



National Center for Youth Law

June 27, 2018

Tomakie Washington
Acting Director, Information Collection Clearance Division
Office of the Chief Privacy Officer
Office of Management
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202

Re: Request for Correction under the Information Quality Act

Dear Tomakie Washington:

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; Futures Without Violence; Public Justice; Legal Voice; Know Your IX, a project of Advocates for Youth; American Association of University Women; and Legal Momentum, the Women’s Legal Defense and Education Fund, we respectfully submit this Request for Correction to the U.S. Department of Education (the “Department”) pursuant to the Information Quality Act (“IQA”).

The 2017 Dear Colleague Letter withdrawing earlier guidance on Title IX and sexual violence and issuing a new guidance letter made various factual assertions about procedures that schools use or have used to resolve Title IX complaints. These assertions are presented without citation, in direct violation of a requirement to identify data sources, and indeed appear unlikely to be supported by any accurate and quality information, as required by the IQA.

Accordingly, on behalf of those 12 affected organizations, Democracy Forward Foundation and the National Center for Youth Law make this request for correction, pursuant to the Department’s IQA guidelines, of the information contained in the 2017 Dear Colleague Letter. We request that you correct this letter to remove the unsupported and incorrect factual assertions. Further, because the Department provided no basis other than those erroneous factual assertions to justify its rescission of prior guidance on Title IX and sexual violence, the degree of correction that is appropriate for the information involved necessitates undoing the rescission altogether.

I. The IQA's Requirements

The IQA, found at Section 515 of Public Law 106-554, together with its implementing regulations and guidelines, requires that information disseminated to the public by federal agencies, including the Department, be accurate, reliable, and unbiased.¹ The IQA directs the Office of Management and Budget (“OMB”) to issue guidelines that “provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies.”² Federal agencies, in turn, must issue their own guidelines to promote the quality, utility, and integrity of disseminated information and 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.”³

Pursuant to these directives, OMB and the Department have promulgated guidelines establishing information quality standards and providing a means for parties to seek redress for information that does not conform to these standards.⁴ Under these guidelines, the touchstone for the IQA is that (1) information (2) disseminated by an agency (3) be of requisite quality. “Information” includes “any communication or representation of knowledge, such as facts or data, in any medium or form.”⁵ And dissemination “refers to any distribution of information to the public that is initiated or sponsored by a federal agency.”⁶

The Department “assess[es] information quality using three factors: utility, objectivity, and integrity.”⁷

- Utility “refers to the usefulness of the information to its intended users.”⁸ Any aggregate data or information presented in a Departmental product should be “carefully described and documented.”⁹ “The usefulness of information the Department disseminates will be evaluated from the perspective of the Department, educators, education researchers, policymakers, and the public.”¹⁰

¹ Consolidated Appropriations Act, 2001, Pub. L. No. 106-554 § 515, 114 Stat. 2763, 2763A-153 & 154 (codified at 44 U.S.C. § 3516 note) (“IQA”); Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. 8452 (Feb. 22, 2002) (“OMB Guidelines”); U.S. Dep’t of Educ., *Information Quality Guidelines* (“Departmental Guidelines”), <https://www2.ed.gov/policy/gen/guid/iq/infoqualguide.pdf>.

² IQA, *supra* note 1, § 515(a).

³ *Id.* § 515(b). As discussed in Part III, *infra*, the organizations jointly submitting this letter are all affected persons.

⁴ See Departmental Guidelines.

⁵ *Id.* at 1.

⁶ *Id.*

⁷ *Id.* at 4.

⁸ *Id.*

⁹ *Id.* at 5.

¹⁰ *Id.*

- Objectivity “refers to the accuracy, reliability, and unbiased nature of information.”¹¹ It “involves both the content and the presentation of the information.”¹² Content “should be complete, includ[ing] documentation of the source of any information used.”¹³ Department products should, among other things, “[c]learly identify data sources” and “[c]onfirm and document the reliability of the data, and acknowledge any shortcomings or explicit errors in any data that is included.”¹⁴
- Integrity “refers to the security or protection of information” and “ensures that the information is not compromised through corruption or falsification.”¹⁵

Research findings of third parties are subject to the IQA when the Department “represents, uses, or relies upon the information ... in support of the official position of the Department.”¹⁶ Indeed, when information is “reasonably likely to have a clear or substantial impact on” the Department’s policies, it “needs to meet higher quality standards.”¹⁷ Such “influential information” must be “accompanied by supporting documentation that allows an external user to understand clearly the information and be able to reproduce it, or understand the steps involved in producing it.”¹⁸

II. The 2017 Dear Colleague Letter Disseminated Information of Questionable Quality

On September 22, 2017, the Department issued a Dear Colleague Letter (the “2017 Dear Colleague Letter” or “Letter”).¹⁹ The 2017 Dear Colleague Letter, and accompanying Q&A guidance, both set forth the Trump Administration’s policy regarding Title IX and rescinded a 2011 Dear Colleague Letter and 2014 Questions & Answers document (collectively “Prior Guidance”).

