



National Center for Youth Law

December 14, 2018

Ms. Jessica Ramakis
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 Jessica.Ramakiss@ed.gov

Re: Information Quality Request Appeal

Dear Ms. Ramakis:

This is a request—submitted by the National Center for Youth Law; SurvJustice; National Women’s Law Center; Equal Rights Advocates; Victim Rights Law Center; Public Justice; Legal Voice; American Association of University Women; and Legal Momentum, the Women’s Legal Defense and Education Fund—for reconsideration and/or clarification of your November 29, 2018, letter (“Appeal Response Letter”). The letter was responding to our October 4, 2018, Appeal of the Office for Civil Rights’ September 6, 2018¹ denial of our June 27, 2018 Request for Correction under the Information Quality Act (“IQA”). Our Request for Correction relates to the Office for Civil Rights’ 2017 Dear Colleague Letter concerning Title IX (“2017 Dear Colleague Letter”).²

Your Appeal Response Letter appears to decline to reach the merits of our Appeal solely on the ground that the Department recently published a Notice of Proposed Rulemaking (“NPRM”) that “seeks to address the concerns” that we “note[d] in [our] appeal.” We believe that was error on both procedural and substantive grounds.

First, the Appeal does not appear to have been decided by the proper Department personnel. The Department’s IQA Guidelines require that appeals be “conducted by parties other than those who prepared the Department’s position.”³ For example, in the Department’s 2011 Response to the

¹ This 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.

² See U.S. Dep’t of Educ., Ltr. from Ass’t Sec’y Candice Jackson (Sept. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf> (“2017 Dear Colleague Letter”).

³ U.S. Dep’t of Educ., Information Quality Guidelines 13 (emphasis added),

Association of Proprietary Colleges Appeal (“2011 APC Appeal Response”),⁴ the Department informed the requester that it had “convened a [three-person] panel made up of parties other than those who reviewed” the original Request for Correction. Here, despite the Appeal remaining pending for almost two months, it appears that no “parties” were convened into a panel to decide the issues raised in the Appeal. Further, the Appeal Response Letter does not assert, like the 2011 APC Appeal Response, that the decision was made “consistent with rules” of the Department’s IQA Guidelines or that an “impartial review” was conducted by parties other than those who prepared the Department’s position at the Request for Correction stage. Based on the timing and the content of the Appeal Response Letter, it appears that the Department was waiting for the NPRM to be issued in the Federal Register in order to issue the Appeal Response Letter, suggesting that, in conducting the review of the Appeal, the personnel preparing the Appeal Response Letter coordinated with staff from the Office for Civil Rights (“OCR”) and others who were involved with the incipient NPRM. If so, any such staff were not appropriate parties to participate in the Appeal. A panel should have been convened to impartially review our Appeal, as in the appeal leading to the 2011 APC Appeal Response.

Second, contrary to the Appeal Response Letter’s assertion, the NPRM does not address the “concerns” raised in our Appeal. The NPRM does not recite all of the factual assertions in the 2017 Dear Colleague Letter that we have requested be corrected because they were not based on quality information. But all those factual assertions were relied on, and serve as the basis for, OCR’s rescission of the 2011 and 2014 Sexual Violence Guidances and OCR’s adoption of the 2017 Dear Colleague Letter. Although the 2017 Dear Colleague Letter is labeled an interim guidance, it currently governs OCR and will likely do so for many months, if not years. Furthermore, the challenged information in the 2017 Dear Colleague Letter remains disseminated to the public without correction even while the rulemaking process proceeds. If, as we contend, those statements were not based on quality information, we are entitled to a Departmental determination of that and an appropriate correction *now*.

Third, the rationale for not addressing our Appeal on the merits is in tension with the requirements under the IQA that were adopted by the OMB. OMB requires each agency to “establish administrative mechanisms allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency that does not comply with the guidelines.” 67 Fed. Reg. 8451, 8452 (Feb. 22, 2002). OMB’s “intent is to ensure that agency guidelines specify an objective administrative appeal process that, upon further complaint by the affected person, reviews an agency’s decision to disagree with the correction request.” *Id.* at 8458. Here, the Department did not allow us to “obtain correction of information ... that does not comply with the guidelines.” Nor did it “review[] ... an agency’s decision to disagree with the correction request.” To the contrary, the Appeal Response Letter acknowledged that OCR denied the Request for Correction but refused to review that decision, and thus refused to allow us to obtain a correction even if, as we contend, the information does not comply with the Department’s IQA Guidelines. This undermines the “purpose of Section 515” (i.e., the IQA): “to ensure that the public can justifiably have confidence in the information that Federal agencies disseminate and that affected persons will have administrative mechanisms for identifying

<https://www2.ed.gov/policy/gen/guid/iq/infoqualguide.pdf> (“IQA Guidelines”).

⁴ U.S. Dep’t of Educ., Ltr. from Principal Deputy Ass’t Sec’y for Mgmt. Winona H. Varnon (June 1, 2011), <https://www2.ed.gov/policy/gen/guid/iq/2011/dowlohnes-response.pdf> (“2011 APC Appeal Response”).

problems and having the agencies take corrective action.” 66 Fed. Reg. 34489, 34491 (June 28, 2001).

