Understanding the September 2017 Interim Guidance on Campus Sexual Misconduct
For Advocates and those Supporting Survivors Through Title IX Investigations

MCEDSV is disappointed by the Department of Education's release of New Interim Guidance on Campus Sexual Misconduct[1] and the withdrawal of the 2011 Dear Colleague Letter and 2014 guidance on that topic. We fear that the new approach and the rhetoric leading up to it will embolden victim-blaming attitudes. This document is intended to help advocates support survivors through the investigation process under the new guidance.

It is vital to remember that the new guidance does not change the law. Title IX is still the law and both the statute and the cases interpreting it are clear that educational institutions have a duty to prevent and mitigate situations that create hostile environments, especially sexual violence. For now, most schools will likely make few, if any, changes to their Title IX procedures. Indeed, the Michigan university administrators who have spoken publicly about the interim guidance have all stated that they will not change policies right away. Advocates should be aware of the following aspects of the interim guidance and assure survivors accordingly:

Standard of Proof

- The new guidance states that the "preponderance of the evidence" is no longer the mandatory standard of proof in campus sexual misconduct investigations and proceedings. The interim guidance allows institutions to use *either* the preponderance of evidence *or* the (more difficult to prove) "clear and convincing" standard.
- However, institutions must use the same standard in all cases of student misconduct—meaning that unless the school applies the "clear and convincing" standard to other campus disciplinary procedures, like academic dishonesty or destruction of campus property, then schools should not apply the "clear and convincing" standard to sexual misconduct.
- Importantly, schools may continue to use the preponderance of the evidence standard of proof if they wish, so long as that standard is consistent across types of investigations. This is key because most schools (over 70 percent) were using the preponderance standard before the 2011 Dear Colleague Letter ("DCL") and there is no reason to believe that schools will make hasty changes in this regard.
- While Michigan advocates should inquire with their school's Title IX director to confirm, it is unlikely that schools will adopt a higher standard of proof right away.

[1] Office for Civil Rights, Q&A on Campus Sexual Misconduct, https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf (Sept. 2017) ("the new guidance").

Mediation or Other Informal Resolution Strategies

- The new guidance suggests that, if the school determines it is appropriate, and where all parties voluntarily agree, then informal resolution may be used. It is reported that, in a phone briefing with college lawyers about the new guidance, Acting Assistant Secretary for Civil Rights Candice Jackson said that colleges can use informal resolutions in cases involving sexual assaults.
- That said, the 2001 guidance, which is left in place by the new guidance, states, "In some cases, such as alleged sexual assaults, mediation will not be appropriate even on a voluntary basis." (page 21)
- Advocates should be ready to refer to the 2001 guidance to remind any administrator who asks whether a sexual assault survivor would like to voluntarily mediate a Title IX case that such a procedure is not appropriate.

Interim measures

- The new guidance says that schools must make interim measures, like counseling or separate class schedules, available to both parties, not just the claimant. It is difficult to know exactly what to expect with regard to interim measures that will be requested by respondents to Title IX proceedings. That said, Advocates should prepare for those respondents who have retained counsel to begin requesting interim measures in order to shore up their defense.
- That said, the 2001 guidance stated that interim measures "should be designed to minimize, as much as possible, the burden on the student who was harassed." (page 16) This means that the new mandate to provide interim measures to respondents may burden schools, but should not burden claimants.
- In the rare instance where an interim measure requested by a respondent cannot be accommodated while also accommodating a claimant (e.g., there are not enough offerings of a particular class), advocates may argue that the claimant's needs must take precedence.

Direct and Cross-Examinations

- The new guidance insists that any processes used during Title IX proceedings be made available to both parties, including the right to cross-examine parties and witnesses. In the 2011 DCL, schools were strongly discouraged from allowing parties to cross-examine one another during campus sexual misconduct investigations.
- In practice, many schools allow either a written response-to or questioning-of all adverse witnesses through the hearing officer. Courts have declined to hold that cross-examination is required in Title IX investigations. It is unlikely that Michigan schools will rush to add in-person cross-examination to their procedures.
- Advocates should be on the lookout for any movement towards incorporating cross-examination into school policies. If it is unclear whether a survivor will be required to endure cross-examination during an investigation, then advocates should assist in clarifying whether that is a possibility.

