**What Does the End of Obama’s Title IX Guidance Mean for Colleges?**

By Sarah Brown September 22, 2017



J. Lawler Duggan, The Washington Post, Getty Images

In a speech this month at George Mason U., the education secretary, Betsy DeVos, heightened fears among advocates for sexual-assault victims that the Education Dept. planned to roll back Obama-era rules for complying with Title IX. In the wake of her announcement on Friday, college administrators said they’d stay the course in responding to sexual assault for now, but remained anxious about what’s to come.

Practically speaking, federal guidance on campus sexual-assault policy has returned to the pre-2011 era. But colleges’ policies won’t. At least not right away.

Campus Title IX officers told *The Chronicle* on Friday that their colleges would remain committed to sexual-assault prevention and response, despite the federal government’s announcement that the approach to the gender-equity law that the Obama administration had championed was effectively over.

The U.S. Department of Education’s Office for Civil Rights [rescinded](http://www.chronicle.com/blogs/ticker/education-dept-replaces-obama-era-title-ix-directives-with-new-interim-guidance/120249) a pivotal ["Dear Colleague" letter,](https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf) issued in 2011, that spelled out for colleges their responsibility to respond promptly and equitably to reports of sexual violence. The letter made clear that the federal government would aggressively police that obligation, and marked a [new era of strict enforcement.](http://www.chronicle.com/article/How-a-20-Page-Letter-Changed/239141)



[**A New Approach to Enforcement on Campus Sex Assault**](http://www.chronicle.com/specialreport/A-New-Approach-to-Enforcement/143?cid=RCPACKAGE)

This collection of *Chronicle* articles explores what a shift in enforcement of the gender-equity law known as Title IX might mean for sexual-assault survivors, accused students, and colleges.

The department on Friday also scrapped a 2014 [question-and-answer document](https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf) that went into more detail about how colleges should bring their policies and practices into compliance with Title IX. (A 2015 letter on the [roles and responsibilities of campus Title IX coordinators](https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf) remains in place.)

In lieu of those documents, the department released [interim guidance](https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf) that will eventually be replaced by regulations, after a [notice-and-comment process](http://www.chronicle.com/article/A-DeVos-Speech-on-Title-IX/241108) involving input from experts and the public. Advocates for victims decried what they saw as the devastating consequences of the move. Advocates for accused students cheered, seeing the decision as a sign that federal officials were taking their concerns about due process seriously.

The tone of the new guidance is much more permissive than that of the Obama-era directives, said Peter F. Lake, who leads the Center for Excellence in Higher Education Law and Policy at Stetson University. It’s also shorter and more to the point, he said. (Read [this *Chronicle* article](http://www.chronicle.com/article/What-You-Need-to-Know-About/241277) for a detailed analysis of the new guidance.)

But Mr. Lake has a lot of questions. Among them: Will this interim document become integral to the department’s enforcement of Title IX?

Here’s what we know about how Friday’s announcement could affect campuses.

**Colleges are reviewing the new guidance carefully.**

Department officials said the purpose of the interim guidance, which took the form of a Q&A, was "to help schools clarify their obligation" in a time of flux. They said they would continue working on the [360 open Title IX investigations](https://projects.chronicle.com/titleix/) into colleges’ handling of sexual assault, and would keep opening new ones.

Even so, some Title IX administrators said the guidance raises more questions than answers. Several officials said they wished the document had included more specificity.

"Right now I don’t know if anybody is truly sure about where we’re at," said Jennifer L. Ball, Title IX coordinator at Clarkson University, in New York, and an assistant professor of humanities there.

Ms. Ball was disappointed that the new document didn’t credit campuses with improving their response to sexual assault since the 2011 letter. Moreover, she said, "there are a few things in there that basically say, Go ahead, rewrite your policy."

The more-specific parts of the interim guidance, such as the description of what constitutes an equitable investigation, will warrant a closer look by campus officials, said Elizabeth Conklin, associate vice president of the Office of Institutional Equity and Title IX coordinator at the University of Connecticut.

Those fine details, she said, will require "more assessment and deliberation with partners on campus."

The 2011 and 2014 documents were "tremendously effective" in prompting colleges to take sexual assault more seriously, said Eric Butler, Title IX coordinator at the University of Denver. "While there were certainly areas in which the guidance could have been fine-tuned or clarified, this could have been achieved without retracting these documents altogether," he said.

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"The retraction," he continued, "will present schools with the first true test of their commitment to the progress of the last several years." Also, in the interim guidance, he said, "there is foreshadowing about things to come in the new regulations."

Jody Shipper, founder of Project IX, a nonprofit group that helps small colleges comply with Title IX, said she remained concerned about what the secretary of education, Betsy DeVos, and other top department officials believe about how campus disciplinary matters play out in reality.

In a [speech about Title IX](http://www.chronicle.com/article/A-DeVos-Speech-on-Title-IX/241108) this month, Ms. DeVos "included information that was just absolutely inaccurate," said Ms. Shipper, who has also served in Title IX roles at the University of Southern California and the University of California system. "What does she really think is going on?"

**Campuses aren’t going to change their policies overnight.**

It took colleges years to comply with the 2011 guidance, Mr. Lake said. "Higher ed just doesn’t turn on a dime," he said.

Some Title IX coordinators pointed out that the middle of the fall semester isn’t typically a time when colleges would change any policies. Many new students have just been taught at freshman orientation about campus procedures for responding to sexual-assault reports, administrators said, and it wouldn’t be fair to them to backtrack suddenly.

