NYS Management Advocates for School Labor Affairs

Title IX Training
Discrimination & Investigations

Onondaga-Cortland-Madison BOCES

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Dominic D'Imperio, Esq.
DIRECTOR OF LABOR RELATIONS
ONONDAGA-CORTLAND-MADISON BOCES

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Agenda
Today's Training & Review

- **Part 1: 12:30 to 2:00**
- **Title IX Defined – Legal Rules and Requirements**
  I. **Title IX Harassment Defined**
  II. **Rules and Obligations**
  III. **Title IX Specific Terms**
  IV. **Title VII and Title IX Intersections**
- **Part 2: 2:15 – 3:30**
- **Title IX – Implementation and Practice Recommendations**
  I. **Investigation of Complaints-Legal Obligations and Requirements**
  II. **Practical Considerations**
  III. **Best Practices**
  IV. **Conclusions and Discussions**

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Title IX Harassment Defined

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What is Title IX Harassment[1]

- Title IX prohibits sex discrimination in the programs and activities of all educational institutions receiving federal funding, including school-sponsored activities, school approved and/or funded activities or programs, and school sponsored or approved travel, where such locations or activities are under the substantial control of the institution
- Title IX prohibits different treatment on the basis of sex in all aspects of a school's education programs or activities with respect to both students and staff, where such differential treatment effectively prevents an individual from accessing the educational institution
- Title IX prohibits retaliation against an individual for opposing or reporting discrimination, complaining about discrimination, or participating in a discrimination investigation.
- Title IX also can prohibit policies and procedures that disproportionately affect women or girls in an adverse way, even if those policies and procedures appear neutral.
- Title IX requires schools to adopt policies and procedures that are important for the prevention and correction of sex discrimination.
- Effective 08/16/20 – Title IX also expressly covers dating violence, domestic violence, stalking, and unwanted/non-consensual sexual conduct as a form of Sexual Harassment

1. https://www2.ed.gov/about/offices/list/ocr/docs/titleix-summary.pdf

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What is Title IX Harassment

- Title IX regulations as amended on August 14, 2020, make clear that Sexual harassment is a form of sex discrimination covered by Title IX (and Title VII – more later).
- Regulations include expansive definitions under federal law with overlap under New York State Law, which is in some areas more expansive
- Sexual harassment is now defined under 34 C.F.R. §106.30 as conduct that occurs on the basis of sex that prevents a complainant's right of equal access to the educational institution and falls under one or more of the following three categories:
- The Final Rule defines sexual harassment broadly to include any of three types of misconduct on the basis of sex, all of which jeopardize and "effectively deny" a complainant's equal access to the educational institution that Title IX is designed to protect:.
  - Any instance of "Quid Pro Quo" harassment - an employee of the recipient institution conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
  - Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or
  - Any instance of conduct that qualifies as "Sexual assault" as defined under the Clery Act, "dating violence", "domestic

1. https://www2.ed.gov/about/offices/list/ocr/docs/titleix-summary.pdf

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What is Title IX Harassment

- The Final Rule utilizes the "effectively denies" standard from the Supreme Court's decision in *Davis v. Monroe*, 526 U.S. 629 (1999)
  - Case involving peer sexual harassment between students
  - Intent of offender is irrelevant
  - so severe, pervasive, and objectively offensive, and that so undermines and detracts from the … educational experience, that the victim … are effectively denied equal access to an institution's resources and opportunities.
- The Final Rule removes language and standard for harassment where conduct only "limits" equal access to the institution's resources and opportunities
- The Final Rule as originally crafted in 2020 attempts to rely more directly on Supreme Court precedents in in Title IX cases like *Davis*, while also distinguishing any reliance on Title VII cases in the employment context

1. https://www2.ed.gov/about/offices/list/ocr/docs/titleix-summary.pdf

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Where does Title IX apply

- Sexual Harassment is defined as occurring in a School's "Education Program or Activity" and "in the United States"
- The Title IX statute applies to persons in the United States with respect to education programs or activities that receive Federal financial assistance. Under the Final Rule, schools must respond when sexual harassment **occurs in the school's education program or activity, against a person in the United States.**
  - The Title IX statute and existing regulations contain broad definitions of a school's "program or activity" and the Department will continue to look to these definitions for the scope of a school's education program or activity.
  - Education program or activity includes locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurred, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution (such as a fraternity or sorority house).
- A school may address sexual harassment affecting its students or employees that falls outside Title IX's jurisdiction in any manner the school chooses, including providing supportive measures or pursuing discipline

1. https://www2.ed.gov/about/offices/list/ocr/docs/titleix-summary.pdf

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Why is Title IX Harassment a Concern?

- While sexual harassment is a concern for schools generally, it could be of particular concern in STEM areas or other programs where there are historically and/or frequently small numbers of female students in such courses or programs of study. Small numbers increase the potential that female students may become targets of harassment.
- Under new and recently released guidance, Title IX also gender-based harassment as a form of discrimination as prohibited under New York State Law.
- Harassing conduct based on sex or sex stereotypes may or may not still be barred, even if the harassment is not sexual in nature, but it is still prohibited under New York State Law.
- Examples include:
  - A student harassing a fellow student by altering his/her lab results because of his/her sex.
  - A student harassing another student and refusing to be his/her lab partner in a physics class or CTE class because s/he thinks s/he will not be able to handle the work seriously because of his/her sex.
  - A teacher refusing to assign a partner to work with a female students because the teacher thinks the female student cannot/will not be able to handle the work seriously because of her sex

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Rules and Obligations

Title IX Policy Requirements

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Title IX - Policy Requirements

- Required Title IX Policy components:
  - Designate and authorize a Title IX Coordinator
  - Description of the role of the Title IX Coordinator.
  - Definition of sexual harassment for purposes of Title IX and a description of when a Formal Complaint can be filed.
  - Process for responding to a "Formal Complaint" (grievance process) that complies with Title IX regulations, including appeals for both the charging party and respondent.

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Title IX - Policy Requirements

- Required Title IX Policy components:
  - Requirement that the Title IX Coordinator, investigators, initial and appeal decision makers receive training as required by Title IX.
  - Description of the potential sanctions to be imposed upon a harasser where there is a determination that a complainant has been sexually harassed.
  - **State the evidentiary standard to be used in all cases: "clear and convincing" or "preponderance of evidence."**
- Under New York Human Rights law, contractors can also be accused of Title IX violations

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Title IX - Policy Requirements

Schools are required to comply with and make available the following procedural requirements, which are important for the prevention and correction of sex discrimination, in accordance with complaint procedures required to be adopted under 34 CFR § 106.8(c) and 106.45.

- Publish a **notice of nondiscrimination**;
- Designate a **person to coordinate the school's compliance with Title IX** and notify all students and employees of the name or title and contact information for this person;
- Adopt and publish **grievance procedures** providing for the prompt and equitable resolution of sex discrimination complaints;
- Provide support measures and remedies to persons alleged to be victimized by sexual harassment;
- Resolve allegations of sexual harassment promptly and accurately under a fair grievance process that provides due process protections to alleged victims and alleged perpetrators of sexual harassment;
- Prohibit retaliation; and
- Effectively implement remedies for victims

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Rules and Obligations

Title IX Publications and Notices

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Title IX – Notice of Nondiscrimination

- **Publish a notice of nondiscrimination** – "that the recipient does not discriminate on the basis of sex in the education program or activity that it operates, and that it is required by title IX and this part not to discriminate in such a manner. Such notification must state that the requirement not to discriminate in the education program or activity extends to admission (unless subpart C of this part does not apply) and employment, and that inquiries about the application of title IX and this part to such recipient may be referred to the recipient's Title IX Coordinator, to the Assistant Secretary, or both" (34 CFR § 106.8)
- Schools are required to publish a notice of nondiscrimination in the following ways. (34 C.F.R. § 106.9);
  - The notice must be widely distributed to students, employees, AND prospective students and employees, and other relevant individuals.
  - The notice must state that inquiries concerning the application of Title IX may be referred to the school's Title IX coordinator or to the federal Office for Civil Rights with information on how to contact the Title IX coordinator.

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Title IX - Publication and Procedures

- Designate at least one Title IX Coordinator (34 CFR 106.8(a))
  - **Coordinator MUST be an employee of recipient –** *See* DOE OCR Policy Guidance Portal, Office for Civil Rights Issues New Resource to Help Education Institutions Implement the Title IX Final Regulations - Part 2 (Jan. 15, 2021)[1]
  - "Each recipient must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities under this part, which employee must be referred to as the 'Title IX Coordinator.' Thus, the restriction placed on a recipient's choice of a Title IX Coordinator is that the person must be the recipient's 'employee'."[1]
- Provide that any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), in person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report.
- Such a report may be made at any time (including during non-business hours) by using the telephone number or electronic mail address, or by mail to the office address, listed for the Title IX Coordinator

1. https://www2.ed.gov/about/offices/list/ocr/docs/qa-titleix-part2-20210115.pdf

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Title IX - Publication and Procedures

- Each recipient must prominently display the **contact information** required to be listed for the Title IX Coordinator under paragraph (a) of this section and as part of the required policy described in paragraph (b)(1) of this section on its website, if any, and in each handbook or catalog that it makes available to persons entitled to a notification under paragraph (a) of this section. (34 CFR § 106.8)
- **Persons entitled to notification** of identity of Title IX Coordinator, include applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient.
- The notice to persons entitled to notice must also include the following information about the Title IX Coordinator: name or title, office address, electronic mail address, and telephone number.
- School's policy is also required to address the process for handling Formal Complaints made under Title IX, referred to as a "grievance process." – Similar under New York Law. Must identify the filing, forms, persons to file complaints to, and the overall process. (34 CFR § 106.8)

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Title IX - Publication and Procedures

Current District policies that could address sexual harassment now:

- Policy prohibiting harassment of students under the Dignity for All Students Act.
- Code of Conduct Policy.
- Policies proclaiming nondiscrimination against students
- Policy prohibiting sexual harassment of employees, interns, applicants for employment, and independent contractors under the NY Law.

- Coordinate existing policies – to make certain that if a Formal Complaint is filed under the Title IX policy, it must be handled in accordance with the process under a New Unified Title IX and not under any other policy.
- Consider how principals, Dignity Act Coordinators, Human Resources personnel, and the Title IX Coordinator need to communicate among themselves regarding reports of sexual harassment.

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Title IX–Investigation Requirements

Title IX Final Regulations require the following:

- **Respond promptly** when **any** school employee has notice of sexual harassment, including sexual assault
- Title IX extends to all aspects of a school's education program or activity and applies to any activity controlled or operated by the school, or any building owned or controlled by school
- If a survivor (accuser/complainant) ***chooses*** to participate in a grievance process, accusers cannot be inappropriately being asked about prior sexual history (also known as "rape shield" protections), and a survivor ***is not*** be required to divulge any medical, psychological, or similarly privileged records.
- A survivor never has to come face-to-face with the accused during a hearing, and an accused is never allowed to personally ask questions of a survivor.
- Survivors are protected against retaliation when they choose to report sexual misconduct ***or not***, file a formal complaint ***or not***, participate in a grievance process ***or not***.
- Survivors are protected against bullying or harassment throughout the grievance (complaint and investigation) process

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Rules and Obligations

Title IX Investigation Requirements

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Title IX–Investigation Requirements

- Schools must take immediate and appropriate action to investigate or otherwise determine what happened.
- The inquiry must be prompt, thorough, and impartial.
- Procedures must provide equal opportunity for both Parties to appeal a determination and decision
- If harassment occurs, schools must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment, and prevent it from happening again to the victim or to others.
- For Example:
  - If a student files a sexual harassment complaint with the school against her teacher and the school determines that a hostile environment has been created, it must take steps to end the harassment, eliminate the hostile environment, and prevent its recurrence. Potential remedies should include allowing the student to have a new class or teacher.
  - If a school is made aware that a particular teacher denigrates the answers that are provided by female students but not similar answers by male students and this causes a hostile environment, it must take steps to end the conduct, eliminate the hostile environment, and prevent its recurrence. This may include speaking with that teacher and providing appropriate training.

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Title IX–Investigation Requirements

Title IX can also apply in the context of Employment in the same manner as Title VII

- Schools may not discriminate on the basis of sex in employment or recruitment, including but not limited to hiring, promotion, consideration of and award of tenure, grants of leave, benefits, and selection and financial support for training. (34 C.F.R. § 106.51)
- Schools are prohibited from applying policies or employment actions concerning the marital, parental, or family status of employees or applicants that treat persons differently based on sex, or that are based on whether the employee or applicant is the head of household or principal wage earner. (34 C.F.R. § 106.57)
- A school cannot base a hiring or promotion decision for a teacher on stereotypes about a woman's ability to perform her job because she has/will have/may have children. (34 C.F.R. § 106.57)

1. https://sites.ed.gov/titleix/policy/

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Title IX Specific Terms
Definition of Harassment "Based on Sex"

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Title IX–Scope of Title IX *Redux and Reversed*

Title IX in the context of Title VII case law – The Supreme Court's Decision in *Bostock*[1]

- Holding: an employer violates Title VII, which makes it unlawful to discriminate against an individual "because of" the individual's sex, by firing an individual for being homosexual or being a transgender person.
- So long as the plaintiff 's sex was one but-for cause of that decision, that is enough to trigger the law. *Citing* Nassar, 570 U.S. at 350, 133 S.Ct. 2517.
- Congress has moved in the opposite direction [of narrow liability], supplementing Title VII in 1991 to allow a plaintiff to prevail merely by showing that a protected trait like sex was a "motivating factor" in a defendant's challenged employment practice. Civil Rights Act of 1991, § 107, 105 Stat. 1075, codified at *1740 42 U.S.C. § 2000e–2(m).
- "[D]iscrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second. Nor is there any such thing as a "canon of donut holes," in which Congress's failure to speak directly to a specific case that falls within a more general statutory rule creates a tacit exception. Instead, when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule. And that is exactly how this Court has always approached Title VII." *Id.,* 140 S.Ct. at 1747.
- "We do not hesitate to recognize today a necessary consequence of that legislative choice: An employer who fires an individual merely for being gay or transgender defies the law." *Id.*

1. *Bostock v. Clayton County,* 140 S.Ct. 1731 (June 15, 2020)

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Title IX–Scope of Title IX *Redux and Reversed*

Title IX in the context of Title VII case law – the resistance to *Bostock*[1]

- OCR's Letter of Impending Enforcement Action dated May 15, 2020[2]
  - Connecticut Interscholastic Athletic Conference (CIAC) promulged rules allowing transgender athletes to compete based on gender identity rather than biological sex
  - Female Student Athletes filed OCR complaints under Title IX claiming they were deprived of competitive opportunities based on sex for being forced to compete against transgendered athletes who were biologically male
  - OCR referred to DOJ for civil enforcement and pursuit of claims against the CIAC and the Glastonbury Board of Education[3]
- OCR's Letter of Impending Enforcement Action dated August 31, 2020[2]
  - OCR specifically disavowed the application of the Supreme Court's decision in *Bostock* asserting it "does not alter the relevant legal standards" under Title IX's regulations and that on its face, *Bostock* only applies in the context of Title VII given the differing statutory authorities and case law

1. *Bostock v. Clayton County*, 140 S.Ct. 1731 (June 15, 2020)
2. https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01194025-a2.pdf
3. https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01194025-a3.pdf

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Title IX–Scope of Title IX *Redux and Reversed*

Title IX in the context of Title VII case law – the resistance to *Bostock*[1]

- OCR's Withdrawal Letter of Impending Enforcement Action dated February 23, 2021[1]
  - OCR determined "the Revised Letter was issued without the review required for agency guidance documents that set out policy on a regulatory issue" and "Revised Letter's statement of OCR's interpretation of Title IX and its implementing regulations should not be relied upon in this or any other matter."
- OCR Notice of Interpretation dated June 16, 2021 – Published to the Federal Register on June 22, 2021[2]
  - "Department has determined that the interpretation of sex discrimination set out by the Supreme Court in Bostock—that discrimination "because of . . . sex" encompasses discrimination based on sexual orientation and gender identity—properly guides the Department's interpretation of discrimination "on the basis of sex" under Title IX and leads to the conclusion that Title IX prohibits discrimination based on sexual orientation and gender identity."

1. https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01194025-a5.pdf, and https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/index.html
2. Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County, 86 Fed.Reg. 32367 (June 22, 2021)

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Title IX–Scope of Title IX *Redux and Reversed*

Title IX in the context of Title VII case law – the resistance to *Bostock*[1]

- OCR and DOJ release a joint notice flyer "Confronting Anti-LGBTQI+ Harassment in Schools" dated June 23, 2021[1]
  - Reiterated OCR's determination regarding the withdrawal of the revised enforcement letter in the CIAC case that the "Revised Letter's statement of OCR's interpretation of Title IX and its implementing regulations should not be relied upon in this or any other matter."
- OCR Releases "Questions and Answers on the Title IX Regulations on Sexual Harassment" dated July 20, 2021[2]
  - Provides comprehensive Q&A regarding all the requirements under Title IX from new regulations, including most recent interpretation on applicability to gender status, gender identity, etc in light of Bostock

1. https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-tix-202106.pdf
2. https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf

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Title IX Specific Terms
Prohibited Retaliation

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Title IX–Prohibited Retaliation

Title IX prohibits retaliation against any individual for:

- Opposing or reporting discrimination, complaining about discrimination, or participating in a discrimination investigation.
- Schools are prohibited from retaliating against an individual because the individual has asserted a right protected by Title IX; made a Title IX complaint or participated in a Title IX investigation, hearing, or proceeding; or protested sex discrimination. (34 C.F.R. §106.71; 34 C.F.R. §100.7(e))
- If a student files a complaint alleging that a school discriminated ***on the basis of sex*** concerning course work, grades, access to extra-curricular activities, etc, the school must ensure that the student is not subjected to retaliation.
- If an employee alleges that the school discriminates against individuals in its decisions concerning employment ***on the basis of sex***, including but limited to tenure decisions; classroom or course assignments; approval of time off additional pay opportunities (advisors/coaches/professional development time) the school must ensure that the employee is not subjected to retaliation.