Similarly, in promulgating its own IQA Guidelines, the Department identified two specific grounds when it will not address a request for correction on the merits. First, “the Department need not respond substantively to requests that concern information not covered by the information quality guidelines.” 67 Fed. Reg. 62043, 62044 (Oct. 3, 2002). There is no question that the statements we challenged are covered by the IQA Guidelines. Second, the Department reserved the discretion to “reject a request that appears to be made in bad faith or without justification.” *Id.* But neither OCR nor the Appeal Response Letter suggested that our Request for Correction was made in bad faith or without justification. Finally, the Department made clear that it “is only required to undertake the degree of correction that it concludes is appropriate for the nature and timeliness of the information involved.” *Id.* In this instance, the Department did not decide whether it disseminated non-quality information, and thus did not address what “degree of correction” was appropriate.

To be sure, the Department’s IQA Guidelines do say that “[c]omments about information on which the Department has sought public comment, such as rulemaking or studies cited in a rulemaking, will be responded to through the public comment process, or through an individual response if there was no published process for responding to all comments.”⁵ But, as noted above, the NPRM has not sought public comment about the factual information that the Department disseminated and relied upon in its 2017 Dear Colleague Letter. By contrast, the Department itself invited public comment on the 2017 Dear Colleague Letter.⁶ The Department’s own IQA Guidelines provide that such comments “will be responded to ... through an individual response” when there is no public place for the Department to respond.

OMB has already clarified that the “plain meaning and intent” of the IQA reveal that the IQA is not limited “to information used in agency rulemaking,” but rather, it applies to “the larger government information universe.” 66 Fed. Reg. 49718, 49720-721 (Sept. 28, 2001). The Department cannot now narrow the relevant “government information universe” subject to the IQA’s administrative mechanisms to exclude information that was influential in OCR’s decisions in 2017 (i.e., the repeal of the 2011 and 2014 Guidances and the adoption of the 2017 Dear Colleague Letter) simply because information about the general topic might *also* be “used in agency rulemaking.”

Fourth, the disposition of this Appeal is inconsistent with the Department’s prior practice under the IQA, without any acknowledgement of its change in policy or practice. Previously, the Department has been willing to address IQA claims on the merits even if there was a pending notice-and-comment process that addressed the exact same information.

For example, in its most recent IQA decision, the Department’s 2015 Response to Carroll,⁷ the Department granted a Request for Correction of the FAFSA form even though the FAFSA was

⁵ IQA Guidelines, *supra* n.3, at 11.

⁶ 2017 Dear Colleague Letter, *supra* n.2, at 2 n.7 (“[i]f you have questions or are interested in commenting on this letter, please contact the Department of Education”).

⁷ U.S. Dep’t of Educ., Ltr. from Deputy Dir. of the Office of the Chief Privacy Officer Angela Arrington (Sept. 2, 2015), <https://www2.ed.gov/policy/gen/guid/iq/2015/ed-iq-response.pdf>.

then “out for [60-day] public comment” under the Paperwork Reduction Act. The Department said in that case that relevant changes in response to the Request for Correction “will be in place before the FAFSA goes out for an additional 30 days of public comment.” *Id.*

Similarly, the 2011 APC Appeal Response addressed on the merits “several issues that fall within the information quality challenge process arising under the IQA” that it determined were “not part of the public comment process.” 2011 APC Appeal Response, *supra* n.4, at 3. With regard to “those issues appropriately raised in the Appeal that will not be addressed by the rulemaking process,” the appeals panel found that the Department complied with the IQA. *Id.* at 5. Among the matters that the Department considered *not* part of the public comment process and *appropriately* raised and addressed in the IQA Appeal were: (1) whether “the information contained in the proposed rule” was subject to the “peer review” requirement of the IQA, *id.* at 3-4; (2) whether the proposed rule identified and listed the limitations of the “Missouri data” as required by the IQA, *id.* at 4-5; and (3) whether the calculations in the proposed rule relied on “secret data” in violation of the IQA, *id.* at 5.

Our Appeal raises questions that will not be addressed in the rulemaking, i.e., whether the information disseminated by and relied on in the 2017 Dear Colleague Letter complied with the IQA and the appropriate remedy if it did not. These issues are certainly less likely to be addressed in the current notice-and-comment process than the issues resolved under the IQA on the merits in the 2011 APC Appeal Response, much less in the 2015 Response to Carroll, where the challenged information was corrected even as it was subject to notice-and-comment.

Finally, even if you believe the Appeal Response Letter properly resolved our Appeal, we would respectfully request that you amend the Letter to clarify that the Department has denied our Appeal and that there is no other administrative recourse within the Department for our IQA claims regarding the 2017 Dear Colleague Letter. If this is the Department’s final decision, that should be made express.

Thank you for your continued consideration.

Sincerely:



Jesse Hahnel
Executive Director, National Center for Youth Law

cc: Denise L. Carter, Acting Assistant Secretary, Office of Management
Sandra Bruce, Acting 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)
Appeal (dated October 4, 2018)
Letter Response to Appeal (dated November 29, 2018)