The 2017 Dear Colleague Letter is covered by the IQA. The Letter contains information, *i.e.*, a “representation of knowledge, such as facts or data ... including in textual ... [or] narrative ... forms.”²⁰ The information, quoted immediately below, consists of assertions of facts in narrative form about what schools were doing before the Prior Guidance was issued and the effect that the Department’s Prior Guidance had on the procedures that schools employed to resolve Title IX complaints. And the Letter was plainly disseminated to the public. The Department issued the 2017 Dear Colleague Letter with an accompanying press release and continues to make the Letter available to the public on its webpage.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 9.

¹⁶ *Id.* at 3.

¹⁷ *Id.* at 9.

¹⁸ *Id.* at 10.

¹⁹ See U.S. Dep’t of Educ., Ltr. from Acting 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”).

²⁰ Departmental Guidelines at 1.

Specifically, the Department disseminated the following information in the 2017 Dear Colleague Letter:

1. “Many schools [before the Prior Guidance] had traditionally employed a higher clear-and-convincing-evidence standard.”²¹
2. “[M]any schools [before the Prior Guidance] had previously followed procedures reserving appeal for accused students.”²²
3. “As a result [of the Prior Guidance], many schools have established procedures for resolving allegations that lack the most basic elements of fairness and due process.”²³
4. “As a result [of the Prior Guidance], many schools have established procedures for resolving allegations that ... are overwhelmingly stacked against the accused.”²⁴
5. The Prior Guidance “led to the deprivation of rights for many students--both accused students denied fair process and victims denied an adequate resolution of their complaints.”²⁵
6. The Prior Guidance “has not succeeded ... in leading institutions to guarantee educational opportunities on the equal basis that Title IX requires.”²⁶

Each of the six statements purports to contain factual information about what schools were doing prior to 2011 or that the Prior Guidance “result[ed]” in or “led to” particular effects. These cannot be considered mere statements of opinion. Although opinions are not generally subject to the IQA, any such opinions must be “clearly identified as such” and “not represent facts.”²⁷ The information in these statements is not clearly identified as opinion, and the statements each represent that the Department is describing true information about the world around us. Thus, these statements contain information that is squarely governed by the IQA.

This information fails the IQA requirements for utility and objectivity, and as a result, the Department’s dissemination of and apparent reliance on this information violates the IQA and its implementing guidelines.

²¹ 2017 Dear Colleague Letter at 1.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 1-2.

²⁶ *Id.* at 2.

²⁷ Departmental Guidelines at 3.

First, there is no indication where this information comes from, which is critical to both the utility and objectivity factors. Absent citations to data sources, it is impossible for members of the intended audience – including students, educators, education researchers, policymakers, and the public – to fully understand the claims and verify the information. Indeed, the Department failed to identify a single source that it considered in drawing these conclusions, despite the requirement that it “[c]learly identify data sources.”²⁸

Second, the utility and objectivity of the information is further undermined by its facial implausibility. Four of the statements discussed above use the phrase “many schools” in describing the information. There are more than 98,000 K-12 public schools, run by over 16,000 local education agencies, that receive federal financial assistance; there are an additional 7,236 such institutions of higher education.²⁹ The term “many” means “a number relatively large as compared with the whole or possible number of persons or things.”³⁰ Indeed, as a noun, “many” means “majority.”³¹ With more than 105,000 total schools that receive federal funds, when the Department says in its Letter that “many schools” that receive federal financial assistance had done certain things a certain way or responded to the Prior Guidance in a certain manner, the Department leaves the intended audience – including students, educators, education researchers, policymakers, and the public – with the understanding that the Letter is referring to, and asserting factual information about, schools numbering in the thousands, even the majority of such schools. (If the Department were intending to claim hundreds out of 105,000 schools had done things, the word “many” would not be appropriate.) Yet the Department provided no evidence that would support such a factual claim, and we are not aware of any that exists.

In fact, the existing research clearly contradicts the Letter’s conclusions, even if the claim had been limited only to the practices of institutions of higher education (which it was not). For example, a Congressionally-mandated report submitted to the U.S. Department of Justice in 2002 revealed that more than eighty percent of schools did not mention the burden of proof used in a hearing, and that for those that did, 81% used the “preponderance of the evidence standard.”³² There is no information reported from that survey as to how many schools actually used the “clear and convincing standard.” Nor is there any information reported from that survey regarding whether appeal rights were reserved for accused students only, or both the accuser and the accused.