1. https://sites.ed.gov/titleix/policy/

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Title IX–Prohibited Retaliation

Title IX prohibitions on retaliation also include:

- Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by title IX or this part, constitutes retaliation. (34 CFR § 106.71 (a))
- The recipient of a complaint must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

Specific Circumstances under § 106.71

- (1) The exercise of rights protected under the First Amendment does not constitute retaliation prohibited under this section.
- (2) Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under this part does not constitute retaliation prohibited under paragraph (a) of this section, provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.

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Title IX Specific Terms
Grievance Process

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Title IX– "Grievance" Process

34 CFR § 106.45 - Title IX Grievance (complaint) procedures – Similar to the older requirements and would encompass requirements consistent with NYS law

- Provide Notice of Allegations to accused of potential charges of sexual harassment upon receipt of a formal complaint
  - Notice must provide sufficient details with sufficient time for respondent to prepare for any interview.
  - Sufficient details include the identities of the parties involved in the incident, if known, the conduct allegedly constituting sexual harassment under § 106.30, and the date and location of the alleged incident, if known.
  - The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process.
  - The written notice must inform the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, and may inspect and review evidence.
  - The written notice must inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process
- If NEW claims or allegations arise during course of the investigation, a NEW "Notice of Revised Allegations" must be issued to the accused for those allegations.

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Title IX– "Grievance" Process

34 CFR § 106.45 – Grievance and Complaint Procedures:

- Dismissal of Complaints
  - If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in § 106.30 even if proved, did not occur in the recipient's education program or activity, or did not occur against a person in the United States, then the recipient must dismiss the formal complaint with regard to Title IX
  - The recipient may dismiss the formal complaint or any allegations therein, if at any time during the investigation or hearing: A complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein; the respondent is no longer enrolled or employed by the recipient; or specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.
  - Upon a dismissal, the recipient must promptly send written notice of the dismissal and reason(s) therefor simultaneously to the parties

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Title VII and Title IX Intersections

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What is Title VII Harassment

General Anti-Discrimination Civil Rights Laws

- Title VII of the Civil Rights Act of 1964 (Title VII):
  - Is the major federal law prohibiting discrimination in employment.
  - Title VII prohibits discrimination based on **race**, **sex**, **color**, **religion**, **national origin**, and **retaliation**.
- The Equal Pay Act of 1963 (EPA):
  - Protects men and women who perform substantially equal work from sex-based wage discrimination.
- The Age Discrimination In Employment Act of 1967 (ADEA):
  - Protects employees and job applicants who are 40 years of age or older from employment discrimination based on age.

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What is Title VII Harassment

SEX BASED HARASSMENT

- Title VII of the Civil Rights Act of 1964, as amended at 42 USC §2000e *et seq*
- New York State Executive Law §296 *et seq* (New York Human Rights Law)
- Prohibits unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature, all of which constitute "sexual harassment" when:
  1. Submission to such conduct is made explicitly or implicitly a condition of an individual's employment (Quid Pro Quo)
  2. Submission to or rejection of such conduct is used as a basis for an employment decision affecting the employee (Quid Pro Quo plus); or
  3. The harassment has the purpose or effect of unreasonably interfering with the employee's work performance or creating an environment which is intimidating, hostile or offensive to the employee (Hostile work environment)

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What is Title VII Harassment

Unwelcome or offensive conduct in the workplace that constitutes Harassment under Title VII is a form of discrimination that is:

- Based on sex (including sexual orientation, pregnancy, and gender identity), race, color, national origin, religion, age, disability, and/or genetic information; AND
- Detrimental to an employee's work performance, professional advancement, and/or mental health, or conduct that denies or limits employment based participation or benefits.

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What is Title VII Harassment

Unwelcome or offensive conduct in the workplace:

- Ranges of Possible Harassment includes:
  - Offensive jokes, slurs, epithets or name calling
  - Offensive objects or pictures
  - Unwelcome touching or contact
  - Physical threats or assaults
  - Ridicule, mockery, or put-downs
  - Constant or unwelcome questions about an individual's identity to personal information
  - Undue and unwanted attention
- For Harassment in general, and particularly sexual harassment, it is **IRRELEVANT** whether or not conduct is motivated by sexual desire.
- The ONLY issue: Are members of different sexes/races/ethnicities treated differently on account of their sex/race/ethnicity?

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What is Title VII Harassment

For Prohibited Sexual Harassment Under Title VII (and Title IX)

- IS IT SEXUAL HARASSMENT?
  - Unwanted and unwelcome.
  - Interferes with your performance at work or school; creates intimidating or hostile environment.
  - Could be dangerous.
  - Causes uncomfortable feelings.
  - Designed or does make victim feel powerless.
  - Negatively influences work performance.
  - Sexual in nature.

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What is Title VII Harassment

TITLE VII does not prohibit all conduct of a sexual nature…it only forbids conduct which becomes a term or condition of employment.

- Unwelcomed Conduct:
  - Acquiescence in sexual conduct may not mean that the conduct is welcome.
  - The charging party need not have confronted her offending supervisor where she feared retaliation, so long as her actions and comments demonstrated that the conduct was unwelcome.
  - Standard – Plaintiff can not prevail if s/he unreasonably refused to take advantage of corrective measures.
- Quid Pro Quo Conduct:
  - Occurs when submission to unwelcome sexual conduct is made an explicit or implicit term or condition of an individual's employment.

https://www.diversity.va.gov/training/files/eeo-employees.ppt

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What is Title VII Harassment

- Hostile Work Environment
  - The day-to-day working environment is polluted with verbal or physical abuses.
  - Unwelcome sexual conduct unreasonably interferes with job performance or creates an intimidating, hostile or offensive work environment.
- Factors Considered:
  - Frequency of the conduct.
  - Offensive utterances.
  - The more severe the conduct, the less pervasive it must be.
  - Environment
  - Did the conduct occur in view of others?
  - Consequences of conduct upon plaintiff
  - Plaintiff's unreasonable delay in reporting harassment

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What is Title VII Harassment

Employer Requirements regarding Title VII Claims and Investigations

- Employers must take timely and effective action to prevent sexual harassment.
- Employers and managers may be held personally liable for damages due to harassment.
- A "reasonable woman" standard MAY be used by the court to identify sexual harassment.
- *Ellison v Brady* (1991): Unless the conduct is quite severe, isolated incidents of sexual conduct or statements do not create a hostile environment. BUT, they do create an obligation on the part of a concerned employer to prevent a recurrent of the offensive act or statement

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What is Title VII Harassment

Remedial Corrective Actions - *Fuller v. Oakland* (1995)

- Must be reasonably calibrated to stop the conduct, to correct the impact of the conduct, and to prevent the conduct from reoccurring
- Remedial and/or Corrective Action will be evaluated in the context of:
  - Severity of conduct
  - Pervasiveness of conduct
  - Likelihood for conduct to be repeated
  - Courts will 2nd guess you … especially if the conduct did continue
- Poor or Failed corrective actions include
  - Ignore a complaint or problem
  - Deviate from or ignore your policy
  - Discuss with the violator over coffee
  - Put the victim and accused in a room to "sort it out"
  - **Punish/Retaliate** against the victim
  - Accept recantations blindly or half hearted investigations - "Oh, that's just Joe"
  - Pass investigation "up the chain" without legal or follow-up

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What is Title VII Harassment

RETALIATION

- Elements of a Charge for Retaliation under Title VII
  - Plaintiff filed a charge of harassment, or engaged in protected activity in connection to a complaint
  - Plaintiff's employer subsequently took adverse employment action against the plaintiff – much broader than what is required to sustain a complaint for hostile environment or discrimination, can be ***any*** employment related action
  - The adverse action was causally linked (in time, scope, or proximity) to the plaintiff's protected activity
- Once this prima facie showing of retaliation is made by the plaintiff, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for its actions
- If the employer meets that burden of a legitimate, nondiscriminatory reason for its actions, the presumption of retaliation disappears UNLESS the employee can show that the employer's reason was simply pretext and the Employer's decisions were motivated by discriminatory/retaliatory animus

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What is Title VII Harassment

RETALIATION

- Retaliation Examples Include:
  - Unwanted/undeserved lower performance reviews
  - Transfers, duty changes, taking away or denying privileges
  - Discipline/discharge
  - Ridicule/blaming for work problems
  - Increased counseling, criticisms, or oversight without a change in work performance
  - Continuing/escalating the prohibited conduct
  - Threats
  - Ostracism/exclusion in a way that creates an intimidating, stressful environment
- Title VII (like Title IX) prohibits retaliation against an individual for opposing or reporting discrimination, complaining about discrimination, or participating in a discrimination investigation.

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BREAK

Don’t Forget your Code

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Investigations of Complaints

Legal Obligations and Requirements

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Investigation of Complaints

- Initial Referral and/or Complaint
- Review of Policies & Procedures
- Interview of Complainant
- Requests for Documentary Evidence
- Fact Witness Interviews
- Interview of Accused
- Final Evidentiary Follow-up
- Preliminary Report, Party Reviews, and Questions
- Final Decision & Outcome Letters

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Initial Referral and/or Complaint

- Immediately upon receipt of Complaint, do the following:
  - Written Complaints-
    - Is it signed and/or dated?
    - Is it on District provided complaint form?
    - Outline the details, facts, allegations
    - Is there an alleged violation on the face of the complaint?
    - Conduct alleged – duration, severity, scope, relative employment positions of the accused vs the complainant?
  - Verbal Complaints-
    - Still have an obligation to investigate
    - Who received the complaint, when, how?
    - Have the recipient memorialize the nature of the complaint as completely and thoroughly as possible
    - See above regarding written complaints
- Outline any clearly identified issues, concerns, topics
- Create a potential witness list
- Create a list of documents to request
- IMMEDIATELY request to secure any potential video evidence before it is lost

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Notice of Allegations – Pre-Investigation

Written Notice of Allegations – Receipt of *FORMAL WRITTEN COMPLAINT*

- Upon receipt of a formal complaint, a recipient must provide the following written notice to the parties, INLCUDING the accused and the complainant:
- Notice of the recipient's grievance process that complies with this section, including any informal resolution process.
- Notice of the allegations of sexual harassment potentially constituting sexual harassment as defined in § 106.30, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview.
- Sufficient details include the ***identities of the parties involved*** in the incident, if known, the conduct allegedly constituting sexual harassment under § 106.30, and the date and location of the alleged incident, if known.
- The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process.
- The written notice must inform the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, and may inspect and review evidence that is not otherwise protected.
- The written notice must inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

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Review of Policies & Procedures

- KNOW YOUR DISTRICT'S SEXUAL HARASSMENT AND TITLE IX POLICIES
- Who is the appointed Title IX Coordinator?
- Interview and/or confirm District's standard procedures
- Confirm District's standard forms in use and reporting process
- Policy Definitions vs. Legal Definitions
  - Is the District's Policy broader than legal requirements
  - Sexual Harassment
  - Gender-based harassment
  - Hostile Work Environment
- Does the Policy define unacceptable conduct?
  - Conduct that applies to students and employees alike
  - Sexual and/or gender based harassment are likely treated the same

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Review of Policies & Procedures

- Does the Policy provide guidelines for determining what constitutes Sexual Harassment?
- Not all unacceptable conduct with sexual connotations may constitute sexual harassment.
- In many cases (other than quid pro quo situations where the alleged harasser offers academic or employment rewards or threatens punishment as an inducement for sexual favors), unacceptable behavior must be sufficiently severe, pervasive and objectively offensive to be considered sexual harassment.
- If the behavior doesn't rise to the level of sexual harassment, but is found to be objectionable behavior, it may not constitute "**H**arassment" but could still be a violation of District Policies and/or the Code of Conduct as "**h**arassment", i.e., unprofessional or inappropriate conduct**.**

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Review of Policies & Procedures

- Does the Policy provide guidelines for determining what constitutes Sexual Harassment?
- In evaluating the totality of the circumstances and making a determination of whether conduct as alleged constitutes sexual harassment, the individual investigating the complaint should consider:
  - 1. the degree to which the conduct affected the ability of the student/employee to participate in or benefit from his or her education or altered the conditions of the student's learning environment or altered the conditions of the employee's working environment;
  - 2. the type, frequency and duration of the conduct;
  - 3. the identity of and relationship between the alleged harasser and the subject of the harassment (e.g., sexually based conduct by an authority figure is more likely to create a hostile environment than similar conduct by another student or a co-worker);
  - 4. the number of individuals involved;
  - 5. the age and sex of the alleged harasser and the subject of the harassment;
  - 6. the location of the incidents and context in which they occurred;
  - 7. other incidents at the school; and
  - 8. incidents of gender-based, but non-sexual harassment.

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Review of Policies & Procedures

- Policy Guidelines for Investigating Complaints?
  - Generally, reviews should begin within 5 working days of the initial complaint with the review be completed within 30 days, absent extenuating circumstances
  - Requirement to investigate verbal complaints as well as written complaints
  - Informal vs. Formal investigation procedures
  - Rules regarding parental involvement for student complaints
  - Requirements regarding notifications or outcome letters for complainants and accused
  - Range of proscribed penalties and/or approved remedial actions
  - Maintenance of complaint records
- Review the Code of Conduct
- Review any other related "harassment" policies & applicable collective bargaining agreements for issues that may fall outside the scope of your Title IX Policy

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Interview of Complainant

- After review of the policy and complaint (memorialized verbal and written complaints), interview Complainant
- Use an initial opening script, provide a copy of the written script to the interviewee (separate script for complainant, witness, accused)
- Try to conduct the interview within 5 days of the initial complaint, the sooner the better
- Recommendations
  - Recording interviews – yes or no?
  - Union representatives – yes or no?
  - Attorney's or outside district personal participating in the interview process – yes or no?
  - Interview scripts to each interviewee - have them sign and date at the bottom as acknowledgement, and provide a copy for their records

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Interview of Complainant

Written Complaints

- Start the interview – ASK THESE TWO IMPORTANT QUESTIONS
  - Are you taking any medications today that would prevent you from understanding my questions and providing truthful and complete answers?
  - Are you suffering from any medical conditions
- With a WRITTEN complaint
  - Try to narrow down specific details of each and every allegation or incident – Who, What, Where, When, Why
  - Identify witnesses, date and time, location and circumstances, and the specific language used or conduct that occurred
- At the end, ask –

  IS THERE ANYTHING ELSE YOU WOULD LIKE TO ADD THAT I HAVE NOT ASKED YOU ABOUT

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Interview of Complainant

Verbal Complaints

- Start the interview – ASK THESE TWO IMPORTANT QUESTIONS
  - Are you taking any medications today that would prevent you from understanding my questions and providing truthful and complete answers?
  - Are you suffering from any medical conditions
- IF there was a VERBAL complaint
  - Detail the questions /responses by typing into a word document on laptop
  - Narrow the allegations – Who, What, Where, When, Why
  - Identify witnesses, date and time, location and circumstances, and the specific language used or conduct that occurred
- At the end, ask –
  IS THERE ANYTHING ELSE YOU WOULD LIKE TO ADD THAT I HAVE NOT ASKED YOU ABOUT
- THEN
  - At a statement to the end of the notes:

    "**The above notes are an accurate statement as to the events described and the undersigned swears they are true to the best of their recollection**"
  - Print out a copy of the notes from the interview, Ask the complainant to review the notes of the interview, sign and date the notes

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Initiation of a "Formal" Complaint

Verbal Complaints

- For Verbal Complaints, if the complainant does not want to submit a written complaint, the Title IX Coordinator can sign the written complaint on behalf of the District as the "complainant" if the Title IX coordinator believes there is sufficient evidence of a potential claim of violation of Title IX
- Formal Complaint moves forward with potential "victim" as a witness
- Normal process followed from investigation through conclusion
- Does not prohibit use of "informal" process for resolving potential Title IX claim

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Requests for Documentary Evidence

Following interview of Complainant

- Immediately request and secure any video evidence as soon as possible to ensure retention
- Request and review a copy of the personnel file/student file of complainant
- Request and review a copy of the personnel file/student file of accused
- Request and review a copy of the personnel file/student file of an critical fact witness
- Where necessary, interview any administrator/supervisor not involved with the substance of the complaint regarding general work history of the complainant and the accused
- Use the complaint to drive the document/evidence requests

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Fact Witness Interviews

- Start the interview – ASK THESE TWO IMPORTANT QUESTIONS
  - Are you taking any medications today that would prevent you from understanding my questions and providing truthful and complete answers?
  - Are you suffering from any medical conditions Use an initial opening script, provide a copy of the written script to the interviewee
- Try to conduct fact interviews within 2 weeks of the complainant's interview, the sooner the better
  - Emphasis CONFIDENTIALITY and NO RETAILIATION
  - Who, What, Where, When, Why – Challenge with evidence, records, video, etc.
  - Inform the witness that dishonesty can be grounds for discipline if the witness is evasive, try cooperation
  - Contemporaneously memorialize the witnesses testimony
- At the end, ask –

