



National Center for Youth Law

October 4, 2018

Ms. Angela Arrington
Acting Chief Privacy Officer
Office of the Chief Privacy Officer
Office of Management
U.S. Department of Education
Room 2E215, LBJ
400 Maryland Avenue, S.W.
Washington, D.C. 20202

Via email to OMinformationQualityRequest@ed.gov and Angela.Arrington@ed.gov

Re: Information Quality Request Appeal

Dear Ms. Arrington:

On behalf of the National Center for Youth Law; SurvJustice; National Women’s Law Center; Equal Rights Advocates; Victim Rights Law Center; End Rape on Campus; Public Justice; Legal Voice; American Association of University Women; and Legal Momentum, the Women’s Legal Defense and Education Fund, we respectfully submit this appeal from the Department of Education’s Office for Civil Rights’ (OCR’s) denial of our Request for Correction pursuant to the Information Quality Act (“IQA”).¹

Our Request for Correction identified serious IQA violations regarding the information disseminated by OCR’s 2017 Dear Colleague Letter, which made various factual assertions about procedures that schools use or have used to resolve Title IX complaints and relied on those facts as part of its rationale for withdrawing earlier guidance on Title IX and sexual violence.² OCR’s Denial Letter summarily dismissed or ignored each of the violations we identified.

We renew all the arguments made in our IQA Request for Correction and highlight here three key instances demonstrating that OCR’s response to the Request for Correction is inadequate, incomplete, and in error.

¹ The Denial Letter was dated August 23, 2018, but was not received by the undersigned until emailed to the National Center for Youth Law by Stephanie Valentine on September 6, 2018. The appeal is therefore timely.

² See U.S. Dep’t of Educ., Ltr. from Ass’t Sec’y Candice Jackson (Sept. 22, 2017), <https://www.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf> (“2017 Dear Colleague Letter”). The 2017 Dear Colleague Letter rescinded a 2011 Dear Colleague Letter and 2014 Questions & Answers document (collectively “Prior Guidance”).

First, the 2017 Dear Colleague Letter contained no documentation or identification of sources to support the factual assertions it made. The Department’s IQA Guidelines, by contrast, require that a document that contains factual assertions “include documentation of the source of any information used” and “[c]learly identify data sources.”³ The OCR Denial Letter did not dispute that the 2017 Dear Colleague Letter did not contain documentation or identify data sources to support the six factual assertions identified in our Request for Correction. Instead, the Denial Letter itself appears to try to address that violation by identifying five documents that it suggests, but does not actually state, *could* support some of the factual assertions made in the 2017 Letter. This effort does not lessen the original IQA violation or negate the need for a public remedy. To the contrary, citing them without explaining which documents support which specific factual assertions made in the 2017 Letter improperly shifts the burden to establish the quality of the data from the Department – where the IQA puts it – onto the public. OCR’s decision not to correct the 2017 Letter by supporting the factual assertions made therein, or withdrawing those factual assertions, as required is thus in error.

Second, the Denial Letter asserts that OCR “made the decision to issue the 2017 DCL” only “[a]fter considering these and other materials,” but there is nothing in either the 2017 Letter or the Denial Letter that suggests OCR assessed the “accuracy, reliability, and unbiased nature of [this] information.”⁴ As we noted in the Request for Correction, when information is “reasonably likely to have a clear or substantial impact on” the Department’s policies, such “influential information” must be “accompanied by supporting documentation” and “needs to meet higher quality standards” under the Department’s Guidelines.⁵ OCR’s decision to reference select documents and various “discussions” and “listening sessions” in its Denial Letter and its failure to consider or even discuss any of the contrary evidence identified in our Request for Correction is not at all adequate to meet those requirements. To the contrary, a recently published report further contradicts OCR’s unsupported factual assertion that the Prior Guidance had been “widely criticized,” again demonstrating that OCR’s decision not to correct the 2017 Letter is in error.⁶

Finally, the Request for Correction noted that the 2017 Dear Colleague Letter made four factual assertions about what “many schools” had done before the Prior Guidance and how those actions had affected “many students,” without providing any support for the specified scale of these assertions. As our Request for Correction establishes, the ordinary meaning of “many” is “a number relatively large as compared with the whole or possible number of persons or things,” and the term can be a synonym of “majority.” With more than 105,000 schools and 77 million students in the United States, the natural reading of the 2017 Letter’s repeated references to

³ U.S. Dep’t of Educ., *Information Quality Guidelines* (“Departmental Guidelines”), <https://www2.ed.gov/policy/gen/guid/iq/infoqualguide.pdf> at 5.

⁴ *Id.* at 5.

⁵ *Id.* at 9-10.

⁶ See Tiffany Buffkin, Nancy Chi Cantalupo & Mariko Cool, Widely Welcomed and Supported by the Public: A Report on the Title IX-Related Comments in the U.S. Department of Education’s Executive Order 13777 Comment Call, at 2 (Sept. 25, 2018), <https://ssrn.com/abstract=3255205> (concluding based on a review of 12,035 public comments filed with the Department regarding Title IX and the Department’s guidance that 99 percent of commenters support Title IX and 97 percent of those individuals “specifically urg[ed] [the Department] to uphold the 2011 Dear Colleague Letter: Sexual Violence (2011 DCL).”)

“many schools” and “many students” is that the Letter is describing factual information about schools numbering in the thousands and students numbering in the millions. For instance, the 2017 Letter makes the factual assertion that “many” schools had traditionally used a clear-and-convincing burden of proof or one-sided appeals for the alleged perpetrator before issuance of the Prior Guidance, suggesting without support a preexisting consensus among schools in favor of those procedures. The Denial Letter responds only that the Department has not “codified” a “definition” for the term “many.” This misses the point. In the absence of a specialized definition, the intended audience must rely on the word’s ordinary meaning. In using the term “many” to describe schools and students without providing any evidence to support the scale of these factual assertions, OCR has exaggerated the utility of the information without justification, contrary to the Department’s IQA Guidelines.

As we noted in our Request for Correction, the unsupported and misleading assertions in the 2017 Dear Colleague Letter about the Prior Guidance have made our organizations’ jobs more difficult because these assertions discourage schools from voluntarily complying with the Prior Guidance. Furthermore, the inaccurate information disseminated in the 2017 Letter reinforces an incorrect belief that students who make allegations of sexual harassment and violence (primarily women and girls) are being given unfair advantages in comparison to the alleged perpetrators (primarily men and boys). That inaccurate information has a chilling effect that discourages the students whom our organizations support from reporting their experiences to campus authorities. It also creates and reinforces stereotypical views regarding women and girls that our organizations will have to combat in order to achieve our goals of gender justice and equal opportunity.

For the reasons described above, the Department should reverse the Denial Letter and instruct OCR to correct the 2017 Letter by retracting the assertions containing unsupported factual information and noting its errors prominently on its website, and through a press release and email blast reaching those to whom the Letter was disseminated. Further, because OCR provided no basis other than that unsupported factual information to justify its rescission of the Prior Guidance, the degree of correction that is appropriate for the information involved necessitates unwinding the rescission altogether.

Sincerely:



Jesse Hahnel
Executive Director
National Center for Youth Law

cc: Denise L. Carter, Acting Assistant Secretary, Office of Management
Kathleen S. Tighe, Inspector General, Office of the Inspector General
Kenneth L. Marcus, Assistant Secretary, Office for Civil Rights

Enc. Request for Correction (dated June 27, 2018)
Denial of Request for Correction (dated August 23, 2018; received September 6, 2018)