²⁸ *Id.* at 5.

²⁹ Nat’l Ctr. for Educ. Statistics, *Educational Institutions*, <https://nces.ed.gov/fastfacts/display.asp?id=84> (last visited June 21, 2018).

³⁰ Ballentine’s Law Dictionary (“Many”).

³¹ Oxford English Dictionary (“Many”).

³² Heather M. Karjane, et al., Educ. Development Ctr., Inc., *Campus Sexual Assault: How America’s Institutions of Higher Education Respond* 122 (Oct. 2002), <https://www.ncjrs.gov/pdffiles1/nij/grants/196676.pdf>.

Further, in 2011, a survey released by the advocacy group Foundation for Individual Rights in Education (“FIRE”) of 197 universities – selected because they were ranked the highest by U.S. News & World Report – showed that before the Prior Guidance was issued in 2011, only 24 schools said they used the clear and convincing standard.³³ Further, FIRE’s analysis suggested that such high-ranking institutions of higher education were more likely to use that standard than other schools.³⁴ This survey then further indicates that the total number of schools who used clear and convincing evidence before 2011 was not “many” of the 7,236 institutions of higher education, much less “many” of the more than 105,000 total schools.

In 2014, at the request of Senator Claire McCaskill, the Senate Subcommittee on Financial and Contracting Oversight of the Committee on Homeland Security and Governmental Affairs conducted a comprehensive survey of colleges and universities for school year 2011-12 (shortly after the issuance of the 2011 Dear Colleague Letter). That 2014 survey found that only 11% of institutions of higher education that responded to the survey employed the clear and convincing standard and that only 6% of institutions appeared to provide an appeal right to the accused but not the accuser.³⁵

We are unaware of any other recent large-scale analysis of school sexual assault policy that provides a factual basis for the Letter’s assertions and, in violation of the IQA, the Letter did not cite any such analysis in support of its assertions of factual information. Indeed, a recent survey of the relevant literature, including the effects of federal Title IX policy, does not identify any such research.³⁶ Further, we are aware of no information, much less quality information, that is available surveying the procedures used before the Prior Guidance at the more than 98,000 K-12 public schools in the country.

Third, the Letter asserts that the Prior Guidance led to a deprivation of rights for “many students.” Even if the Department had facts of specific examples at particular institutions in mind (which it elected not to share) and could establish a causal link between the Prior Guidance and the deprivations, the Department has not cited any evidence to support its claim that “many” of the Nation’s more than 77 million students experienced such deprivations.³⁷ Its failure to do so again demonstrates a lack of utility and objectivity in the information asserted.

³³ FIRE, *Standard of Evidence Survey: Colleges and Universities Respond to OCR’s New Mandate* Appendix (August 2011) (calculated by counting schools that FIRE coded as “Clear and Convincing Evidence” in the column “Standard of Evidence used prior to April 4, 2011”), <http://thefire.org/public/pdfs/8d799cc3bcca596e58e0c2998e6b2ce4.pdf?direct>.

³⁴ FIRE, *Standard of Evidence Survey: Colleges and Universities Respond to OCR’s New Mandate*, at 4 (2011) (FIRE’s description of survey findings), <http://thefire.org/public/pdfs/f17fa5caafd96ccdf8523abe56442215.pdf?direct>.

³⁵ S. Subcomm. on Financial & Contracting Oversight, *Sexual Violence on Campus*, App. tbl. F4, F3.14, F3.15 (July 9, 2014), <https://www.hsgac.senate.gov/download/sexual-violence-on-campus-survey-report2>.

³⁶ Carrie A. Moylan & McKenzie Javorka, *Widening the Lens: An Ecological Review of Campus Sexual Assault*, Sage J.: Trauma, Violence, & Abuse (Feb. 6, 2018), <http://journals.sagepub.com/doi/pdf/10.1177/1524838018756121>.

³⁷ Press Release, U.S. Census Bureau, School Enrollment in the U.S. (Oct. 20, 2016), <https://www.census.gov/newsroom/press-releases/2016/cb16-tps142.html> (number of students in United States).

Finally, the Letter’s conclusions about the scope and type of harm the Prior Guidance caused to accused students lack utility and objectivity. The Letter fails to define what it means when it refers to “the most basic elements of fairness and due process” or what it means to have procedures be “overwhelmingly stacked against the accused.” Even so, we are aware of no data, either within the Department or based on external research, that identifies a systemic problem. To be sure, one can cherry-pick one-sided anecdotes or allegations made (but not yet proven) in some litigation. But those assertions are not quality information that the Department may lawfully disseminate under the IQA, much less rely on for policy decisions.