  IS THERE ANYTHING ELSE YOU WOULD LIKE TO ADD THAT I HAVE NOT ASKED YOU ABOUT

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Fact Witness Interviews

- If the witness is lying or less than truthful, attempt to redirect them to provide truthful answers
- If necessary, suspend the interview and reschedule with a union representative present, provide notices of Weingarten & Garrity rights where necessary
- Recommendations
  - Recording interviews – yes or no?
  - Union representatives – yes or no?
  - Attorney's or outside district personal participating in the interview process – yes or no?
  - Interview scripts to each interviewee - have them sign and date at the bottom as acknowledgement, and provide a copy for their records

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Update Request for Documentary Evidence – Re-interviews as needed

- Request updated evidence as necessary based on interviews
- Conduct re-interviews for any discrepancies or clarifications between competing witness statements
- Review interview notes to drive any new or updated document/evidence requests

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Revised Notice of Allegations

Issue a New Written "Notice of Revised Allegations"

- Upon review of evidence, prior to interview of Respondent, review Notice of Allegations
- Updated facts from records, witness interviews
- Preserve records, videos, evidence for Respondent accused
- Provide new notice to both complainant and accused
- Should occur PRIOR to interview of accused
- Provide with sufficient time for accused to have a representative present as required under Title IX

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Interview of Accused

- Should be the LAST interview conducted
- Consider using a companion to take notes so that you can concentrate on the interviewing and questioning
- Start the interview – ASK THESE TWO IMPORTANT QUESTIONS
  - Are you taking any medications today that would prevent you from understanding my questions and providing truthful and complete answers?
  - Are you suffering from any medical conditions
- Use an initial opening script, provide a copy of the written script to the accused
  - Weingarten Rights explicitly stated
  - Garrity Rights where necessary explicitly stated
  - CADET Rights where available explicitly stated
  - Any waiver of union representation should be in writing signed by the employee –

    Employee knowing and freely waives their right to union representation for an interview with the employer, and recognizes that anything the employee says during such interview can be use by the employer for disciplinary purposes

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Interview of Accused

- Ask specific questions about the facts and nature of the allegations, about who, what, where, when, why
- If the accused denies any claims, ask them why someone would provide a different story from what the accused is stating
- Press the accused on any inconsistencies
- Present and review evidence with the Accused
- Ask the accused about any evidence
  - Review Video/Audio recordings
  - Review documentary evidence
  - Be specific in your factual questions

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Interview of Accused

- Regardless of Weingarten, Garrity, or CADET Rights, ASK EVERY QUESTION
- Send a message to the accused about the nature of the allegations, strength of the District's facts and evidence
- For the benefit of a union representative to advise the accused
- End by EMPHASISING
  - CONFIDENTIALITY
  - NO RETALIATION
  - NO COMMENTS/CONTACTS WITH THE COMPLAINANT ABOUT THE NATURE OF THE COMPLAINT OR ALLEGATIONS

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Final Evidentiary Follow-up

- Re-update any requests for evidence or records as necessary
- Request updated evidence as necessary based on interviews
- Conduct final round of re-interviews for any discrepancies or clarifications between competing witness statements and accused
- Review interview notes to drive any new or updated document/evidence requests
- Review final facts with Title IX Policy, other Board Policies, Code of Conduct, and Legal Standards

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Final Evidentiary Follow-up

- Create timeline of events and circumstances
- Organize documents and evidence chronologically based on timeline
- Notate timeline with supporting interview statements/evidence
- Number and order any supporting documentation to be included in final report
- Prepare draft Executive Summary (no more than 2 pages) of the what a preliminary review of the evidence shows relative to the claims

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Preliminary Draft Report & Conclusions

- Should be marked CONFIDENTIAL and, where possible, ATTORNEY CLIENT PRIVILEGED
- Report Details and Specifics
  - Background – Initial referral and credentials
  - Executive Summary – Summary of Complaint & Findings
  - Investigation - Chronological Order of evidence
    - Initial Complaint
    - Statement of the Allegations
    - Applicable Board Policies
    - Interviews
    - Documentary Evidence and Records
    - Conclusions and Findings
    - Possible Recommendations for Outcomes

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Preliminary Draft Report & Conclusions

- Attach relevant and necessary documents, communications, as Appendices to the Final Report
- Provide Draft Outcome letters for review by the District/Board of Education
- Provide range of recommendations based on findings and conclusions
- Superintendent and/or the Board of Education are the final decisions makers
- Title IX Coordinator/Officer only makes recommendations, is NOT the decision maker in the process

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Preliminary Draft Report & Conclusions to Final Report and Conclusions

- Prior to completion of the investigative report, the recipient must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy
- Parties (complainant/victim & accused) must have at least 10 days to submit a written response, as well as pose any written questions either Party would like the other Party/witnesses to respond
- The recipient must make all such evidence subject to the parties' inspection and review available at any hearing (hearings are required in higher education, not in K-12 schools) to give each party equal opportunity to refer to such evidence during, including for purposes of cross-examination by written questions; Title IX coordinator must pass on written questions from the Parties and solicit responses from opposing Parties

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Preliminary Draft Report & Conclusions to Final Report and Conclusions

- Parties can refuse to response to written questions, and their refusal is construed as a refusal to submit to "cross-examination", which can result in exclusion of refusing Parties' statements and testimony
- Title IX Coordinator must consider all Parties feedback, questions, and responses prior to completion of the investigative report; and
- Title IX Coordinator prepares a Final investigative report that fairly summarizes relevant evidence, responses, District's policy, and basis for finding of responsibility or no responsibility, and recommended outcome
- Final Report and Recommendations MUST include all elements of any final conclusions and recommendations – CANNOT BIFURCATE LIABILITY AND PENALTY

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Decision Makers and Outcome Letters

- Decision Maker must review Final Report and Recommendations
- Final Decision based on Decision Maker's independent review of the totality of report, evidence, and conclusions
- Issuance of Outcome Letters – Required as part of the process for Complainant and Accused – Comes from Final Decision Maker
- Complainant Outcome Letters – One to each complainant
- Purpose of the final outcome letter – Once Approved
  - Notify the conclusion of the investigation
  - Summarize the nature of the complaint
  - Provide a statement of findings and outcomes
- Outcome letters are approved by the Employer's Final Decision Maker and must be issued by someone other than Title IX Coordinator
- Potentially means the Superintendent or Board, or their Designee where appropriate

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Decision Makers and Outcome Letters

Federal Code and Rules

34 CFR §106.45 – Formal Grievance (Complaint/Investigation) Process

- The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility. To reach this determination, the recipient must apply the standard of evidence described in paragraph (b)(1)(vii) of this section.
- The written determination must include -
  - **(A)** Identification of the allegations potentially constituting sexual harassment as defined in § 106.30;
  - **(B)** A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;
  - **(C)** Findings of fact supporting the determination;
  - **(D)** Conclusions regarding the application of the recipient's code of conduct to the facts;
  - **(E)** A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant; and
  - **(F)** The recipient's procedures and permissible bases for the complainant and respondent to appeal.
- The recipient must provide the written determination to the parties simultaneously. The determination regarding responsibility becomes final either on the date that the recipient provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.

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Decision Makers and Appeals

Federal Code and Rules

34 CFR §106.45 – Formal Grievance (Complaint/Investigation) Process

Both Parties must have a right to appeal a determination regarding responsibility or dismissal of a formal complaint or any allegations therein, on the following bases:

- (A) Procedural irregularity that affected the outcome of the matter;
- (B) New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and
- (C) The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.
- (D) Or on any other basis the District deems appropriate.

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Decision Makers and Appeals

Federal Code and Rules

34 CFR §106.45 – Formal Grievance (Complaint/Investigation) Process

As to all appeals, the District must

- (A) Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;
- (B) Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator;
- (C) Ensure that the decision-maker(s) for the appeal complies with the standards set forth in paragraph (b)(1)(iii) of this section;
- (D) Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;
- (E) Issue a written decision describing the result of the appeal and the rationale for the result; and
- (F) Provide the written decision simultaneously to both parties.

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Practical Considerations

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Pitfalls and Obstacles

- "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a).
- This provision, which is enforceable through an implied private right of action, was enacted to supplement the Civil Rights Act of 1964's bans on racial discrimination in the workplace and in universities. *Yusuf v. Vassar Coll.*, 35 F.3d 709, 714 (2d Cir. 1994).
- As such, it is important to note that the relevant conclusions and findings here apply to this context as an employment matter, the analysis and evaluation under Title IV and Title IX would carry equal weight.

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Pitfalls and Obstacles

- "The law doesn't prohibit simple teasing, offhand comments, or isolated incidents that are not very serious. Harassment is illegal when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted). A hostile work environment exists '[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment'." *Harris v. Forklift Systems, Inc*, 510 U.S. 17, 21 (1993).
- Conduct that is "merely offensive" and "not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview." *Id*.

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Pitfalls and Obstacles

- Section 703(a) sets forth Title VII's core ***anti discrimination*** provision in the following terms:

  "It shall be an unlawful employment practice for an employer—
  (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
  (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."
  Burlington Northern & Santa Fe Ry. Co. v. White, 548 U.S. 53, 62 (2006), *citing* 42 USC § 2000e–2(a).

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Pitfalls and Obstacles

"The anti retaliation provision protects an individual not from all retaliation, but from retaliation that produces an injury or harm. … Courts … have used differing language to describe the level of seriousness to which this harm must rise before it becomes actionable retaliation. … a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, 'which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'

…

The anti retaliation provision seeks to prevent employer interference with "unfettered access" to Title VII's remedial mechanisms. It does so by ***prohibiting employer actions*** that are likely 'to deter victims of discrimination from complaining to the EEOC,' the courts, and their employers."

Burlington Northern, 548 U.S. at 62-63, *citing Robinson v Shell Oil Co.,* 519 U.S. 337, 346 (1997).

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Pitfalls and Obstacles

- Stated differently, while sexual harassment is typically based on pervasive and repeated objectively sexual or gender related conduct creating a hostile work environment or results in an adverse employment action, an isolated incident of harassment may be so severe as to rise to the level of creating an objectively hostile work environment.
- Though Title IX (and Title VII) applies to the workplace, and generally to employees and workspaces over which the employer exercises managerial control, it does not apply to "non-employees" over which management has no control and where management does not approve or allow access or harassing conduct to take place

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Pitfalls and Obstacles

- Liability for retaliation is MUCH BROADER than liability for Harassment or Hostile Work Environment
- You can have a finding of no Harassment, but still be liable for retaliation
- Retaliation can be any adverse workplace action
  - Undeserved negative evaluation
  - Change in work assignment
  - Change in work location
  - Increased counseling memorandums
- Supervisors and managers should be very wary of any work place decisions in close temporal proximity to a complaint

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Pitfalls and Obstacles

- **H**arassment vs. **h**arassment
- Harassment - Constitutional or Statutory
- harassment – Unprofessional conduct, Code of Conduct violations, workplace civility
- Two very different standards, responsibilities, and outcomes
- Handled as very different matters, different standards of proof, different outcomes and responsibilities

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Best Practices

- Regular Sexual Harassment & Hostile Work Environment Training for Supervisors and Staff – Legally required
- Regular review of policies and procedures
- KEEP SEPARATE "**H**arassment" and "**h**arassement"
- Proper Training for Title IX Officers – Legally required
- Standardized Reporting Forms – New York State Law
- Clear procedures for investigating complaints – New York State Law
- 30 Day process from complaint to findings and outcome

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Additional Resources

- Summary of Major Provisions of the Department of Education's Title IX Final Rule Released August 2020
- OCR FAQ - Part 1: Questions and Answers Regarding the Department's Title IX Regulations dated January 15, 2021
- OCR FAQ - Part 2: Questions and Answers Regarding the Department's Title IX Regulations dated January 15, 2021
- Letter to Educators on Title IX's 49th Anniversary Notice of Language Assistance dated June 23, 2021
- Joint Department of Justice and Department Education Notice: Confronting Anti-LGBTQI+ Harassment in Schools, a Resource for Students and Families dated June 23, 2021
- OCR Question and Answers on the Title IX Regulations on Sexual Harassment dated July 20, 2021

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THANK YOU

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Don’t Forget your Code

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Summary of Major Provisions of the Department of Education's Title IX Final Rule

Released August, 2020

Summary of Major Provisions of the Department of Education's Title IX Final Rule

Issue	The Title IX Final Rule: Addressing Sexual Harassment in Schools
1. Notice to the School, College, University ("Schools"): Actual Knowledge	The Final Rule requires a K-12 school to respond whenever *any* employee has notice of sexual harassment, including allegations of sexual harassment. Many State laws also require all K-12 employees to be mandatory reporters of child abuse. For postsecondary institutions, the Final Rule allows the institution to choose whether to have mandatory reporting for all employees, or to designate some employees to be confidential resources for college students to discuss sexual harassment without automatically triggering a report to the Title IX office. For all schools, notice to a Title IX Coordinator, or to an official with authority to institute corrective measures on the recipient's behalf, charges a school with actual knowledge and triggers the school's response obligations.
2. Definition of Sexual Harassment for Title IX Purposes	The Final Rule defines sexual harassment broadly to include any of three types of misconduct on the basis of sex, all of which jeopardize the equal access to education that Title IX is designed to protect: Any instance of *quid pro quo* harassment by a school's employee; any unwelcome conduct that a reasonable person would find so severe, pervasive, and objectively offensive that it denies a person equal educational access; any instance of sexual assault (as defined in the Clery Act), dating violence, domestic violence, or stalking as defined in the Violence Against Women Act (VAWA). - The Final Rule prohibits sex-based misconduct in a manner consistent with the First Amendment. *Quid pro quo* harassment and Clery Act/VAWA offenses are <u>not</u> evaluated for severity, pervasiveness, offensiveness, or denial of equal educational access, because such misconduct is sufficiently serious to deprive a person of equal access. - The Final Rule uses the Supreme Court's *Davis* definition (severe *and* pervasive *and* objectively offensive conduct, effectively denying a person equal educational access) as one of the three categories of sexual harassment, so that where unwelcome sex-based conduct consists of speech or expressive conduct, schools balance Title IX enforcement with respect for free speech and academic freedom. - The Final Rule uses the Supreme Court's Title IX-specific definition rather than the Supreme Court's Title VII workplace standard (severe *or* pervasive conduct creating a hostile work environment). First Amendment concerns differ in educational environments and workplace environments, and the Title IX definition provides First Amendment protections appropriate for educational institutions where students are learning, and employees are teaching. Students, teachers, faculty, and others should enjoy free speech and academic freedom protections, even when speech or expression is offensive.

3. Sexual Harassment Occurring in a School's "Education Program or Activity" and "in the United States"	The Title IX statute applies to persons in the United States with respect to education programs or activities that receive Federal financial assistance. Under the Final Rule, schools must respond when sexual harassment occurs in the school's education program or activity, against a person in the United States. - The Title IX statute and existing regulations contain broad definitions of a school's "program or activity" and the Department will continue to look to these definitions for the scope of a school's education program or activity. Education program or activity includes locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurred, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution (such as a fraternity or sorority house). - Title IX applies to all of a school's education programs or activities, whether such programs or activities occur on-campus or off-campus. A school may address sexual harassment affecting its students or employees that falls outside Title IX's jurisdiction in any manner the school chooses, including providing supportive measures or pursuing discipline.
4. Accessible Reporting to Title IX Coordinator	The Final Rule expands a school's obligations to ensure its educational community knows how to report to the Title IX Coordinator. - The employee designated by a recipient to coordinate its efforts to comply with Title IX responsibilities must be referred to as the "Title IX Coordinator." - Instead of notifying only students and employees of the Title IX Coordinator's contact information, the school must also notify applicants for admission and employment, parents or legal guardians of elementary and secondary school students, and all unions, of the name or title, office address, e-mail address, and telephone number of the Title IX Coordinator. - Schools must prominently display on their websites the required contact information for the Title IX Coordinator. - Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), in person, by mail, by telephone, or by e-mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report. - Such a report may be made at any time, including during non-business hours, by using the telephone number or e-mail address, or by mail to the office address, listed for the Title IX Coordinator.
5. School's Mandatory Response Obligations: The Deliberate Indifference Standard	Schools must respond promptly to Title IX sexual harassment in a manner that is not deliberately indifferent, which means a response that is not clearly unreasonable in light of the known circumstances. Schools have the following mandatory response obligations: - Schools must offer supportive measures to the person alleged to be the victim (referred to as the "complainant").

