

Drake's FAQ on Updated Title IX Guidance

On September 22, 2017, the U.S. Department of Education's Office for Civil Rights (OCR) withdrew two previous guidance documents concerning Title IX and sexual misconduct. This activity has received a considerable amount of attention on our campus and nationwide, and this FAQ is offered to address many common questions on the guidance and what it means for Drake.

What is Title IX?

Title IX is a federal law prohibiting sex discrimination for educational institutions receiving federal funding. Through guidance documents issued beginning in 2001, OCR has made clear that Title IX prohibits sex discrimination in the form of sexual violence and other misconduct, including harassment and assault. This guidance also required colleges and universities to adopt detailed procedures to receive and respond to complaints of sexual misconduct.

For more information, visit Drake's Title IX website: <http://www.drake.edu/titleix/>

What did OCR withdraw?

On Friday, OCR formally withdrew two previous *guidance* documents. From time to time, federal agencies like the Department of Education will issue guidance on its interpretation, application, and enforcement of various laws.

In 2011 and again in 2014, the Department of Education's OCR issued informal guidance documents on Title IX, which addressed sexual misconduct cases and its recommendations on procedures for processing complaints. OCR has now withdrawn those two documents and will no longer rely on them when enforcing Title IX.

Did the law change?

No, the language of the Title IX law did not change. The law and its prohibition of sexual discrimination still stands. Further, OCR still considers sexual misconduct (including sexual assault, sexual harassment, sexual violence) to fall under Title IX's prohibition on sex discrimination.

Is there new guidance from OCR?

Yes. Along with the letter withdrawing the previous guidance documents from 2011 and 2014, OCR also issued a "Q&A on Campus Sexual Misconduct (September 2017)." This Q&A addresses OCR's priorities in Title IX enforcement, including what it views as the required elements for "prompt and equitable" complaint procedures.

OCR also confirmed that it is not withdrawing all previous guidance on Title IX and sexual misconduct. OCR still intends to rely on a 2001 *Revised Sexual Harassment Guidance* document, which recognized that sexual assault was a form of sexual harassment. Under the

2001 guidance, schools have a responsibility to respond when they know or reasonably should know that sexual misconduct has occurred.

Additionally, the Q&A recognized that OCR's approach to Title IX enforcement will not affect obligations under other federal law. Specifically, OCR confirmed that its guidance and rulemaking under Title IX will not affect schools' obligations under the Jeanne Clery Act, which currently requires statistical compilation, statements of policy, and educational programming to address "dating violence, domestic violence, sexual assault, or stalking" on campus. In other words, Drake still must follow the Clery Act's requirements for these sexual and interpersonal offenses.

- **What does this mean for Drake?** Drake will continue to follow applicable law and best practices in providing students with a safe educational environment and in treating all students fairly and respectfully. Drake will continue its policies and programs to prevent sexual misconduct, provide outreach when it learns of possible sexual misconduct, and respond appropriately and equitably to complaints of sexual misconduct.

Are schools required to adopt a different standard than "preponderance of the evidence" when determining whether a student is responsible for sexual misconduct?

No. The Q&A permits schools to continue to use the "preponderance of the evidence," standard, although they can also consider whether to adopt a higher "clear and convincing evidence" standard. OCR advises that whichever standard is used, it should be the same as that used in other forms of student misconduct.

- **What does this mean for Drake?** Drake will continue to use the "preponderance of the evidence" standard, as it does for all allegations of student misconduct.

Has the recommended timeline for complaint resolution changed?

Yes. Under previous guidance, OCR strongly recommended that complaints be resolved within 60 days, absent reasonable delays due to witnesses, academic breaks, or other unavoidable conflicts. The new Q&A does not suggest a specific timeframe, but expects schools to make a good faith effort to conduct a fair, impartial investigation in a timely manner. Under the 2001 guidance, schools must nonetheless take "prompt and effective" actions to stop the misconduct, "prevent its recurrence, and remedy the effects on the victim that could reasonably have been prevented had it responded."

- **What does this mean for Drake?** Prompt, thorough, and equitable responses to sexual misconduct continue to be the focus of Title IX even without a specific timeline required by OCR. Drake has protocols in place to monitor the progress of cases to ensure they are moving forward appropriately given the nature and complexity of the case.

What does OCR mean by “equitable” investigations and resolutions of sexual misconduct complaints?

OCR requires investigations and resolutions to be equitable to both parties, meaning the students involved. OCR stresses in its new guidance that both parties must have equal opportunities to participate, to be heard, and to know what is happening in the investigation and resolution process.

- **What does this mean for Drake?** Drake’s protocols currently include both Title IX and Clery Act requirements for equitable sexual misconduct investigations, and provide equitable processes for the parties. This includes the opportunity for both parties to participate, offer evidence and witnesses, be supported by an advisor of their choice, respond to an investigation report before a final decision, and receive notifications of the outcome of the complaint.

Can schools still pursue “informal resolution” of sexual misconduct complaints, short of the formal investigation and hearing procedures?

Yes. The new guidance permits informal resolution, including mediation, if appropriate under the circumstances and if all parties agree.

- **What does this mean for Drake?** The Code of Student Conduct permits voluntary informal resolution, although not mediation, if the parties are both interested. Informal resolution can sometimes better meet the needs and goals of the parties and will continue to be available on a voluntary basis when appropriate.

Are appeals of disciplinary decisions still allowed?

Yes, although appeal processes have never been required. OCR has changed its approach to appeals in the new guidance, stating that schools may choose to allow appeals “solely by the responding party” or “by both parties.” Previously, if an appeal process was offered, it had to be offered to both parties.

- **What does this mean for Drake?** The Code of Student Conduct permits either party to appeal a final decision in the complaint process, and both parties will continue to be able to appeal adverse decisions in complaints filed with Drake.

What’s next?

The 2017 Q&A document will continue to guide OCR’s enforcement of sexual misconduct cases for the foreseeable future. However, OCR also stated that it will begin a formal rule-making process, which means that it will go through formal processes to adopt administrative regulations under Title IX. This formal rulemaking process will involve a public comment period in which individuals and groups can provide valuable input on Title IX’s application to sexual misconduct

on campuses. The resulting regulations will then carry the weight of law. New regulations would also be harder to amend or repeal than informal guidance documents.

- **What does this mean for Drake?** It is possible some standards and requirements could change after the formal rule-making. Just as before, Drake will continue to review any new guidance and regulations. However, Drake will not lessen its commitment to the campus community in preventing sexual misconduct, and appropriately and equitably responding to all complaints.