Indeed, those factual assertions run counter to the available evidence. For example, the 2014 survey of institutions of higher education by a Senate Subcommittee, discussed above, determined that while there are ongoing, widespread problems with regard to protecting survivors of sexual harassment, including sexual violence, no similar widespread problem exists with regard to protecting the due process rights of the accused:

In the adjudication process, it is necessary to balance the rights of survivors with the rights of alleged perpetrators. There has been concern voiced among some groups that if universities adopted more victim-centered approaches in their handling of sexual assault cases, they would violate the due process rights of alleged perpetrators. Some have even said the system is already too survivor-focused. Contrary to these concerns, it appears that some institutions actually afford certain due process elements more frequently to alleged perpetrators than they do to survivors. For example, 82% of schools allow alleged perpetrators to challenge hearing members regarding impartiality or conflicts of interest, while only 78% provide the same right to survivors.³⁸

Even more recent studies in Maryland and North Carolina similarly found that accused students were more likely than complainants to be given various procedural rights, including the right to receive written notice of the charges, to call witnesses (including character witnesses), to submit evidence, to question witnesses, and to challenge decisionmakers for bias.³⁹ The Maryland study, moreover, found that in some institutions the procedures were still stacked against the complainant: schools that “were strongly oriented to protecting accused students’ due process rights did not, as a group, have values for protecting victims/accusers that were above the mean. Two, in fact, had victim support values of zero.” The Letter’s failure to acknowledge these and other analyses of the ongoing robustness of due process protections violates the IQA and its implementing guidelines’ regarding the objectivity and utility requirements.

³⁸ S. Subcomm. on Financial & Contracting Oversight, *supra* note 35, at 11-12.

³⁹ Amanda Konradi, *Can Justice Be Served on Campus? An Examination of Due Process and Victim Protection Policies in the Campus Adjudication of Sexual Assault in Maryland*, *Humanity & Soc’y* 373, 387 (2016), http://www.academia.edu/attachments/52957101/download_file?st=MTUyOTAwMDk4OCwxOTkuMjMwLjExMi4yMjY%3D&s=profile; Joshua D. Elrod, *Prompt and Equitable: A Critical Study of Sexual Violence Policies and Procedures at University of North Carolina Systems* 86 (Aug. 2015) (Ph.D. dissertation, Appalachian State University), <https://libres.uncg.edu/ir/asu/f/Elrod%20Dissertation.pdf>.

III. The Signatories Are Affected Persons

Each of the 12 organizations that joins this letter is adversely affected by the Department's dissemination of the information at issue.⁴⁰ As part of a mission to promote gender justice and equal opportunity, the organizations work to prevent and redress sexual harassment, including sexual violence, by supporting and representing student survivors and by educating school officials, students, and members of the public about their rights and obligations under federal law. Consistent with this mission, the organizations have expended, and will continue to expend, their resources to ensure that all schools follow Title IX as explained by the Prior Guidance.

The Department, by making the unsupported assertion in the 2017 Dear Colleague Letter that the Prior Guidance resulted in the establishment of inappropriate procedures and the infringement of accused students' rights, makes our organizations' jobs more difficult because this assertion discourages schools from voluntarily complying with the Prior Guidance.

Further, the 2017 Dear Colleague Letter not only informs schools about the Department's new legal interpretation of Title IX to permit the use of a clear-and-convincing burden of proof and one-sided appeals for the alleged perpetrator, but it also asserts that many schools had traditionally used such standards and procedures. That inaccurate factual assertion suggests a pre-existing consensus among schools in support of those procedures – and approval from the Department – that makes it more difficult for our organizations to oppose schools' adoption of the procedures.

Finally, the inaccurate information disseminated here reinforces an incorrect belief that students who claim they have experienced sexual 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 which discourages victims of sexual harassment, including sexual violence, 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.

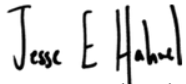
IV. Remedy and Conclusion

Prevention and redress of sexual violence in educational institutions is a serious issue. The Department disrespects the issue, as well as the people who experience it, when it relies on and disseminates information that lack the basic attributes of quality.

⁴⁰ Departmental Guidelines at 10 (“An affected person is an individual or an entity that may use, benefit or be harmed by the disseminated information at issue.”).

For the reasons described above, the Department should first correct the 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.⁴¹ Further, because the Department 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



Karianne Jones, Counsel
Robin Thurston, Senior Counsel
Democracy Forward Foundation

*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, Futures Without Violence, Public Justice, Legal Voice,
Know Your IX, a project of Advocates for Youth, American Association of University Women, and
Legal Momentum, the Women's Legal Defense and Education Fund*

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

⁴¹ Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 66 Fed. Reg. 49,718, 49,721 (Sept. 28, 2001) (“Examples of appropriate responses ... include ... press releases or mass mailings that correct a widely disseminated error or address a frequently raised complaint.”).