	- The Title IX Coordinator must promptly contact the complainant confidentially to discuss the availability of supportive measures, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint. - Schools must follow a grievance process that complies with the Final Rule before the imposition of any disciplinary sanctions or other actions that are not supportive measures, against a respondent. - Schools must not restrict rights protected under the U.S. Constitution, including the First Amendment, Fifth Amendment, and Fourteenth Amendment, when complying with Title IX. - The Final Rule requires a school to investigate sexual harassment allegations in any formal complaint, which can be filed by a complainant, or signed by a Title IX Coordinator. - The Final Rule affirms that a complainant's wishes with respect to whether the school investigates should be respected unless the Title IX Coordinator determines that signing a formal complaint to initiate an investigation over the wishes of the complainant is not clearly unreasonable in light of the known circumstances. - If the allegations in a formal complaint do not meet the definition of sexual harassment in the Final Rule, or did not occur in the school's education program or activity against a person in the United States, the Final Rule clarifies that the school must dismiss such allegations *for purposes of Title IX* but may still address the allegations in any manner the school deems appropriate under the school's own code of conduct.
6. School's Mandatory Response Obligations: Defining "Complainant," "Respondent," "Formal Complaint," "Supportive Measures"	When responding to sexual harassment (e.g., by offering supportive measures to a complainant and refraining from disciplining a respondent without following a Title IX grievance process, which includes investigating formal complaints of sexual harassment), the Final Rule provides clear definitions of complainant, respondent, formal complaint, and supportive measures so that recipients, students, and employees clearly understand how a school must respond to sexual harassment incidents in a way that supports the alleged victim and treats both parties fairly. The Final Rule defines "complainant" as an individual *who is alleged to be the victim* of conduct that could constitute sexual harassment. - This clarifies that any third party as well as the complainant may report sexual harassment. - While parents and guardians do not become complainants (or respondents), the Final Rule expressly recognizes the legal rights of parents and guardians to act on behalf of parties (including by filing formal complaints) in Title IX matters. The Final Rule defines "respondent" as an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

	The Final Rule defines "formal complaint" as a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the school investigate the allegation of sexual harassment and states: - At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the school with which the formal complaint is filed. - A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator under the Final Rule, and by any additional method designated by the school. - The phrase "document filed by a complainant" means a document or electronic submission (such as by e-mail or through an online portal provided for this purpose by the school) that contains the complainant's physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint. - Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or a party during a grievance process, and must comply with requirements for Title IX personnel to be free from conflicts and bias. The Final Rule defines "supportive measures" as individualized services reasonably available that are non-punitive, non-disciplinary, and not unreasonably burdensome to the other party while designed to ensure equal educational access, protect safety, or deter sexual harassment. - The Final Rule evaluates a school's selection of supportive measures and remedies based on what is not clearly unreasonable in light of the known circumstances, and does not second guess a school's disciplinary decisions, but requires the school to offer supportive measures, and provide remedies to a complainant whenever a respondent is found responsible.
7. Grievance Process, General Requirements	The Final Rule prescribes a consistent, transparent grievance process for resolving formal complaints of sexual harassment. Aside from hearings (see Issue #9 below), the grievance process prescribed by the Final Rule applies to all schools equally including K-12 schools and postsecondary institutions. The Final Rule states that a school's grievance process must: - Treat complainants equitably by providing remedies any time a respondent is found responsible, and treat respondents equitably by not imposing disciplinary sanctions without following the grievance process prescribed in the Final Rule. - Remedies, which are required to be provided to a complainant when a respondent is found responsible, must be designed to maintain the complainant's equal access to education and may include the same individualized services described in the Final Rule as supportive measures; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent. - Require objective evaluation of all relevant evidence, inculpatory and exculpatory, and avoid credibility determinations based on a person's status as a complainant, respondent, or witness.

	- Require Title IX personnel (Title IX Coordinators, investigators, decision-makers, people who facilitate any informal resolution process) to be free from conflicts of interest or bias for or against complainants or respondents. - Training of Title IX personnel must include training on the definition of sexual harassment in the Final Rule, the scope of the school's education program or activity, how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias. - A school must ensure that decision-makers receive training on any technology to be used at a live hearing. - A school's decision-makers and investigators must receive training on issues of relevance, including how to apply the rape shield protections provided only for complainants. - Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process. - Recipients must post materials used to train Title IX personnel on their websites, if any, or make materials available for members of the public to inspect. - Include reasonably prompt time frames for conclusion of the grievance process, including appeals and informal resolutions, with allowance for short-term, good cause delays or extensions of the time frames. - Describe the range, or list, the possible remedies a school may provide a complainant and disciplinary sanctions a school might impose on a respondent, following determinations of responsibility. - State whether the school has chosen to use the preponderance of the evidence standard, or the clear and convincing evidence standard, for all formal complaints of sexual harassment (including where employees and faculty are respondents). - Describe the school's appeal procedures, and the range of supportive measures available to complainants and respondents. - A school's grievance process must not use, rely on, or seek disclosure of information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege. - Any provisions, rules, or practices other than those required by the Final Rule that a school adopts as part of its grievance process for handling formal complaints of sexual harassment, must apply equally to both parties.

8. Investigations	The Final Rule states that the school must investigate the allegations in any formal complaint and send written notice to both parties (complainants and respondents) of the allegations upon receipt of a formal complaint. During the grievance process and when investigating: - The burden of gathering evidence and burden of proof must remain on schools, not on the parties. - Schools must provide equal opportunity for the parties to present fact and expert witnesses and other inculpatory and exculpatory evidence. - Schools must not restrict the ability of the parties to discuss the allegations or gather evidence (e.g., no "gag orders"). - Parties must have the same opportunity to select an advisor of the party's choice who may be, but need not be, an attorney. - Schools must send written notice of any investigative interviews, meetings, or hearings. - Schools must send the parties, and their advisors, evidence directly related to the allegations, in electronic format or hard copy, with at least 10 days for the parties to inspect, review, and respond to the evidence. - Schools must send the parties, and their advisors, an investigative report that fairly summarizes relevant evidence, in electronic format or hard copy, with at least 10 days for the parties to respond. - Schools must dismiss allegations of conduct that do not meet the Final Rule's definition of sexual harassment or did not occur in a school's education program or activity against a person in the U.S. Such dismissal is only for Title IX purposes and does not preclude the school from addressing the conduct in any manner the school deems appropriate. - Schools may, in their discretion, dismiss a formal complaint or allegations therein if the complainant informs the Title IX Coordinator in writing that the complainant desires to withdraw the formal complaint or allegations therein, if the respondent is no longer enrolled or employed by the school, or if specific circumstances prevent the school from gathering sufficient evidence to reach a determination. - Schools must give the parties written notice of a dismissal (mandatory or discretionary) and the reasons for the dismissal. - Schools may, in their discretion, consolidate formal complaints where the allegations arise out of the same facts. - The Final Rule protects the privacy of a party's medical, psychological, and similar treatment records by stating that schools cannot access or use such records unless the school obtains the party's voluntary, written consent to do so.
9. Hearings:	The Final Rule adds provisions to the "live hearing with cross-examination" requirement for postsecondary institutions and clarifies that hearings are optional for K-12 schools (and any other recipient that is not a postsecondary institution).

Summary of Major Provisions of the Department of Education's Title IX Final Rule

(a) Live Hearings & Cross-Examination (for Postsecondary Institutions)	(a) For postsecondary institutions, the school's grievance process must provide for a live hearing: - At the live hearing, the decision-maker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. - Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally. - At the request of either party, the recipient must provide for the entire live hearing (including cross-examination) to occur with the parties located in separate rooms with technology enabling the parties to see and hear each other. - Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker must first determine whether the question is relevant and explain to the party's advisor asking cross-examination questions any decision to exclude a question as not relevant. - If a party does not have an advisor present at the live hearing, the school must provide, without fee or charge to that party, an advisor of the school's choice who may be, but is not required to be, an attorney to conduct cross-examination on behalf of that party. - If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions. - Live hearings may be conducted with all parties physically present in the same geographic location or, at the school's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually. - Schools must create an audio or audiovisual recording, or transcript, of any live hearing.
(b) Hearings are Optional, Written Questions Required (for K-12 Schools)	(b) For recipients that are K-12 schools, and other recipients that are not postsecondary institutions, the recipient's grievance process may, *but need not*, provide for a hearing: - With or without a hearing, after the school has sent the investigative report to the parties and before reaching a determination regarding responsibility, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.
(c) *Rape Shield Protections for Complainants*	(c) The Final Rule provides rape shield protections for complainants (as to all recipients whether postsecondary institutions, K-12 schools, or others), deeming irrelevant questions and evidence about a complainant's prior sexual behavior unless offered to prove that someone other than the respondent committed the alleged misconduct or offered to prove consent.

10. Standard of Evidence & Written Determination	The Final Rule requires the school's grievance process to state whether the standard of evidence to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard. The Final Rule makes each school's grievance process consistent by requiring each school to apply the same standard of evidence for all formal complaints of sexual harassment whether the respondent is a student or an employee (including faculty member). - The decision-maker (who cannot be the same person as the Title IX Coordinator or the investigator) must issue a written determination regarding responsibility with findings of fact, conclusions about whether the alleged conduct occurred, rationale for the result as to each allegation, any disciplinary sanctions imposed on the respondent, and whether remedies will be provided to the complainant. - The written determination must be sent simultaneously to the parties along with information about how to file an appeal.
11. Appeals	The Final Rule states that a school must offer both parties an appeal from a determination regarding responsibility, and from a school's dismissal of a formal complaint or any allegations therein, on the following bases: procedural irregularity that affected the outcome of the matter, newly discovered evidence that could affect the outcome of the matter, and/or Title IX personnel had a conflict of interest or bias, that affected the outcome of the matter. - A school may offer an appeal equally to both parties on additional bases.
12. Informal Resolution	The Final Rule allows a school, in its discretion, to choose to offer and facilitate informal resolution options, such as mediation or restorative justice, so long as both parties give voluntary, informed, written consent to attempt informal resolution. Any person who facilitates an informal resolution must be well trained. The Final Rule adds: - A school may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to a formal investigation and adjudication of formal complaints of sexual harassment. Similarly, a school may not require the parties to participate in an informal resolution process and may not offer an informal resolution process unless a formal complaint is filed. - At any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint. - Schools must not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

13. Retaliation Prohibited	The Final Rule expressly prohibits retaliation. - Charging an individual with code of conduct violations that do not involve sexual harassment, but arise out of the same facts or circumstances as a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX constitutes retaliation. - The school must keep confidential the identity of complainants, respondents, and witnesses, except as may be permitted by FERPA, as required by law, or as necessary to carry out a Title IX proceeding. - Complaints alleging retaliation may be filed according to a school's prompt and equitable grievance procedures. - The exercise of rights protected under the First Amendment does not constitute retaliation. - Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a Title IX grievance proceeding does not constitute retaliation; however, a determination regarding responsibility, alone, is not sufficient to conclude that any party made a bad faith materially false statement.

OCR FAQ - Part 1: Questions and Answers Regarding the Department's Title IX Regulations dated January 15, 2021

UNITED STATES DEPARTMENT OF EDUCATION
Office for Civil Rights

January 15, 2021

Part 1: Questions and Answers Regarding the Department's Title IX Regulations

The Department of Education's (Department) Office for Civil Rights (OCR), through its Outreach, Prevention, Education and Non-discrimination (OPEN) Center, issues the following technical assistance document to support institutions with meeting their obligations under the Title IX regulations. This is Part 1.

The Department announced new Title IX regulations on May 6, 2020. The new regulations were published in the *Federal Register* on May 19, 2020 at 85 Fed. Reg. 30026 (codified in 34 C.F.R. Part 106), and became effective on August 14, 2020. Many of the questions in this document are derived from questions posed to the OPEN Center via e-mail. This document supplements the Question and Answer document issued by the OPEN Center on September 4, 2020. OCR may periodically release additional Question and Answer documents addressing the Title IX regulations. All references and citations are to the official version of the Title IX regulations, as published in the Federal Register here.

Other than statutory and regulatory requirements included in the document, the contents of this guidance do not have the force and effect of law and are not meant to bind the public. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

Applicability of Prior OCR Guidance

Question 1: How should recipients reconcile the requirements in the Title IX regulations with different requirements in guidance documents previously issued by OCR?

Answer 1: In the Preamble to the Title IX regulations at 30535, the Department explains: "On September 22, 2017, the Department expressly stated that its 2017 Q&A along with the 2001 Guidance 'provide information about how OCR will assess a school's compliance with Title IX.'"

The Department further states at 30535 of the Preamble: "To the extent that these final regulations differ from any of the Department's guidance documents (whether such documents remain in effect or are withdrawn), these final regulations, when they become effective, and not the Department's guidance documents, are controlling."

The Department also unequivocally states at 30029 of the Preamble to the regulations that "guidance is not legally enforceable," and cites to *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 96-98 (2015),

for that proposition. Additionally, at 30068, the Department acknowledges that guidance documents do not have the force and effect of law and states: "Because guidance documents do not have the force and effect of law, the Department's Title IX guidance could not impose legally binding obligations on recipients."

The new Title IX regulations became effective on August 14, 2020, and the Department will not apply or enforce the new regulations retroactively. As to alleged sexual harassment occurring prior to the effective date of the new regulations, recipients may find it helpful to refer to the now-rescinded 2001 Revised Sexual Harassment Guidance and the 2017 Q&A on Campus Sexual Misconduct, which remain accessible on the Department's website.

Definitions

Question 2: If a formal complaint alleges attempted sexual assault, would that be covered under the definition of sexual harassment in 34 C.F.R. § 106.30(a), or would a recipient need to dismiss that complaint for Title IX purposes?

Answer 2: The Preamble to the Title IX regulations at 30174 and FN 777-779 addresses attempted sexual assault (such as rape): "With respect to an attempted rape, we define 'sexual assault' in § 106.30 by reference to the Clery Act, which in turn defines sexual assault by reference to the [Federal Bureau of Investigation's Uniform Crime Reporting system], and the FBI has stated that the offense of rape includes attempts to commit rape."

For further information on the definition of sexual harassment, see this blog post published by OCR. Additionally, even if allegations in a formal complaint do not meet the Title IX definition of sexual harassment, a recipient school is only required to dismiss such allegations *for purposes of Title IX* and may address such allegations under the recipient's own code of conduct. 34 C.F.R. § 106.45(b)(3)(i).

Deliberate Indifference

Question 3: Under the Title IX regulations, will the Department apply the deliberate indifference standard to a complaint regarding a recipient's response to sexual harassment? For example, will the Department apply the deliberate indifference standard to assess a respondent's allegations that the recipient's grievance process was inequitable or that the supportive measures implemented by the recipient were unreasonably burdensome?

Answer 3: The Title IX regulations require a recipient to promptly respond to actual knowledge of sexual harassment in the recipient's education program or activity against a person in the United States in a manner that is not deliberately indifferent. 34 C.F.R. § 106.44(a). The regulations further require, as part of the recipient's response, that the re pie r a t hich for a respondent mea refraining from imposing disciplinary sanctions or other actions that are not supportive measures (as defined in 34 C.F.R. § 106.30) against a respondent, without following the 34 C.F.R. § 106.45 grievance process. *See, e.g.*, 34 C.F.R. §§ 106.44(a), 106.45(b)(1)(i).

With respect to a respondent's claim that a recipient's grievance process was inequitable, the recipient's legal obligation is to comply with 34 C.F.R. §§ 106.44, 106.45 as it conducts a grievance process. Where a recipient's supportive measures unreasonably burden a respondent, those supportive measures would not meet the definition of a "supportive measure" in 34 C.F.R. § 106.30. The recipient must follow the grievance process specified in 34 C.F.R. § 106.45 before taking an action that is not a supportive measure, unless the emergency removal provision in 34 C.F.R. § 106.44(c) or administrative leave provision in 34 C.F.R. § 106.44(d) applies.

Program or Activity

Question 4: May a recipient use the procedures outlined in 34 C.F.R. § 106.45 of the Title IX regulations even in cases where an incident of sexual harassment occurs outside of the recipient's education program or activity and thus does not trigger the recipient's duties under 34 C.F.R. § 106.44(a)?

Answer 4: Yes. Nothing in the regulations precludes a recipient from responding under its code of conduct to sexual harassment that does not trigger its duties under 34 C.F.R. § 106.44(a), using grievance procedures that nevertheless correspond with those described in 34 C.F.R. § 106.45. The regulations leave recipients flexibility in this regard.

Off-campus Locations

Question 5: Is a recipient required to investigate a formal complaint alleging that sexual harassment occurred off campus or against a student engaged in a study abroad program, or must such complaints be dismissed?

Answer 5: The Title IX regulations recognize the statutory jurisdiction of Title IX's language, which applies to persons in the United States. *See* 20 U.S.C. § 1681(a) (beginning with the words, "No person in the United States . . . ."). A recipient's study abroad program may be part of the recipient's "education program or activity," but Title IX does not extend to conduct that occurs outside the United States. However, even when a recipient must dismiss allegations of sexual harassment because the alleged misconduct occurred outside the United States, nothing in the regulations precludes the recipient from addressing those allegations under the recipient's own code of conduct. 34 C.F.R. § 106.45(b)(3)(i).

With respect to conduct that occurs at an off-campus location within the United States, the regulations require a recipient to respond to actual knowledge of sexual harassment in the recipient's education program or activity against a person in the United States. 34 C.F.R. § 106.44(a). The regulations state in 34 C.F.R. § 106.44(a): "Education program or activity" includes "locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution."

The Preamble to the regulations contains extensive discussion of the "education program or activity" jurisdictional condition, at 30195-30201, including, for example, the following statement from the Department at 30196 (footnotes omitted here):

> For purposes of § 106.30, § 106.44, and § 106.45, the phrase "education program or activity" includes "locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the harassment occurs" and also includes "any building owned or controlled by a student organization that is officially recognized by a postsecondary institution." The Title IX statute and existing Title IX regulations already contain detailed definitions of "program or activity" that, among other aspects of such definitions, include "all of the operations of" a postsecondary institution or local education agency. The Department will interpret "program or activity" in these final regulations in accordance with the Title IX statutory (20 U.S.C. 1687) and regulatory definitions (34 CFR 106.2(h)), guided by the Supreme Court's language applied specifically for use in sexual harassment situations under Title IX regarding circumstances over which a recipient has control and (for postsecondary institutions) buildings owned or controlled by student organizations if the student organization is officially recognized by the postsecondary institution.

