

# ASCA News Blast

## Statement on new DoED Guidance

Greetings!

Today, and as expected, the U.S. Department of Education released new, **interim** guidance on Title IX in higher education. We encourage you to read through the [Announcement Letter](#) and the [Q&A on Campus Sexual Misconduct](#). The question and answers issued today merely provide information about how OCR will assess an institution's compliance in the **interim**. We cannot and should not assume this information shall serve as long-term, permanent guidance.

This new letter by no means indicates that what institutions have been doing is wrong. It merely rescinds the "requirement" to do certain things. It does not condemn what institutions are doing. It simply indicates that the current administration does not believe the 2011 letter was done in accordance with regulations and they now intend to do so. The letter today refers to the 2001 guidance for which most of us used well before the 2011 letter.

We continue to encourage our members to engage in the comment period once that begins as that is the most appropriate venue to express our thoughts, expertise, and experience. As stated in a previous letter to you, I will be testifying at the U.S. Department of Education's Public Hearing on October 4, 2017 on behalf of ASCA.

We encourage everyone to read the question and answers for yourself. As you will see, much of the Q & A provides general guidance as to an institution's responsibility vs. tasks. Question #8 is the most specific and possibly policy changing given the information OCR expects an institution to provide at the onset when some of that information is not available. Given that there are not new regulations and there are regulations connected to VAWA and Clery as well as Title IX case law, institutions should continue to provide student-centered processes that address issues around potential violation of institutional policy.

In our best effort to respond in a timely manner to today's U.S. Department of Education's rescinding of the 2011 and 2014 guidance documents, we have compiled an FAQ outline about the new information released today. Below you will find a brief analysis based on our best efforts to understand the impact to our practice. This is not legal advice, and we encourage you to work with your institutional Title IX Coordinator and General Counsel should you need to adapt any processes.

We invite you to join ASCA and NASPA for a free webinar **Title IX Turmoil: Initial Analysis and Next Steps After the Withdrawal of the 2011 Dear Colleague Letter on Wednesday, September 26, 2017 at 3:00 p.m. EDT, moderated by**

As we have stated previously, compliance is a floor, not a ceiling. ASCA will continue to provide support not only around actual guidance and regulations but practices that are ethical, sound, and grounded in fundamental fairness. Keep calm and carry on the good work that you do.

In service,



Jill L. Creighton  
ASCA President

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### **Review of September 22, 2017 DCL & FAQ**

- Rescinds April 4, 2011 DCL
- Rescinds April 29, 2014 Q&A

#### **Mandates:**

- Standard of proof - The Preponderance of Evidence is no longer mandatory. Institutions may use either the preponderance of evidence or clear & convincing standard, however, institutions must use whatever is used for the rest of your conduct violations.
- Written notice must be provided prior to first interview with the respondent and must include:
  - identities of the parties involved
  - the specific section of the code of conduct allegedly violated
  - the precise conduct allegedly constituting the potential violation
  - the date and location of the alleged incident.

#### **General Changes:**

- The 60-day time frame has been removed.
  - According to the 2001 guidance says schools must have "designated and reasonable time frames for the major stages of the complaint process" (p. 20) but does not give a number of days.
- Clearly states burden of proof is on the school, not on either party, to gather sufficient evidence to reach a fair, impartial determination.
- It is no longer required to let both parties appeal (if there is an appeal process), however it is permissible for both parties to appeal.
- There is a prohibition on direct questioning/cross-examination, however there is nothing to indicate that it must be allowed.
- The Prohibition on asking about complainant's sexual history with anyone other than the respondent has been removed, however there is nothing stating that it must be allowed.
- Interim measures are no longer required and should be used when needed to ensure equal access as well as be available to both parties.

**Language from 2014 Q&A that is no longer in 2017 Q&A but is partially**

**addressed in 2001 Guidance:**

- Informal resolutions
  - 2017 Q&A removes restrictions on informal resolutions, but the 2001 Guidance document still contains restrictions, specifically that mediation is inappropriate for sexual assault cases (p. 21).
- Responsible employees - 2001 Guidance (p.13)
- Confidentiality request by complainant - 2001 Guidance (p. 17)
- Retaliation - 2001 Guidance (p. 17)

**Language from 2014 Q&A that is no longer in 2017 Q&A and not in 2001 Guidance:**

- Language suggesting schools offer amnesty for drug or alcohol use is gone.
- Guidance related to students with disabilities is gone
- Guidance related to international/undocumented students is gone
- Guidance about delaying when working with police is gone

*Special thanks to authors of this FAQ: Martha Compton, ASCA Director of Education; Christy Anthony; Regina Curran; and Kevin Carmody.*

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