Complainant's Sexual History

- Some media outlets have reported that the new guidance allows respondents to question a complainant's sexual history, but advocates should be aware that the new guidance does not make this change explicitly. Instead, the new guidance takes away an express rule barring that line of questioning. The now-withdrawn 2014 guidance specifically stated: "Questioning about the complainant's sexual history with anyone other than the alleged perpetrator should not be permitted." In turn, the 2001 guidance we are left with does not expressly address this issue.
- Whether it is explicit policy or not, in keeping with Michigan's "rape shield" evidence rules and trauma-informed investigations, many Title IX investigators have been trained to avoid this line of inquiry. Advocates are advised to increase their vigilance, but it is unlikely that Michigan Title IX investigators will suddenly begin to question survivors about their sexual history with anyone other than the respondent(s) in that case. Advocates should assist survivors in firmly pointing out that such inquiry is not relevant to the incident being investigated.

Restrictions on Parties' Right to Speak During Investigations

- The new guidance suggests that restricting "either party to discuss the investigation (e.g., through 'gag orders')" gets in the way of the parties' ability to obtain and present evidence. Schools may discontinue any existing practice of using an across-the-board or blanket ban on discussing the case.
- That said, retaliation is still against the law. The 2001 Guidance states: "the school will take steps to prevent retaliation and will take strong responsive actions if retaliation occurs." (page 17)
- This means that schools should still use interim measures that take a more nuanced approach. For instance, a prohibition on discussing the case with anyone other than potential witnesses or sources of evidence would still be appropriate.
- Respondents should also be counseled against retaliation and, in appropriate cases, respondents may need to receive counseling to ensure that they know what it means to harass or retaliate against someone.
- Advocates should discuss the many forms that retaliation could take and ensure that survivors are prepared to document instances of retaliation so that they can make an informed decision about reporting such conduct. Ultimately, under the new guidance, survivors may be able to have a little more freedom to seek counsel and evidence without fear that they are violating a blanket gag order. That said, survivors should be aware that abusers may also seek to sue for defamation based on any speech surrounding the incidents, so survivors should use care with what they choose to put on social media or other public outlets.

Bearing the Burden of Proof in Sexual Misconduct Cases on Campus

- The new guidance clarifies that the school bears the burden of proof to gather sufficient evidence to reach a fair, impartial determination.

- Advocates could leverage this language to resist school investigators who do not follow through or suggest that survivors must bring their own evidence—reminding them the burden is on the school.
- That said, advocates should be weary of this language being construed to suggest that trauma-informed investigative tactics are somehow inappropriate or place the burden on the respondent. This is not the case. The school has the burden to gather sufficient evidence and to do so using trauma-informed tactics.

Time to Investigate

- The new guidance removes the previously mandated 60-day timeframe for investigations that the 2011 DCL specified. Instead, the new guidance requires merely that investigations be handled promptly, without making specific what that means. But the new guidance leaves in place the rule set forth in 2001,[2] which states that schools must have "designated and reasonable time frames for the major stages of the complaint process" but does not give an exact number of days.
- If schools are in compliance with the prior rules, they have internal policies that dictate a particular time frame (likely 60 days) within which to conclude the investigation. There is no reason for schools to suddenly increase that internal timeframe.
- Advocates should also note that the 2001 guidance admonished schools from allowing a criminal investigation to slow the pace of their own procedures. (page 21)
- Again, advocates should check with local programs, but it is unlikely that any Michigan schools will go out of their way to change to their internal rules regarding prompt investigations.

Appeals

- The new guidance allows schools to provide an appeal process to the responding party only. This is contrary to the 2011 DCL, which required that any appeal provided be given to both parties.
- Those schools who have a procedure in place allowing both parties to appeal the outcome may keep that procedure. The new guidance only requires that such schools ensure that the appeal process is made equally available for both parties.
- Advocates should ensure that survivors receive proper notice of the right to appeal. If advocates are faced with school administrators who are under the impression that, because of the new guidance, they must do away with any existing victim-appeal process, then advocates should point out that misunderstanding.

Questions: If advocates have questions about navigating the Title IX process under the new guidance, they may call MCEDSV at (517) 347-7000.

[2] Office for Civil Rights, Revised Sexual Harassment Guidance (66 Fed. Reg. 5512, Jan. 19, 2001), available at https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf ("the2001 guidance" with page numbers noted for important issues).