With respect to addressing such conduct via a recipient's code of conduct, 34 C.F.R. § 106.45(b)(3)(i) expressly authorizes a recipient to address alleged misconduct that does not meet the Title IX jurisdictional requirements (i.e., did not allegedly occur in the recipient's education program or activity, or did not occur against a person in the United States). Furthermore, at 30199 of the Preamble to the regulations, the Department notes:

> [N]othing in the final regulations prevents recipients from initiating a student conduct proceeding or offering supportive measures to students affected by sexual harassment that occurs outside the recipient's education program or activity. Title IX is not the exclusive remedy for sexual misconduct or traumatic events that affect students. As to misconduct that falls outside the ambit of Title IX, nothing in the final regulations precludes recipients from vigorously addressing misconduct (sexual or otherwise) that occurs outside the scope of Title IX or from offering supportive measures to students and individuals impacted by misconduct or trauma even when Title IX and its implementing regulations do not require such actions.

Parents (Role, Filing Complaints)

Question 6: Is a recipient required to notify a parent or guardian of reported sexual harassment that affects that parent or guardian's student?

Answer 6: To comply with 34 C.F.R § 106.6(g) (i.e., in order to not derogate the legal rights of parents and guardians), a recipient may need to notify a parent or legal guardian so that the recipient adequately respects any underlying legal rights of a parent or guardian to make decisions "on behalf of" a complainant, respondent, or other individual involved in a Title IX matter. Additionally, the Title IX regulations impose a duty on the recipie not to respond in a manner that is deliberately indifferent. C.F.R. § 106.44(a). Thus, if it would be "clearly unreasonable in light of the known circumstances" for the recipient not to notify a parent or legal guardian of reported sexual harassment

that affe s ha parent or guardian's student, the school must notify the parent or guardian of the Title IX matter.

Employees

Question 7: Do the requirements in the Title IX regulations apply to allegations between employees of a recipient?

Answer 7: Yes. The Title IX regulations, in 34 C.F.R. § 106.30(a), define "complainant" and "respondent" respectively as "an individual who is alleged to be the victim" and "an individual who has been reported to be the perpetrator." Any person may be a complainant or respondent, regardless of whether the person is a student, employee, or otherwise affiliated with the university.

Similarly, the regulations require a university to respond promptly when the university has actual knowledge of sexual harassment in the university's education program or activity against a person in the United States, and that response must treat the complainant and respondent equitably by offering supportive measures to the complainant and refraining from imposing disciplinary sanctions on the respondent without following a grievance process that complies with 34 C.F.R. § 106.45. (34 C.F.R. § 106.44(a)). Thus, the regulations cover sexual harassment allegations in cases where the complainant and respondent are both employees.

At 30439 of the Preamble to the regulations, the Department explains:

> The Department appreciates support for its final regulations, which apply to employees. Congress did not limit the application of Title IX to students. Title IX, 20 U.S.C. 1681, expressly states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." Title IX, thus, applies to any person in the United States who experiences discrimination on the basis of sex in any education program or activity receiving Federal financial assistance. Similarly, these final regulations, which address sexual harassment, apply to any person, including employees, in an education program or activity receiving Federal financial assistance.

(footnotes omitted).

Recipients who are subject to both Title VII and Title IX must comply with both. The Title IX regulations, at 34 C.F.R. § 106.6(f), provide that nothing about the Title IX regulations lessens an individual's rights under Title VII. In the Preamble to the regulations, at 30438-30441, the Department discusses at length the intersection between Title VII and the Title IX regulations, and the application of the Title IX regulations to employees.

Question 8: Is a recipient permitted to conduct teacher or faculty discipline processes in which sanctions are reviewed by a separate committee, and which can lead to tenure revocation proceedings, outside of the requirements of 34 C.F.R. §106.45, or are recipients required to combine the

determination regarding responsibility and sanctions aspects of a Title IX grievance process into a single process subject to the requirements of 34 C.F.R. § 106.45?

Answer 8: The Title IX regulations, at 34 C.F.R. § 106.45(b)(7), require a recipient's decision-maker to issue a written determination regarding responsibility that must include, among other items, the result as to each allegation and rationale for the result, any disciplinary sanctions imposed by the recipient against the respondent, and whether remedies will be provided by the recipient to the complainant.

The regulations do not preclude a recipient from using one decision-maker to reach the determination regarding responsibility, and having different decision maker(s) (e.g., a tenure committee) determine appropriate disciplinary sanctions (including making such a decision during a separate process, such as another hearing), so long as the end result is that the single written determination includes any disciplin ry sanctions imposed by the rec against the respondent, pursuant to 34 C.F.R. § 106.45(b)(7). The iss nce of a ritten determination cannot be a piecemeal process that is broken down into chronologically occurring sub-parts.

Recipients should also remain aware of their obligation to conclude the grievance process within the reasonably prompt time frames designated in the recipient's grievance process, under 34 C.F.R. § 106.45(b)(1)(v). Additionally, each decision-maker—whether an employee of the recipient or an employee of a third party such as a consortium of schools—must not have a conflict of interest or bias for or against complainants or respondents generally, or with respect to an individual complainant or respondent, pursuant to 34 C.F.R. § 106.45(b)(1)(iii).

The above principles apply to recipients that are not postsecondary institutions, with respect to determinations regarding responsibility and sanction decisions involving teachers, staff, or other employees, except that the regulations do not govern whether a non-postsecondary institution holds a hearing as part of its Title IX grievance process.

Record-Keeping

Question 9: What happens to records following the required seven-year retention period?

Answer 9: The Title IX regulations require that the records described in 34 C.F.R. § 106.45(b)(10) must be maintained for a period of seven years. The regulations do not specify what must or may happen to such records after the seven-year period has elapsed. In the Preamble to the regulations at 30411, the Department notes that "while the final regulations require records to be kept for seven years, nothing in the final regulations prevents recipients from keeping their records for a longer period of time if the recipient wishes or due to other legal obligations."

FERPA and Confidentiality

Question 10: The Title IX regulations make the release of a respondent's identity confidential unless the FERPA exceptions apply. FERPA permits but does not require the nonconsensual disclosure of records by postsecondary educational institutions in connection with disciplinary proceedings concerning crimes of violence or non-forcible sex offenses. Crimes of violence and non-forcible sex offenses do not include all forms of sexual harassment as defined in 34 C.F.R § 106.30(a). Does that mean that recipients cannot reveal the identity of a respondent found responsible for sexual harassment, including in response to a reference check, because it would be retaliatory to release this confidential information, assuming there is no state law requiring this information to be revealed?

Answer 10: In the Preamble to the regulations at 30426-27 (emphasis added), the Department addresses the intersection of FERPA and the regulations' requirement in 34 C.F.R. § 106.45(b)(5)(vi).

The Title IX regulations, at 34 C.F.R. § 106.71(a), state the general rule that a recipient must keep confidential the identity of any person who has reported sexual harassment, or ho b n reported to be a perpetrator of sexual harassment. The purpose of this provision is to prevent the school from retaliating against anyone. This duty of confidentiality has three exceptions in 34 C.F.R. § 106.71(a): if disclosure is permitted under FERPA; if disclosure is required by law; or if disclosure is necessary to carry out the purposes of Title IX and its regulations, including to conduct a grievance process.

A recipient's disclosure of the identity of a respondent cannot be made with a retaliatory purpose without violating 34 C.F.R. § 106.71. If the disclosu is made by a recipient without falling into one of the three ex listed in 34 C.F.R. § 106.71, OCR may view the disclosure as potentially retaliatory, and examine the facts and circumstances to determine whether the disclosure either (i) satisfied one of the three exceptions (for example, the disclosure was necessary to carry out the purposes of the Title IX regulations), or (ii) was made for a non-retaliatory purpose.

Question 11: How can a recipient address a complainant's request for confidentiality, including in instances where a Title IX Coordinator signs the formal complaint initiating an investigation into a complainant's sexual harassment allegations?

Answer 11: The Title IX regulations balance a complainant's desire for confidentiality (in terms of, for instance, the complainant's identity not being disclosed to the respondent) with a school's discretion to pursue an investigation where factual circumstances warrant an investigation even though the complainant does not desire to file a formal complaint or participate in a grievance process. In the Preamble to the regulations at 30133-30134, the Department discusses these issues at length, including the following (footnotes omitted here):

> A complainant (or third party) who desires to report sexual harassment without disclosing the complainant's identity to anyone may do so, but the recipient will be unable to provide supportive measures in response to that report without knowing the complainant's identity. If a complainant desires supportive measures, the recipient can, and should, keep the complainant's identity confidential (including from the respondent), unless disclosing the complainant's identity is necessary to provide

supportive measures for the complainant (e.g., where a no-contact order is appropriate and the respondent would need to know the identity of the complainant in order to comply with the no-contact order, or campus security is informed about the no-contact order in order to help enforce its terms). . . .

A formal complaint initiates a grievance process (i.e., an investigation and adjudication of allegations of sexual harassment). A complainant (i.e., a person alleged to be the victim of sexual harassment) cannot file a formal complaint anonymously because § 106.30 defines a formal complaint to mean a document or electronic submission (such as an e-mail or using an online portal provided for this purpose by the recipient) that contains the complainant's physical or digital signature or otherwise indicates that the complainant is the person filing the formal complaint. The final regulations require a recipient to send written notice of the allegations to both parties upon receiving a formal complaint. The written notice of allegations under § 106.45(b)(2) must include certain details about the allegations, including the identity of the parties, if known.

Where a complainant desires to initiate a grievance process, the complainant cannot remain a ymous or prevent the complainant's identity from being disclosed to the respondent (via the written notice of allegations). Fundamental fairness and due process principles require that a respondent knows the details of the allegations made against the respondent, to the extent the details are known, to provide adequate opportunity for the respondent to respond. The Department does not believe this results in unfairness to a complainant. Bringing claims, charges, or complaints in civil or criminal proceedings generally requires disclosure of a person's identity for purposes of the proceeding. Even where court rules permit a plaintiff or victim to remain anonymous or pseudonymous, the anonymity relates to identification of the plaintiff or victim in court records that may be disclosed to the public, not to keeping the identity of the plaintiff or victim unknown to the defendant. The final regulations ensure that a complainant may obtain supportive measures while keeping the complainant's identity confidential from the respondent (to the extent possible while implementing the supportive measure), but in order for a grievance process to accurately resolve allegations that a respondent has perpetrated sexual harassment against a complainant, the complainant's identity mu o e respondent, if the complainant's identity is known. However, the identities of complainants (and respondents, and witnesses) should be kept confidential from anyone not involved in the grievance process, except as permitted by FERPA, required by law, or as necessary to conduct the g vance process, and the final regulations add § 106.71 to impose that expectation on recipients.

When a formal complaint is signed by a Title IX Coordinator rather than filed by a complainant, the written notice of allegations in § 106.45(b)(2) requires the recipient to send both parties details about the allegations, including the identity of the parties if known, and thus, if the complainant's identity is known it must be disclosed in the written notice of allegations. However, if the complainant's identity is unknown (for example, where a third party has reported that a complainant was victimized by sexual

harassment but does not reveal the complainant's identity, or a complainant has reported anonymously), then the grievance process may proceed if the Title IX Coordinator determines it is nece a o sign a formal complaint, even though the written notice of allegations does not include the complainant's identity.

Clery Act

Question 12: Do the Title IX regulations intend to mirror Clery Act geography in all off-campus descriptions?

Answer 12: No. The Title IX regulations, at 34 C.F.R. § 106.44(a), state that a recipient's "education program or activity" includes "any building owned or controlled by a student organization that is officially recognized by a postsecondary institution." At page 30197 of the Preamble to the regulations, the Department explains:

> We note that the revision in § 106.44(a) referencing a "building owned or controlled by a student organization that is officially recognized by a postsecondary institution" is not the same as, and should not be confused with, the Clery Act's use of the term "noncampus building or property," even though that phrase is defined under the Clery Act in part by reference to student organizations officially recognized by an institution.
>
> For example, "education program or activity" in these final regulations includes buildings within the confines of the campus on land owned by the institution that the institution may rent to a recognized student organization. As discussed in the "Clery Act" subsection of the "Miscellaneous" section of this preamble, the Clery Act and Title IX serve distinct purposes, and Clery Act geography is not co-extensive with the scope of a recipient's education program or activity under Title IX.

(internal footnotes omitted).

Question 13: How would a complainant's request to dismiss, or a postsecondary institution's decision to dismiss, a formal complaint of sexual harassment under Title IX affect the postsecondary institution's responsibility under the Clery Act?

Answer 13: A complainant's request to dismiss or a recipient's decision to dismiss a formal complaint of sexual harassment under Title IX does not affect a postsecondary institution's obligations under the Clery Act, if the Clery Act applies to the institution. The Title IX regulations do not change a postsecondary institution's responsibilities under the Clery Act. At page 30511 of the Preamble to the Title IX regulations, the Department states: "These final regulations do not change, affect, or alter any rights, obligations, or responsibilities under the Clery Act."

Elementary and Secondary School Proceedings

Question 14: Do the provisions in the Title IX regulations regarding a complainant's prior sexual history and sexual predisposition apply at both the elementary and secondary school and postsecondary levels?

Answer 14: Yes. The Title IX regulations state that with or without a hearing, questions and evidence about the complainant's sexual predisposition are never relevant, and questions and evidence about a complainant's prior sexual behavior are not relevant unless such questions and evidence are offered to (1) prove that someone other than the respondent committed the conduct alleged by the complainant, or (2) if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent. 34 C.F.R. § 106.45(b)(6)(i)-(ii). The same requirements apply at all educational levels and to all recipients whose education programs or activities are covered by Title IX.

Question 15: Are all of the written notifications and opportunities for parties to provide feedback during an investigation of a formal complaint, outlined in 34 C.F.R. § 106.45, required for both elementary and secondary schools, and postsecondary institutions? If not, what Title IX grievance process requirements differ for elementary and secondary schools?

Answer 15: All of the provisions in 34 C.F.R. § 106.45 apply equally to all recipients except § 106.45(b)(6) (regarding hearings). Thus, all recipients (including elementary and secondary schools) must comply with, for instance: 34 C.F.R. §§ 106.45(b)(2) (written notice of allegations); 106.45(b)(3) (written notice of dismissals); 106.45(b)(5)(v) (written notice of investigatory interviews and meetings); 106.45(b)(5)(vi) (parties' inspection and review of evidence); 106.45(b)(5)(vii) (parties' review o h report); 106.45(b)(7) (written determination regarding responsibility); and 106.45(b)(8) (appeals).

The Department has also created a website to aid schools, students, and other stakeholders to better understand the new Title IX regulations.

If you have questions for OCR, want additional information or technical assistance, or believe that a school is violating federal civil rights law, visit OCR's website at www.ed.gov/ocr, or the Department's Title IX page at www.ed.gov/titleix. You may contact OCR at (800) 421-3481 (TDD: 800-877-8339), ocr@ed.gov, OCR's Outreach, Prevention, Education and Non-discrimination (OPEN) Center at OPEN@ed.gov, or e-mail the OPEN Center with additional questions about the Title IX regulations at T9questions@ed.gov. You may also fill out a complaint form online at https://www2.ed.gov/about/offices/list/ocr/complaintintro.html.

OCR FAQ - Part 2: Questions and Answers Regarding the Department's Title IX Regulations dated January 15, 2021

UNITED STATES DEPARTMENT OF EDUCATION
Office for Civil Rights

January 15, 2021

Part 2: Questions and Answers Regarding the Department's Title IX Regulations

The Department of Education's (Department) Office for Civil Rights (OCR), through its Outreach, Prevention, Education and Non-discrimination (OPEN) Center, issues the following technical assistance document to support institutions with meeting their obligations under the Title IX regulations. This is Part 2.

The Department announced new Title IX regulations on May 6, 2020. The new regulations were published in the *Federal Register* on May 19, 2020 at 85 Fed. Reg. 30026 (codified in 34 C.F.R. Part 106), and became effective on August 14, 2020. Many of the questions in this document are derived from questions posed to the OPEN Center via e-mail. This document supplements the Question and Answer document issued by the OPEN Center on September 4, 2020. OCR may periodically release additional Question and Answer documents addressing the Title IX regulations. All references and citations are to the official version of the Title IX regulations as published in the Federal Register here.

Other than the statutory and regulatory requirements included in the document, the contents of this guidance do not have the force and effect of law and are not meant to bind the public. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

Role of the Title IX Coordinator

Question 1: Do the Title IX regulations specify who can and cannot serve as a recipient's Title IX Coordinator?

Answer 1: The Title IX regulations state in 34 C.F.R. § 106.8(a): "Each recipient must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities under this part, w m ef rred to s th 'Title IX Coor Thus, the restrict on l d on a recipient's choice of a Title IX Coordinator is that the person must be the recipient's "employee." Additionally, under 34 C.F.R. § 106.45(b)(1)(iii), the Title IX Coordinator must serve without bias or conflicts of interest, and receive the training specified in that provision. The same requirements apply at all educa ional levels (e.g., elementary and secondary schools, and postsecondary institutions). As explained below in response to Question 2, the Title IX Coordinator cannot serve as

OCR-000126

the decision-maker who makes the determination regarding responsibility. *See* 34 C.F.R. § 106.45(b)(7)(i).

Question 2: Can a Title IX Coordinator also serve as an investigator?