Also, most colleges already have received misconduct reports this semester and are in the middle of conducting investigations, Ms. Ball said. "You’d have to have a pretty hard-core philosophical opposition to what was currently in place to want to change course midstream," she said. "Most people will probably ride out the semester," if not the full academic year, she said.

Some state laws have already codified many of the 2011 letter’s key provisions. California requires colleges to use an evidentiary standard known as "preponderance of the evidence," or more likely than not, when adjudicating cases, as well as to adopt policies mandating affirmative consent to sexual conduct.

Kathleen Salvaty, Title IX coordinator for the University of California system, sent a [letter](http://universityofcalifornia.edu/sites/default/files/Title-IX-Letter-to-Campuses.pdf) to the system’s 10 campuses stressing that "UC’s system-wide policies and procedures on sexual violence and sexual harassment remain in full effect."

New York has passed similar laws. "I’m relieved I don’t have to change my policy," Ms. Ball said. "However," she continued, "I anticipate challenges to that policy because of how this new guidance has offered a mixed bag of options."

**The question of which standard of evidence to use will become even more contentious.**

The new guidance tells colleges that they may pick the standard they’d like to use when adjudicating sexual-assault cases: either the preponderance of the evidence, the standard that the 2011 letter told colleges to use and that is used in civil cases, or the clear and convincing evidence, a higher standard. (Both of those standards are lower than the one used in criminal cases, known as "beyond a reasonable doubt.")

Due-process advocates say that the "preponderance" standard is too low, given that the facts in campus rape cases are often messy and that, much of the time, one or more students involved consumed alcohol or drugs.

The Title IX coordinators who spoke with *The Chronicle* said they’d stick with the "preponderance" standard for now. "We believe it works well for us," said Crystal C. Coombes, senior deputy Title IX coordinator at the University of South Florida.

In a background call with reporters, a senior department official said the government had "left open the option of what schools do in this interim period" but had "no expectation" about whether colleges would adopt a higher standard.

“Allowing schools to select different standards of proof is asking for trouble.”

Offering institutions a choice isn’t a good approach, said Taylor Sinclair, director of Title IX for the Nebraska State College system. "Allowing schools to select different standards of proof is asking for trouble," she said. "Nationally it will be confusing, and it will result in students’ having different protections at different schools."

Colleges could be forced to grapple with "some very serious public-relations issues," because the new guidance will put many colleges in the position of explaining why they had picked one standard or the other, Ms. Ball said. That might open up campuses to more lawsuits, she added.

Some administrators will probably wonder whether this choice means that federal officials are hinting about what’s to come, Mr. Lake said. Is the civil-rights office suggesting that colleges change the standard now, because officials plan to do so in future regulations? Or will those regulations offer colleges a choice instead of a mandate?

**Advocates for victims are worried about the future.**

Lupita Gonzalez, a campus organizer with the victims’ advocacy group Know Your IX and a senior at Saint Mary’s University of Minnesota, said she’s worried that the department’s move will give colleges more freedom to choose how exactly they handle sexual-assault reports.

Without the specific guidance that the 2011 and 2014 documents provided, Ms. Gonzalez said, institutions might feel they had more latitude to sweep cases under the rug, as she believes they often did before 2011.

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She’s also concerned that victims will feel less comfortable reporting sexual violence. "I’m afraid that this is going to send a message to survivors that their education is less important than their alleged perpetrator," she said.

Know Your IX has heard from students who recently filed sexual-assault reports and are wondering whether their college will continue to investigate their cases, given the withdrawal of the "Dear Colleague" letter. "I can’t even imagine how I’d feel if I was going through the Title IX process right now," Ms. Gonzalez said.

The group plans to hold webinars to clarify that, even though the landmark guidance is no longer in place, students still have rights under Title IX and other laws and regulations, she said.

**Some Title IX officers think the new guidance has its positives.**

One notable change in the new document is that colleges no longer must resolve sexual-assault cases within 60 days of a report’s being filed. "There is no fixed time frame under which a school must complete a Title IX investigation," it states.

Ms. Coombes, of South Florida, was one Title IX official who was pleased to see that. She understands the goal of not allowing cases to languish, and she and her staff always try to move quickly through investigations, but sometimes circumstances mean that certain cases take longer, she said. At times, being held to the 60-day rule was "disconcerting," she said.

The new guidance also doesn’t signal a drastic rollback, which some observers had feared, Ms. Coombes said. Federal officials could have said that colleges don’t need a Title IX coordinator, for instance, she said. And the department could have scrapped the idea of "responsible employees," under which many people employed by a college must report any possible sexual misconduct they hear about to the Title IX office.

Ms. Shipper, of Project IX, predicted that "there will be a few early adopters" driving policy changes on their campuses, especially in states that are politically aligned with the Trump administration. But those early adopters, she said, could also invite risk if they don’t act carefully:

"I hope schools really understand that in a permissive world, they better understand the consequences of each of their decisions when they change things."

*Sarah Brown writes about a range of higher-education topics, including sexual assault, race on campus, and Greek life. Follow her on Twitter* [*@Brown\_e\_Points,*](https://twitter.com/Brown_e_Points) *or email her at* *sarah.brown@chronicle.com.*

*Correction (9/25/2017, 10:50 a.m.):* This article initially misstated the affiliation of Taylor Sinclair. She is director of Title IX for the Nebraska State College System, not the University of Nebraska system. The article has been updated to reflect this correction.