investigations**

The right to a speedy criminal trial under the United States Constitution, and the right to a prompt disciplinary process under the Jeanne Clery Act, both stem from the concept of due process.<sup>5</sup> The Department of Education expressed its desire to safeguard the due process rights of student participants in Title IX; however, the Department's removal of the Obama-era guidance encouraging institutions to act in a timely manner is incongruous this alleged desire to protect students' rights.

While it is no secret that academic institutions often fail to meet the 60-day deadline enacted by the 2011 Dear Colleague letter, all students—no matter if they are a complainant or a respondent—should reasonably expect that a Title IX conduct complaint will reach disposition in a timely fashion instead of remaining pending semester after semester. During Title IX proceedings, institutions manage a variety of Title IX accommodations to ensure that the parties' education is not compromised during the pendency of the proceedings. However, when institutions manage Title IX accommodations for lengthy periods of time, the possibility that they will make a mistake and infringe on a student's rights increases. For example, an institution is unable or unwilling to coordinate the parties' class schedules or housing which may result in one of the parties dropping a class or paying for off-campus housing. Or an institution may

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<sup>5</sup> The Fifth Amendment of the U.S. Constitution provides, "No person shall...be deprived of life, liberty, or property, without due process of law." The Fifth Amendment is applied to all states by the 14<sup>th</sup> Amendment.



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neglect to provide on-going support and information about mental-health resources, thereby forcing a student to bear the stress and trauma of the Title IX process alone.

The longer the proceedings go on, the higher the chance that the parties will feel stressed or intimidated and that their academic performance will suffer. A delay in the resolution of a Title IX proceeding not only jeopardizes students' academic success, but may have life and career-related consequences.

To put these costs into perspective, a 2008 study placed the total per-offense cost of rape and sexual assault at \$240,776; while this statistic does not exclusively reflect rape and sexual assault perpetrated on students, it reflects the extent to which sexual violence can impact any survivor's life. In the case of a student-survivor, their ability to try to meet these costs may be dependent on family financial support. For students who do not have such support, or who choose not to disclose to their family, these costs can quickly become unmanageable and dissuade them from pursuing further action.

While the Department's rescission of a timeline may appear unimportant, it can have severe and far-reaching consequences for all students. Without requiring a quick and timely proceeding the Department of Education setting the scene for violations of students' rights and creating confusion for institutions attempting to also meet their requirements under the Clery Act. Further guidance is necessary for students to learn how their due process rights will be protected when a party, or institution, may intentionally drag out the process in the hope of avoiding a resolution.

### **Appellate Process**

In the 2014 Q&A, the Department of Education required institutions that provided for an option to appeal to do so equally for both parties. Under the Department's 2017 interim guidelines, institutions are permitted to limit the right to appeal to the accused party. While the Department touts its Title IX implementations as strengthening due process, this guideline explicitly contradicts its rhetoric. Although appellate processes are not required under Title IX, the Clery Act requires fair and impartial processes. By limiting one party's access to justice, the Department dismantled the legitimacy of Title IX. Student-survivors will face a system that clearly favors protecting the accused, thereby increasing survivors' distrust for the Title IX process and decreasing the chance of reporting.

The Department of Education's cited reasons for rescinding the 2011 Dear Colleague Letter are often saturated with factual inaccuracies about Title IX, contradict its stated goals, and reinforce problematic ideologies. Despite this tense political climate, NVRDC will continue to fight for rights of student-survivors, and against oppression and discrimination. We offer our continued legal and case management resources to all in need. NVRDC stands with survivors.

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*Network for Victim Recovery of DC empowers victims of all crimes to achieve survivor-defined justice through case management and legal advocacy services. For more information, please visit our website ([www.nvrdc.org](http://www.nvrdc.org)) or call (202) 742-1727.*

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