Answer 2: Yes. The Title IX regulations state in 34 C.F.R. § 106.45(b)(7)(i) that the decisi -maker "cannot be the same person(s) as the Title IX Coordinator or the investigator(s)." Similarly, the regulations state in 34 C.F.R. § 106.45(b)(8)(iii)(B) that a decision-maker for an appeal is "not the same person as the decision-maker(s tha reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator." Neither of these provisions prevents a Title IX Coordinator from also serving as an investigator (though, as stated above, not as a decision-maker). Indeed, at page 30370 of the Preamble to the regulations, the Department notes: "The . . . final regulations leave significant flexibility to recipients, including whether the Title IX Coordinator can also serve as the investigator, whether to use a panel of decision-makers or a single decision-maker, and whether to use the recipient's own employee r outsource investigative and adjudicative functions to professionals outside the recipient's employ."

Question 3: Can a Title IX Coordinator serve as a non-decision-making procedural facilitator during the live hearing?

Answer 3: Yes. The Title IX regulations do not preclude a Title IX Coordinator from serving as a hearing officer whose function is to control the order and decorum of the hearing, so long as that role as a hearing officer is distinct from the "decision-maker" whose role is to, among other obligations, objectively evaluate all relevant evidence, apply the standard of evidence to reach a determination regarding responsibility, issue the written determination, and (during any live hearing with cross-examination) determine whether a question is relevant (and explain any decision to exclude a question as not relevant) before a party or witness answers a question.

Whether or not serving as a hearing officer, the Title IX Coordinator (like the decision-maker and other Title IX personnel) must not have a conflict of interest or bias for or against complainants or respondents generally or against an individual complainant or respondent. 34 C.F.R. § 106.45(b)(1)(iii).

Question 4: Assuming that the Title IX Coordinator is free of any confli t o nterest or b , is the Title IX Coordinator permitted to serve as an Informal Resolution Facilitator?

Answer 4: 34 C.F.R. § 106.45(b)(9) of the Title IX regulations permits informal resolutions as long as both parties voluntarily consent to attempt an informal resolution process. The Department recognizes the importance of giving recipients flexibility and discretion to satisfy their Title IX obligations in a manner consistent with their unique values and the needs of their educational communities, while respecting the wishes of the parties to the formal complaint. *See* Preamble at 30371-30372. The regulations do not preclude the Title IX Coordinator from serving as the person designated by a recipient to facilitate an informal resolution process. *See* Preamble at 30558.

Question 5: If a complainant reports or discloses information that puts a recipient on notice of alleged sexual assault, should the Title IX Coordinator sign a formal complaint?

Answer 5: The Title IX regulations direct recipients to respond promptly to each instance of notice of sexual harassment (or allegations of sexual harassment) in the recipient's education program or activity, against a person in the United States, by taking specific, required actions such as:

- offering supportive measures to the complainant;
- promptly contacting the complainant to discuss the availability of supportive measures as defined in § 106.30;
- considering the complainant's wishes with respect to supportive measures;
- informing complainant of e availability of supportive measures with or without the filing of a formal complaint; and
- if a f al complaint is filed, following a grievance process that complies with § 106.45.

See 34 C.F.R. §§ 106.44(a), 106.44(b)(1). These obligations must be met in order for a recipient's response to comply with Title IX.

Additionally, the deliberate indifference standard for judging a recipient's response may require the school to take actions that are not specifically listed as mandatory response obligations. For example, depending on the specific facts of a situation, it may be "clearly unreasonable in light of the known circumstances" for a Title IX Coordinator not to sign a formal complaint even after having discussed the complainant's wishes and understanding that the complainant does not wish to file a formal complaint. The Department understands that deciding how to exercise discretion in each factual circumstance may be challenging, but the purpose is to give recipients flexibility to respond appropriately to each situation, so that the regulations neither automatically override the wishes of a complainant, nor restrict a recipient from investigating when specific circumstances dictate that an investigation is warranted.

In the Preamble to the regulations at 30134-30135, the Department explains:

> While it is true that school administrators other than the Title IX Coordinator may have significant interests in ensuring that the recipient investigate potential violations of school policy, for reasons explained above, the decision to initiate a grievance process in situations where the complainant does not want an investigation or where the complainant intends not to participate should be made thoughtfully and intentionally, taking into account the circumstances of the situation including the reasons why the complainant wants or does not want the recipient to investigate. The Title IX Coordinator is trained with special responsibilities that involve interacting with complainants, making the Title IX Coordinator the appropriate person to decide to initiate a grievance process on behalf of the recipient. Other school administrators may report sexual harassment incidents to the Title IX Coordinator, and may express to the Title IX Coordinator reasons why the administrator believes that an

> investigation is warranted, but the decision to initiate a grievance process is one that the Title IX Coordinator must make.
>
> . . .
>
> In order to ensure that a recipient has discretion to investigate and adjudicate allegations of sexual harassment even without the participation of a complainant, in situations where a grievance process is warranted, the final regulations leave that decision in the discretion of the recipient's Title IX Coordinator. However, deciding that allegations warrant an investigation does not necessarily show bias or prejudgment of the facts for or against the complainant or respondent. The definition of conduct that could constitute sexual harassment, and the conditions necessitating a recipient's response to sexual harassment allegations, are sufficiently clear that a Title IX Coordinator may determine that a fair, impartial investigation is objectively warranted as part of a recipient's non-deliberately indifferent response, without prejudging whether alleged facts are true or not. Even where the Title IX Coordinator is also the investigator, the Title IX Coordinator must be trained to serve impartially, and the Title IX Coordinator does not lose impartiality solely due to signing a formal complaint on the recipient's behalf.

Role of the Investigator

Question 6: Can the investigator testify, either voluntarily or in response to a question from a party or from the decision-maker, about the investigator's report or recommendations, at a Title IX grievance process hearing?

Answer 6: Yes. In the Preamble to the Title IX regulations at 30314, the Department contemplates that an investigator might be a witness:

> The Department further notes that § 106.45(b)(6)(i) already contemplates parties' equal right to cross-examine any witness, which could include an investigator, and § 106.45(b)(1)(ii) grants parties equal opportunity to present witnesses including fact and expert witnesses, which may include investigators.

Note, however, that in the context of a hearing held by a postsecondary institution or on behalf of a postsecondary institution by a consortium or other third party, an investigator may not testify as to statements made by others, including the complainant or respondent, if the individual who made a statement does not submit to cross-examination. 34 C.F.R. § 106.45(b)(6)(i).

Question 7: May the investigator make recommendations in the investigative report?

Answer 7: The Title IX regulations do not require or prohibit an investigator from making a recommendation with respect to a determination regarding responsibility. The Preamble to the regulations at 30308 states: "The Department does not wish to prohibit the investigator from

including recommended findings or conclusions in the investigative report. However, the decision-maker is under an independent obligation to objectiv a thus cannot simply defer to recommendations made by the investigator in the investigative report."

Role of the Decision-maker

Question 8: Do the Title IX regulations specify who can and cannot serve as a recipient's decision-maker?

Answer 8: At page 30370 of the Preamble to the Title IX regulations, the Department states: "The Department notes that the final regulations leave significant flexibility to recipients, including whether the Title IX Coordinator can also serve as the investigator, whether to use a panel of decision-makers or a single decision-maker, and whether to use the recipient's own employees or outsource investigative and adjudicative functions to professionals outside the recipient's employ." Thus, a decision-maker may be the recipient's employee or, at the recipient's discretion, may be a non-employee such as a consultant or contractor. The decision-maker, however, "cannot be the same person(s) as the Title IX Coordinator or the investigator(s)." 34 C.F.R. § 106.45(b)(7).

At 30251-30252 of the Preamble to the regulations, the Department states:

> The final regulations leave recipients flexibility to use their own employees, or to outsource Title IX investigation and adjudication functions, and the Department encourages recipients to pursue alternatives to the inherent difficulties that arise when a recipient's own employees are expected to perform these functions free from conflicts of interest and bias. The Department notes that several commenters favorably described regional center models that could involve recipients coordinating with each other to outsource Title IX grievance proceedings to experts free from potential conflicts of interest stemming from affiliation with the recipient. The Department declines to require recipients to use outside, unaffiliated Title IX personnel because the Department does not conclude that such prescription is necessary to effectuate the purposes of the final regulations; although recipients may face challenges with respect to ensuring that personnel serve free from conflicts of interest and bias, recipients can comply with the final regulations by using the recipient's own employees.

Training

Question 9: If a recipient uses non-employee contractors or consultants to provide the training required for Title IX personnel (described in 34 C.F.R. § 106.45(b)(1)(iii)) such that the recipient does not own or control the training materials, is the recipient required to post the training materials on its website?

Answer 9: Yes. Under 34 C.F.R. § 106.45(b)(10)(i)(D), the training materials referred to in 34 C.F.R. § 106.45(b)(1)(iii) must be made publicly available on a recipient's website, or, if the recipient does

not have a website, such materials must be made available upon request for inspection by members of the public.

In the Preamble to the Title IX regulations, the Department acknowledges that a recipient may hire outside consultants to provide training for the recipient's Title IX personnel, and that the materials may be owned by the outside consultant and not by the recipient itself. In such a circumstance, the Department notes, a recipient would need to secure permission from the consultant to publish the training materials, or alternatively, the recipient could create its own training materials over which the recipient has ownership and control. (Preamble at 30412.) OCR provided additional technical assistance regarding the requirement to post training materials in an OCR Blog post available here.

Question 10: If a recipient participates in a consortium or delegates investigative or adjudicative functions to a regional center, does it still need to post its training materials?

Answer 10: Yes. Notably, the Title IX regulations do permit schools to delegate certain functions to a regional center, or to join a consortium of schools in order to implement the regulations. In these instances, recipients are permitted to publish written grievance procedures that satisfy the regulations, as well as their training materials, by way of hosting these documents on a shared website, so long as they are publicly available under the terms of 34 C.F.R.§ 106.45(b)(10)(i)(D).

For more information about consortia or regional centers, please see this OCR webinar.

Question 11: Can the Department recommend any specific Title IX Coordinator and investigator training?

Answer 11: As stated in the Preamble to the Title IX regulations at 30257:

> [T]he Department encourages recipients to pursue training from sources that rely on qualified, experienced professionals likely to result in best practices for effective, impartial investigations. The Department does not certify, endorse, or otherwise approve or disapprove of particular organizations (whether for profit or non-profit) or individuals that provide Title IX-related training and consulting services to recipients. Whether or not a recipient has complied with § 106.45(b)(1)(iii) is not determined by the source of the training materials or training presentations utilized by a recipient.

Investigative Reports

Question 12: Do the Title IX regulations require the recipient to provide a copy of the investigative report to the decision-maker? If so, at what point in the process should this transmission occur?

Answer 12: The Title IX regulations require the recipient to send a copy of the investigative report to the parties and their advisors (if any) at least ten days prior to the date of a hearing (if a hearing is required or otherwise provided) or other time of determination regarding responsibility, but do not prescribe how or when the investigative report should be given to the decision-maker. Because the

purpose of this requirement, found at 34 C.F.R. § 106.45(b)(5)(vii), is to ensure that the parties are prepared for a hearing or, if no hearing is required or otherwise provided, that the parties have the opportunity to have their views of the evidence considered by the decision-maker, the decision-maker will need to have the investigative report and the parties' responses to same, prior to reaching a determination regarding responsibility, but the timing and manner of transmitting the investigative report to the decision-maker is within the recipient's discretion. *See* Preamble at 30309.

Time Frames

Question 13: Where the Title IX regulations refer to specific time frames, how are "days" calculated?

Answer 13: The time frames referred to in the Title IX regulations (such as the 10-day time period in 34 C.F.R. § 106.45(b)(5)(vi)) may be measured by calendar days, business days, school days, or any other reasonable method that works best with the school's administrative operations. In the Preamble to the regulations, at 30188, for example, the Department states: "The Department appreciates the commenter's request for clarification as to how to calculate 'days' with respect to various time frames referenced in the proposed regulations and appreciates the opportunity to clarify that because the Department does not require a specific method for calculating 'days,' recipients retain the flexibility to adopt the method that works best for the recipient's operations; for example, a recipient could use calendar days, school days, or business days, or a method the recipient already uses in other aspects of its operations." *See also* Preamble at 30098 FN 464; 30306; 30311; and 30433.

Sending Written Determinations

Question 14: The Title IX regulations require that the written determination regarding responsibility be provided to the parties simultaneously. Can the Department clarify what "simultaneous" means in this provision?

Answer 14: The Title IX regulations, at 34 C.F.R. § 106.45(b)(7)(iii), state: "The recipient must provide the written determination to the parties simultaneously." The regulations do not further define "simultaneous," which should be given its plain and ordinary meaning, e.g., occurring at the same time.

Evidence

Question 15: After the parties have been given the opportunity to respond to the investigative report in compliance with 34 C.F.R. § 106.45(b)(5)(vii), is the final investigative report admitted as evidence for consideration by the decision-maker? If so, are the written comments that the parties made in response to the investigative report also admitted as evidence?

Answer 15: The investigative report must contain a summary of relevant evidence gathered during the investigation of a formal complaint of sexual harassment, and prior to a hearing (if a hearing is required or otherwise provided) or other time of determination regarding responsibility, the recipient

must send the investigative report to the parties and their advisors of choice (if any) wit an opportunity for the parties to respond to the investigative report. 34 C.F.R. § 106.45(b)(5)(vii).

The Title IX regulations do not deem the investigative report itself, or a party's written response to it, as relevant evidence that a decision-maker must consider, and the decision-maker has an independent obligation to evaluate the relevance of available evidence, including evidence summarized in the investigative report, and to consider all other relevant evidence. The decision-maker may not, however, consider evidence that the regulations preclude the decision-maker from considering. (For instance, the regulations preclude a recipient from using in a Title IX grievance process information protected by a legally recognized privilege, a party's treatment records, or (as to postsecondary institutions) a party or witness's statements, unless the party or wi ss has submitted to cross-examination. 34 C.F.R. §§ 106.45(b)(1)(x), 106.45(b)(5), 106.45(b)(6)(i).)

Question 16: Do Title IX regulations addressing a complainant's sexual predisposition and prior sexual behavior govern the inclusion of such information in the investigative report?

Answer 16: Yes. The Title IX regulations, at 34 C.F.R. § 106.45(b)(6)(i)-(ii), state that a complainant's sexual predisposition is "not relevant," and that a complainant's prior sexual behavior is "not relevant," unless the questions or evidence meet one of two limited exceptions. The investigative report required under 34 C.F.R. § 106.45(b)(5)(vii) requires a summary of "relevant" evidence. In the Preamble at 30304, the Department explains: ". . . all evidence summarized in the investigative report under § 106.45(b)(5)(vii) must be 'relevant' such that evidence about a complainant's sexual predisposition would never be included in the investigative report and evidence about a complainant's prior sexual behavior would only be included if it meets one of the two narrow exceptions stated in § 106.45(b)(6)(i)-(ii) (deeming all questions and evidence about a complainant's sexual predisposition 'not relevant,' and all questions and evidence about a complainant's prior sexual behavior 'not relevant' with two limited exceptions)."

Question 17: The Title IX regulations do not require elementary and secondary schools to hold live hearings, but must an elementary or secondary school allow the parties to cross-examine other parties and witnesses prior to the decision-maker reaching a determination regarding responsibility?

Answer 17: The Title IX regula ions, at 34 C.F.R. § 106.45(b)(6), require postsecondary institutions to hold a live hearing with cross-examination conducted by the parties' advisors, while making hearings optional for elementary and secondary schools (and other recipients that are not postsecondary institutions), so long as the parties have equal opportunity to submit written, relevant questions for the other parties and witnesses to answer before a determination regarding responsibility is reached.

Cross-Examination

Question 18: If a party refuses to participate in cross-examination at the postsecondary level, will the refusal be held against them?

Answer 18: The Title IX regulations state: "If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that *the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions*." 34 C.F.R. § 106.45(b)(6)(i) (emphasis added).

Advisors

Question 19: If a postsecondary institution must provide a party with an advisor pursuant to 34 C.F.R. § 106.45(b)(6)(i) (i.e., because the party appeared at the live hearing without an advisor of choice), can the provided advisor be an employee of the institution or must such an advisor be independent of the institution?

Answer 19: The Title IX regulations do not preclude a postsecondary institution from providing an advisor who is an employee of the institution to serve as a party's advisor for purposes of cross-examination, if the party does not have an advisor.

Question 20: If the respondent does not find a suitable advisor and only wants to be represented by an attorney, does the postsecondary institution have to pay for the party's attorney?

Answer 20: No. The postsecondary institution is not required to pay for a party's attorney. The Title IX regulations state: "If a party does not have an advisor present at the live hearing, *the recipient must provide without fee or charge to that party, an advisor of the recipient's choice, who may be, but is not required to be, an attorney*, to conduct cross-examination on behalf of that party." 34 C.F.R. § 106.45(b)(6)(i) (emphasis added).

Sanctions

Question 21: Are recipients allowed to place holds (for example, on a transcript, registration, or graduation) on a respondent's account while a formal complaint process is pending, or is such action considered an impermissible sanction prior to a final determination regarding responsibility?

Answer 21: The Title IX regulations prohibit a recipient from imposing "any disciplinary sanctions or other actions that are not supportive measures as defined in 34 C.F.R. § 106.30, against a respondent" without following the 34 C.F.R. § 106.45 grievance process. 34 C.F.R. §§106.44(a), 106.45(b)(1)(i). Even a temporary "hold" on a transcript, registration, or graduation will generally be considered to be disciplinary, punitive, and/or unreasonably burdensome, and appropriate supportive measures cannot be disciplinary, punitive, or unreasonably burdensome. In the Preamble to the regulations at, e.g., 30182, the Department stated: "Removal from sports teams (and similar exclusions from school-related activities) also require a fact-specific analysis, but whether the burden is 'unreasonable' does not depend on whether the respondent still has access to academic programs; whether a supportive measure meets the § 106.30(a) definition also includes analyzing whether a respondent's access to the array of educational opportunities and benefits offered by the recipient is unreasonably burdened. Changing a class schedule, for example, may more often be deemed an

acceptable, reasonable burden than restricting a respondent from participating on a sports team, holding a student government position, participating in an extracurricular activity, and so forth."

Appeals

Question 22: If a complainant or respondent are no longer students, and are not attempting to participate in the recipient's education programs or activities, do they still have a right to appeal under the Title IX regulations, or does the withdrawal terminate their right to appeal?

Answer 22: The Title IX regulations grant complainants and respondents equal rights to appeal, and to participate in any filed appeal, pursuant to 34 C.F.R. § 106.45(b)(8). The regulations do not condition those rights on whether a complainant or respondent is enrolled or employed by the recipient, participating in the recipient's education programs or activities, or otherwise has an affiliation or relationship to the recipient.

Informal Resolution

Question 23: Can a postsecondary institution decide not to go forward with a hearing on a formal complaint of sexual harassment if the complainant and respondent both knowingly and voluntarily waive the right to a hearing?

Answer 23: Yes, but only if the provisions governing informal resolutions are followed. The Title IX regulations provide that under certain conditions, a recipient can facilitate, and the parties may engage in, informal resolution of the formal complaint of sexual harassment. When the recipient and the parties opt to resolve a formal complaint through informal resolution, a hearing is not required (nor is the recipient obligated to continue its investigation into the allegations). To comply with the Title IX regulations concerning informal resolutions, the parties must receive the written notice, voluntarily decide to attempt an informal resolution process, and have the right to withdraw from the informal process and resume the formal grievance process, pursuant to 34 C.F.R. § 106.45(b)(9).

The Department has also created a website to aid schools, students, and other stakeholders to better understand the new Title IX regulations.

If you have questions for OCR, want additional information or technical assistance, or believe that a school is violating Federal civil rights law, visit OCR's website at www.ed.gov/ocr, or the Department's Title IX page at www.ed.gov/titleix. You may contact OCR at (800) 421-3481 (TDD: 800-877-8339), ocr@ed.gov, OCR's Outreach, Prevention, Education and Non-discrimination (OPEN) Center at OPEN@ed.gov, or e-mail the OPEN Center with additional questions about the Title IX regulations at T9questions@ed.gov. You may also fill out a complaint form online at https://www2.ed.gov/about/offices/list/ocr/complaintintro.html.

LETTER TO EDUCATORS ON TITLE IX'S 49TH ANNIVERSARY NOTICE OF LANGUAGE ASSISTANCE DATED JUNE 23, 2021

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Notice of anguage Assistance

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Уведомление для лиц с ограниченным знанием английского языка: Если вы испытываете трудности в понимании английского языка, вы можете попросить, чтобы вампредоставили перевод информации, которую Министерство Образования доводит до всеобщего сведения. Этот перевод предоставляется бесплатно. Если вы хотите получить более подробную информацию об услугах устного и письменного перевода, звоните по телефону 1-800-USA- EARN (1-800-872-5327) (служба для слабослышащих: 1-800-877- 8339), или отправьте сообщение по адресу: Ed. anguage.Assistance@ed.gov.

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVI RIGHTS

THE ASSISTANT SECRETARY

June 23, 2021

Dear Educator:

On this 49th anniversary of the passage of Title IX of the Education Amendments of 1972—our nation's most powerful legal tool for combating sex discrimination in education—I take this opportunity to highlight a selection of resources available for you to ensure that the education environment you provide is free from sex discrimination in all forms. Among these resources is our recent public notice clarifying Title IX's protection against discrimination based on sexual orientation and gender identity.

The U.S. Department of Education's Office for Civil Rights works to ensure that Title IX's mandate protects students in all aspects of their education, including recruitment, admissions, and counseling; financial assistance; athletics; protections from sex-based harassment, which encompasses sexual assault and other forms of sexual violence; treatment of pregnant and parenting students; discipline; equal access to classes and activities; and treatment of lesbian, gay, bisexual, transgender, queer and intersex (GBTQI) students.

I encourage you to review OCR's recent report, Education in a Pandemic: The Disparate Impacts of COVID-19 on America's Students, in which we address the disparities based on sex, including sexual orientation and gender identity, as well as race, disability, and other characteristics experienced by students both before and during the pandemic in -12 and postsecondary settings. On this anniversary of Title IX, I recognize the particular vulnerability of GBTQI students and the often overwhelming challenges these students face in education compared to their peers, including feeling less safe, experiencing poor mental health, facing a higher risk of suicide, being more likely to miss school, and facing a disproportionate risk of being homeless.

I also want to bring to your attention OCR's public notice based on the Supreme Court's recent decision in *ostock v Clayton County*, 140 S. Ct. 1731, 590 U.S. (2020), which clarifies that Title IX's protection against sex discrimination encompasses discrimination based on sexual orientation and gender identity. Specifically, OCR clarifies that the Supreme Court's decision in *ostock* applies to the Department's interpretation of Title IX. In its decision, the Supreme Court explained that "it is impossible to discriminate against a person" because of their sexual orientation or gender identity "without discriminating against that individual based on sex." *d* at 1741. That reasoning applies regardless of whether the individual is an adult in a workplace or a student in school.

Consistent with this notice, OCR will fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity in education programs and activities that receive Federal financial assistance from the Department. For more information, please see our accompanying fact sheet in which OCR and the U.S. Department of Justice's Civil Rights Division provide examples of the kinds of incidents we can investigate.

OCR has also updated its website to provide the resources mentioned above and to provide additional information and resources for GBTQI students.

On Title IX more generally, you might find it useful to review this Overview of the aw and these Answers to Frequently Asked Questions about Sex Discrimination.

We realize educators may have questions about the Department's 2020 amendments to the Title IX regulations, and we appreciate that so many of you shared your insights and experiences during our virtual public hearing on Title IX held on June 7-11, 2021. We are reviewing the comments we received and, as previously noted, anticipate issuing a notice of proposed rulemaking to amend the regulations. In addition, we plan to issue a question-and-answer document to provide additional clarity about how OCR interprets schools' existing obligations under the 2020 amendments, including the areas in which schools have discretion in their procedures for responding to reports of sexual harassment.

If you have questions or would like additional information or technical assistance, please visit us at www.ed.gov/ocr or contact OCR at 800-421-3481 (TDD: 800-877-8339) or at ocr@ed.gov.

We at OCR share with you the responsibility to ensure that all students have equal access to education, regardless of race, color, national origin, sex, disability, or age. Thank you for all that you do to support all of our nation's students and to ensure that they have the opportunity to learn and thrive in school.

Sincerely,

Suzanne B. Goldberg
Acting Assistant Secretary for Civil Rights

Joint Department of Justice and Department Education Notice: Confronting Anti-LGBTQI+ Harassment in Schools, A Resource for Students and Families dated June 23, 2021

U.S. Department of Justice
Civil Rights Division

U.S. Department of Education
Office for Civil Rights

Confronting Anti-LGBTQI+ Harassment in Schools

A Resource for Students and Families

Many students face bullying, harassment, and discrimination based on sex stereotypes and assumptions about what it means to be a boy or a girl. Students who are lesbian, gay, bisexual, transgender, queer, intersex, nonbinary, or otherwise gender non-conforming may face harassment based on how they dress or act, or for simply being who they are. It is important to know that discrimination against students based on their sexual orientation or gender identity is a form of sex discrimination prohibited by federal law. It is also important that LGBTQI+ students feel safe and know what to do if they experience discrimination.

Public elementary and secondary schools, as well as public and private colleges and universities, have a responsibility to investigate and address sex discrimination, including sexual harassment, against students because of their perceived or actual sexual orientation or gender identity. When schools fail to respond appropriately, the Educational Opportunities Section of the Civil Rights Division (CRT) at the U.S. Department of Justice and the Office for Civil Rights (OCR) at the U.S. Department of Education can help by enforcing federal laws that protect students from discrimination. CRT and OCR can also provide information to assist schools in meeting their legal obligations.

Examples of the kinds of incidents CRT and OCR can investigate:

A lesbian high school student wants to bring her girlfriend to a school social event where students can bring a date. Teachers refuse to sell her tickets, telling the student that bringing a girl as a date is "not appropriate for school." Teachers suggest that the student attend alone or bring a boy as a date.

When he starts middle school, a transgender boy introduces himself as Brayden and tells his classmates he uses he/him pronouns. Some of his former elementary school classmates "out" him to others, and every day during physical education class call him transphobic slurs, push him, and call him by his former name. When he reports it to the school's administrators, they dismiss it, saying: "you can't expect everyone to agree with your choices."

A community college student discloses he's gay during a seminar discussion. Leaving class, a group of students calls him a homophobic slur, and one bumps him into the wall. A professor witnesses this, but does nothing. Over the next month, the harassment worsens. The student goes to his dean after missing several lectures out of fear. The college interviews one, but not all, of the harassers, does nothing more, and never follows up with the student.

An elementary school student with intersex traits dresses in a gender neutral way, identifies as nonbinary, and uses they/them pronouns. The student's teacher laughs when other students ask if they are "a boy or a girl" and comments that there is "only one way to find out." The teacher tells the class that there are only boys and girls and anyone who thinks otherwise has something wrong with them. The student tells an administrator, who remarks "you have to be able to laugh at yourself sometimes."

On her way to the girls' restroom, a transgender high school girl is stopped by the principal who bars her entry. The principal tells the student to use the boys' restroom or nurse's office because her school records identify her as "male." Later, the student joins her friends to try out for the girls' cheerleading team and the coach turns her away from tryouts solely because she is transgender. When the student complains, the principal tells her "those are the district's policies."

U.S. Department of Justice
Civil Rights Division

U.S. Department of Education
Office for Civil Rights

What if a Student Experiences Discrimination in School?

If you have been treated unfairly or believe a student has been treated unfairly—for example, treated differently, denied an educational opportunity, harassed, bullied, or retaliated against—because of sexual orientation or gender identity, there are a number of actions you can take:

1. **Notify a teacher or school leader** (for example, a principal or student affairs staff) immediately. If you don't get the help you need, file a formal complaint with the school, school district, college, or university. Keep records of your complaint(s) and responses you receive.

2. **Write down the details** about what happened, where and when the incident happened, who was involved, and the names of any witnesses. Do this for every incident of discrimination, and keep copies of any related documents or other information.

3. If you are not proficient in English, you have the right to **ask the school to translate or interpret information** into a language you understand. If you have communication needs because of a disability, you have the right to receive accommodations or aids and services that provide you with effective communication.

4. Counseling and other mental health support can sometimes be helpful for a student who has been harassed or bullied. **Consider seeking mental health resources** if needed.

5. **Consider filing a complaint** with the Civil Rights Division of the U.S. Department of Justice at **civilrights.justice.gov** (available in several different languages), or with the Office for Civil Rights at the U.S. Department of Education at **www.ed.gov/ocr/complaintintro.html** (to file a complaint in English) or **www.ed.gov/ocr/docs/howto.html** (to file a complaint in multiple languages).

"All students should be able to learn in a safe environment, free from discrimination and harassment. The Civil Rights Division stands with LGBTQI+ students and will fight to protect their right to an education regardless of who they are or whom they love."

– Kristen Clarke, Assistant Attorney General for Civil Rights, Department of Justice

"The Department of Education strives to ensure that all students—including LGBTQI+ students—have access to supportive, inclusive school environments that allow them to learn and thrive in all aspects of their educational experience. Federal law prohibits discrimination based on sexual orientation and gender identity, and we are here to help schools, students, and families ensure that these protections are in full force."

– Suzanne B. Goldberg, Acting Assistant Secretary for Civil Rights, Department of Education

OCR Question and Answers on the Title IX Regulations on Sexual Harassment dated July 20, 2021

Questions & Answers

Questions and Answers on the Title IX Regulations on Sexual Harassment (July 2021)

UNITED STATES
DEPARTMENT
OF EDUCATION

Office for Civil Rights

July 20, 2021

Questions and Answers on the Title IX Regulations on Sexual Harassment and Appendix (July 2021)

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Table of Contents

QUESTIONS AND ANSWERS

I. General Obligations 3

Question 1: What did the 2020 amendments change about the Department's Title IX regulations? 3

Question 2: Is a school permitted to take steps in response to reports of sexual harassment that go beyond those set out in the 2020 amendments? 3

Question 3: What does the Department expect from schools regarding prevention of sexual harassment? 4

Question 4: Are there any differences in the 2020 amendments' requirements for elementary and secondary schools and postsecondary schools? 4

II. Definition of Sexual Harassment 4

Question 5: What is the definition of sexual harassment in the 2020 amendments? 4

Question 6: Do schools need to adopt a particular definition of consent for determining whether conduct is "unwelcome" under the definition of sexual harassment in the 2020 amendments? 6

Question 7: May a school respond to alleged sexual misconduct that does not meet the definition of sexual harassment in the 2020 amendments? 6

Question 8: How can a school determine whether sexual harassment "effectively denies a person's right to equal access to its education program or activity" under the "unwelcome conduct" category in the definition of sexual harassment in the 2020 amendments? 7

III. Where Sexual Harassment Occurs 8

Question 9: Which settings are covered by the 2020 amendments? 8

Question 10: How should a school determine whether it has substantial control over the respondent and context in an off-campus setting? 9

Question 11: How do the 2020 amendments apply to alleged sexual harassment that takes place electronically or on an online platform used by the school? 9

Question 12: How do the 2020 amendments apply to alleged sexual harassment that is perpetrated by a student using a personal electronic device during class? 10

IV. When Harassment Occurred 10

Question 13: What is the appropriate standard for evaluating alleged sexual harassment that occurred before the 2020 amendments took effect? 10

V. Notice of Sexual Harassment 10

Question 14: Which school employees must be notified about allegations of sexual harassment for a school to be put on notice that it must respond? 10

Question 15: If a school trains or requires non-employees who interact with the school's students to report sexual harassment incidents, are those individuals (for example, volunteers, alumni, independent contractors) automatically considered "officials with authority to institute corrective measures" on the school's behalf? 11

Question 16: May a school accept reports of sexual harassment from individuals who are not associated with the school in any way? 12

Question 17: Is a school required to respond to allegations of sexual harassment if the only employee or school official who has notice of the harassment is the alleged harasser? 12

Question 18: Is a school required to respond if it has notice of alleged misconduct that could meet the definition of sexual harassment but is not certain whether the harassment has occurred? 12

Question 19: Does a postsecondary school have discretion to require additional employees to report allegations of sexual harassment to the school? 12

VI. Response to Sexual Harassment 13

Question 20: How must a school respond to allegations of sexual harassment? 13

Question 21: Is a school required to impose particular remedies when a respondent is found responsible for sexual harassment? 14

VII. Formal Complaints 14

Question 22: What is a "formal complaint" under the 2020 amendments? 14

Question 23: Is a school required to accept a formal complaint of sexual harassment from a complainant who is not currently enrolled in or attending the school? 15

Question 24: If a complainant has not filed a formal complaint and is not participating in or attempting to participate in the school's education program or activity, may the school's Title IX Coordinator file a formal complaint? 15

Question 25: If a complainant is not participating in or attempting to participate in the school's education program or activity, may a school respond to reports of sexual harassment under its own code of conduct? 16

Question 26: Is a school required to take action even if the respondent has left the school prior to the filing of a formal complaint with no plans to return? 16

Question 27: Is a school required to dismiss a formal complaint if a respondent leaves the school? 16

Question 28: May a school use trauma-informed approaches when responding to a formal complaint? 17

VIII. Handling Situations in Which a Party or Witness May be Unable to Participate in the Title IX Grievance Process in Person 17

Question 29: May a school stop offering its Title IX grievance process due to the COVID-19 pandemic? 17

Question 30: How should a school proceed in the Title IX sexual harassment grievance process when a party or a witness is temporarily unable to participate due to a disability? 17

Question 31: May a school use technology to permit participants to appear virtually in its Title IX grievance process? 18

IX. Supportive Measures and Temporary Removal of Respondents from Campus 18

Question 32: Does a school have to offer supportive measures to a complainant who has not filed a formal complaint of sexual harassment? 18

Question 33: What are the supportive measures a school must offer to complainants? 18

Question 34: Is a school still required to provide supportive measures during the COVID-19 pandemic? 19

Question 35: May a school remove a respondent from campus while a Title IX grievance process is pending if it determines that the respondent is a threat to others? 19

X. Presumption of No Responsibility 19

Question 36: The 2020 amendments require schools to presume that the respondent is not responsible for the alleged misconduct. Does this mean the school also must assume the complainant is lying or that the alleged harassment did not occur? 19

XI. Time Frames 20

Question 37: What is the appropriate length of time for a school's investigation into a complaint of sexual harassment? 20

XII. Live Hearings and Cross-Examination 21

Question 38: Are all schools required to hold live hearings as part of their Title IX grievance processes? 21

Question 39: What is cross-examination? 21

Question 40: Since elementary and secondary schools are not required to provide a live hearing, what kind of process are they required to provide? 21

Question 41: Is a postsecondary school required to provide complainants and respondents with an advisor for a live hearing? 22

Question 42: Are parties and witnesses required to participate in the Title IX grievance process, including submitting to cross-examination during a live hearing at the postsecondary school level? 22

Question 43: May a school create its own rules for conducting a live hearing? 22

Question 44: May a school put in place rules of decorum or other rules for advisors, parties, and witnesses to follow during a live hearing? 23

Question 45: Are all parties required to be physically present in the same location during the live hearing? 23

Question 46: Is a school permitted to limit the questions that may be asked by each party of the other party or witnesses? 24

Question 47: Are questions and evidence about the complainant's sexual history relevant? 24

Question 48: Can cross-examination include questions about an individual's medical or mental-health records? 25

Question 49: May a school put measures in place to protect the well-being of the parties during the cross-examination? 25

Question 50: How do the 2020 amendments address the manner in which a decision-maker should evaluate answers to cross-examination questions? 25

Question 51: What are the consequences if a party or witness does not participate in a live hearing or submit to cross-examination? 25

Question 52: May a decision-maker at a postsecondary school rely on non-statement evidence, such as photographs or video images, if a party or witness does not submit to cross-examination? 26

Question 53: May a decision-maker at a postsecondary school rely on statements of a party, such as texts or emails, even if the party does not submit to cross-examination? 27

Question 54: May a decision-maker rely on a video, text message or other piece of evidence that includes statements by multiple parties or witnesses if some of them do not submit to cross-examination? 27

Question 55: May a decision-maker rely on the statements of a party or witness who submits to cross-examination, but does not answer questions posed by the decision-maker? 27

XIII. Standard of Proof 28

Question 56: What standard of proof must a school use when deciding whether a respondent is responsible for committing sexual harassment? 28

Question 57: May a school use a different standard of proof for formal complaints of sexual harassment involving students and employees? 28

XIV. Informal Resolution 28

Question 58: May a school offer an informal resolution process, including restorative justice or mediation, as a way to resolve a sexual harassment complaint? 28

Question 59: If a school chooses to offer an informal resolution process, are there any requirements under Title IX? 29

XV. Retaliation and Amnesty 29

Question 60: What is retaliation, and is it prohibited under the 2020 amendments? 29

Question 61: May a school discipline a complainant, respondent, or witness for violating the school's COVID-19 or other policy during a reported incident of sexual harassment? 30

Question 62: Is a school permitted to have an amnesty policy as a way to encourage reporting of sexual harassment? 30

Question 63: May a school punish a complainant for filing a complaint if the decision-maker finds that the respondent did not engage in the alleged sexual harassment? 30

XVI. Forms of Sex Discrimination Other Than Sexual Harassment as Defined by the 2020 Amendments 31

Question 64: How should a school respond to complaints alleging sex discrimination that do not meet the definition of sexual harassment under the 2020 amendments? 31

Question 65: What constitutes a prompt and equitable grievance procedure under Title IX for responding to complaints of sex discrimination that do not include sexual-harassment allegations? 31

XVII. Religious Exemptions 32

Question 66: Are all schools that receive federal financial assistance required to comply with Title IX? 32

Question 67: May a student file a complaint with OCR against a school that has obtained an assurance of a religious exemption from OCR? 32

APPENDIX

I. Receiving and Responding to Reports of Sexual Harassment 39

Example Policies Used by Elementary and Secondary Schools and Postsecondary Schools 39

Example Policy Used by Elementary and Secondary Schools 39

II. Supportive Measures 40

Example Policies Used by Elementary and Secondary Schools and Postsecondary Schools 40

III. Investigations 41

Example Policies Used by Elementary and Secondary Schools and Postsecondary Schools 41

Example Policies Used by Elementary and Secondary Schools 41

IV. The Role of the Advisor 42

Example Policies Used by Postsecondary Schools 42

V. The Live Hearing Process 42

Example Policies Used by Postsecondary Schools 42

A. Before the hearing 42

B. Hearing format 42

C. Evidence 43

D. Confidentiality 44

E. Decision-makers asking questions of the parties or witnesses 45

VI. Behavior During the Live Hearing/Rules of Decorum 45

Example Policies Used by Postsecondary Schools 45

VII. Protecting the Well-Being of the Parties During the Live Hearing/Investigation 46

Example Policies Used by Postsecondary Schools 46

Example Policy Used by Elementary and Secondary Schools 46

VIII. The Cross-Examination Process 46

Example Policies Used by Postsecondary Schools 46

A. Explaining Cross-Examination 46

B. Relevant questions only/Decision-maker reviews all questions 47

IX. Restrictions on Considering a Complainant's or Respondent's Sexual History 47

Example Policies Used by Elementary and Secondary Schools and Postsecondary Schools 47

X. Situations in Which a Party or Witness Does Not Participate in a Live Hearing or in Cross-examination 48

Example Policies Used by Postsecondary Schools 48

XI. Presumptions about Complainants, Respondents and Witnesses 49

Example Policies Used by Elementary and Secondary Schools and Postsecondary Schools 49

XII. Determination Regarding Responsibility 50

Example Policies Used by Elementary and Secondary Schools and Postsecondary Schools 50

XIII. Sanctions and Remedies 51

Example Policies Used by Elementary and Secondary Schools and Postsecondary Schools 51

XIV. Appeals 52

Example Policies Used by Elementary and Secondary Schools and Postsecondary Schools 52

XV. Informal Resolution 53

Example Policies Used by Elementary and Secondary Schools and Postsecondary Schools 53

XVI. Addressing Conduct That the School Deems to be Sexual Harassment but Does Not Meet the Definition of Sexual Harassment Under the Title IX Regulations 55

Example Policies Used by Elementary and Secondary Schools and Postsecondary Schools 55

XVII. Parent and Guardian Rights 56

Example Policy Used by Elementary and Secondary Schools 56

Questions and Answers on the Title IX Regulations on Sexual Harassment (July 2021)

Ensuring equal access to education for all students—from pre-K through elementary and secondary schools and postsecondary institutions—is at the heart of the mission of the U.S. Department of Education's Office for Civil Rights. This includes protecting rights of students and others to an educational environment free from discrimination based on sex, including discrimination in the form of sexual harassment and discrimination based on sexual orientation or gender identity, as guaranteed by Title IX of the Education Amendments of 1972.

This question-and-answer resource describes OCR's interpretation of schools' responsibilities under Title IX, and the Department's current implementing regulations related to sexual harassment, as enforced by OCR. The focus here is on questions related to the most recent amendments to the regulations in 2020 (the 2020 amendments).[1] The Department is undertaking a comprehensive review of its current Title IX regulations as amended in 2020, following President Biden's *Executive Order on Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity*. While this review is ongoing and until any new regulations go into effect, the 2020 amendments remain in effect.

This Q&A does not address policies or procedures under Title VII of the Civil Rights Act of 1964, which prohibits sex discrimination in employment. As the 2020 amendments state: "Nothing in [these regulations] may be read in derogation of any individual's rights under title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* or any regulations promulgated thereunder." 34 C.F.R. § 106.6(f).

For additional information about Title IX, please also see OCR's Title IX and Sex Discrimination Webpage and OCR's Sex Discrimination FAQ Webpage. You can find the Department's Title IX regulations, including the 2020 amendments, at 34 C.F.R. Part 106.

This Q&A has 17 sections and provides information on a variety of topics covered by the 2020 amendments, including the definition of sexual harassment, how a school can obtain notice of sexual harassment, a school's response to allegations of sexual harassment, and how a school must process formal complaints of sexual harassment, including live hearings and cross-examination.

- Preamble references: Please note that where appropriate, this Q&A refers to the preamble to the 2020 amendments, which clarifies OCR's interpretation of Title IX and the regulations. You can find citations to specific preamble sections in the endnotes of this Q&A. The preamble itself does not have the force and effect of law.

- Q&A Appendix: OCR provides an appendix to accompany this Q&A, with examples of policy provisions from various schools. These examples may be helpful as schools continue their work to implement the requirements of the 2020 amendments.

Who can file a discrimination complaint – and how to file: Anyone can file a complaint with OCR, including students, parents and guardians, community members, and others who experience or observe discrimination in education programs or activities. To file a complaint, please use this online form. For more information, see How to File a Discrimination Complaint with the Office for Civil Rights and this short video on How to File a Complaint with the Office for Civil Rights.

Additional questions? Please note that this Q&A addresses many important issues but is not comprehensive. We recognize that you might have additional questions and invite you to send them to OCR at ocr@ed.gov.

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A mini-glossary for this Q&A:

This Q&A is geared towards recipients of federal financial assistance that are educational institutions and uses the term "schools" to refer to all such recipients, including school districts, colleges, and universities. It also includes several terms that are commonly used in Title IX grievance processes for formal complaints of sexual harassment. Here is information about what those terms mean in this document:

Allegation:	An assertion that someone has engaged in sexual harassment.
Complainant:	The person who has experienced the alleged sexual harassment. This person is considered a complainant regardless of whether they choose to file a formal complaint of sexual harassment under Title IX.

Respondent:	The person accused of the alleged sexual harassment.
Reporter:	The person who reports sexual harassment to the school. This may be the complainant but may also be someone else (also known as a "third party" reporter).
Title IX grievance process:	This is the formal name used in the Title IX regulations for a school's process for addressing formal complaints of sexual harassment under Title IX.
Actual knowledge:	When a school receives notice of alleged misconduct that meets the definition of "sexual harassment" under the Title IX regulations, as described below, the school has "actual knowledge" and must respond appropriately. Additional information regarding how schools receive notice and have "actual knowledge" is discussed in Question 14.

I. General Obligations

Question 1: What did the 2020 amendments change about the Department's Title IX regulations?

Answer 1: The Department's Title IX regulations were first issued in 1975, reissued in 1980, and then amended after that, including in 2006 and 2020. Prior to 2020, the regulations set out requirements under Title IX for educational programs and activities that receive federal financial aid, but they did not include specific requirements related to sexual harassment. Instead, OCR had several guidance documents in place to assist schools in understanding how OCR interpreted the Department's Title IX regulations. The 2020 amendments added specific, legally binding steps that schools must take in response to notice of alleged sexual harassment.

Question 2: Is a school permitted to take steps in response to reports of sexual harassment that go beyond those set out in the 2020 amendments?

Answer 2: Yes. The 2020 amendments set out the minimum steps that a school must take in response to notice of alleged sexual harassment. A school may take additional actions so long as those actions do not conflict with Title IX or the 2020 amendments. The preamble provides this additional guidance:

> A school "remain[s] free to adopt best practices for supporting survivors and standards of competence for conducting impartial grievance processes, while meeting obligations imposed under the [2020 amendments]."[2]

Question 3: What does the Department expect from schools regarding prevention of sexual harassment?

Answer 3: The 2020 amendments focus on "setting forth requirements for [schools'] responses to sexual harassment."[3] However, the preamble also says that "the Department agrees with commenters that educators, experts, students, and employees should also endeavor to *prevent* sexual harassment from occurring in the first place."[4] OCR encourages schools to undertake prevention efforts that best serve the needs, values, and environment of their own educational communities.

Question 4: Are there any differences in the 2020 amendments' requirements for elementary and secondary schools and postsecondary schools?

Answer 4: Yes. Although the 2020 amendments have many of the same requirements for elementary and secondary and postsecondary schools, there are two requirements that differ – notice and live hearings.

- Notice: Any time an elementary or secondary school employee has notice that sexual harassment might have occurred, the school must respond. Notice requirements are more limited for postsecondary school employees. See Section V for more information on notice requirements.
- Live hearing: Only postsecondary schools are required to provide for a live hearing with the opportunity for cross-examination to be conducted by each party's advisor of choice. For more information on live hearings and cross-examination, see Section XII.

II. <u>Definition of Sexual Harassment</u>

Question 5: What is the definition of sexual harassment in the 2020 amendments?

Answer 5: The 2020 amendments define sexual harassment to include certain types of unwelcome sexual conduct, sexual assault, dating violence, domestic violence, and stalking. Here is the full definition in the regulations:

> Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:
>
> > (1) An employee of the [school] conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
> >
> > (2) Unwelcome conduct, determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school's education program or activity; or

(3) 'Sexual assault' as defined in 20 U.S.C. 1092(f)(6)(A)(v), 'dating violence' as defined in 34 U.S.C. 12291(a)(10), 'domestic violence' as defined in 34 U.S.C. 12291(a)(8), or 'stalking' as defined in 34 U.S.C. 12291(a)(30).

For additional information, please see 34 C.F.R. § 106.30.

When unwelcome conduct on the basis of sex meets one or more of these three categories, the conduct is considered to be sexual harassment under the 2020 amendments. Here is some additional information about each category:

- The first category is commonly referred to as "quid pro quo" sexual harassment, meaning that a school employee offers something to an individual in exchange for sexual conduct.
- The second category incorporates the definition of sexual harassment set out by the Supreme Court in a case about when a school may be required to pay financial compensation in a lawsuit for sexual harassment by one student toward another student. The case is *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999).
- The third category refers to definitions in the Clery Act and the Violence Against Women Act (VAWA). The Clery Act is a federal law that requires colleges and universities that participate in the federal student financial aid programs to provide current and prospective students and employees, the public, and the Department with crime statistics and information about campus crime prevention programs and policies. VAWA is a federal law administered by the U.S. Departments of Justice (DOJ) and Health and Human Services (HHS) that supports comprehensive responses to domestic violence, sexual assault, dating violence, and stalking.

  Definitions under the Clery Act: The Clery Act defines sexual assault as a forcible or nonforcible offense under the uniform crime reporting system of the Federal Bureau of Investigation.[5] This system includes the National Incident-Based Reporting System (NIBRS), which defines forcible sex offenses to include any sexual act, including rape, sodomy, sexual assault with an object, or fondling "directed against another person, without the consent of the victim including instances where the victim is incapable of giving consent." Please see Question 6 explaining that the 2020 amendments do not require schools to use a particular definition of consent. NIBRS also includes incest and statutory rape as "nonforcible" sex offenses.[6] Conduct that fits within any of these definitions under NIBRS is considered a type of sexual harassment in the 2020 amendments.

  Definitions under VAWA: The 2020 amendments refer to the following definitions of dating violence, domestic violence, and stalking in VAWA:

  - Dating violence includes violence committed by a person who has been in a social relationship of a romantic or intimate nature with the complainant; the existence

of such a relationship shall be determined based on consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.[7]

- Domestic violence includes felony or misdemeanor crimes of violence committed by: a current or former spouse or intimate partner of the complainant, a person with whom the complainant shares a child, a person who is cohabitating with or has cohabitated with the complainant as a spouse or intimate partner, a person similarly situated to a spouse of the complainant under the jurisdiction's domestic or family violence laws, or any other person against a complainant who is protected under the domestic or family violence laws of the jurisdiction.[8]

- Stalking is defined as engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for their own safety or the safety of others or to suffer substantial emotional distress.[9] The 2020 amendments cover instances of stalking based on sex—including stalking that occurs online or through messaging platforms, commonly known as cyber-stalking—when it occurs in the school's education program or activity.[10]

Question 6: Do schools need to adopt a particular definition of consent for determining whether conduct is "unwelcome" under the definition of sexual harassment in the 2020 amendments?

Answer 6: No. The preamble states that the Department will not require a school to adopt a particular definition of consent.[11] The preamble explains that a school has the flexibility to choose a definition of consent that "best serves the unique needs, values, and environment of the [school's] own educational community."[12]

Question 7: May a school respond to alleged sexual misconduct that does not meet the definition of sexual harassment in the 2020 amendments?

Answer 7: Yes. The preamble makes clear that "Title IX is not the exclusive remedy for sexual misconduct or traumatic events that affect students."[13] A school has discretion to respond appropriately to reports of sexual misconduct that do not fit within the scope of conduct covered by the Title IX grievance process.[14] This may include, for example, reported sexual misconduct that a) occurs outside of a school's education program or activity; b) occurs outside of the United States; or c) causes harm in the school environment that does not fit within the definition set out above in Question 5.[15]

The preamble also says that "nothing in the final regulations precludes [a school] from vigorously addressing misconduct (sexual or otherwise) that occurs outside the scope of Title IX or from offering supportive measures to students and individuals impacted by misconduct or trauma."[16]

Put simply, Title IX's sexual harassment regulation need not replace a school's more expansive code of conduct and does not prohibit a school from enforcing that code to address misconduct that does not constitute sexual harassment under the 2020 amendments. OCR encourages schools to develop and enforce their codes as an additional tool for ensuring safe and supportive educational environments for all students. OCR does not enforce school codes of conduct but may investigate complaints that a school's code of conduct treated students differently based on sex, including sexual orientation or gender identity.[17]

For examples of school codes that address sexual misconduct not covered by Title IX, please see Q&A Appendix Section XVI.

Question 8: How can a school determine whether sexual harassment "effectively denies a person's right to equal access to its education program or activity" under the "unwelcome conduct" category in the definition of sexual harassment in the 2020 amendments? (See the definition in Question 5.)

Answer 8: The preamble explains that to determine whether a person has been effectively denied equal access to a school's education program or activity, a school must evaluate "whether a reasonable person in the complainant's position would be effectively denied *equal* access to education compared to a similarly situated person who is not suffering the alleged sexual harassment."[18]

The preamble provides this additional guidance to schools:

- An effective denial of equal access to educational opportunities may include skipping class to avoid a harasser, a decline in a student's grade point average, or having difficulty concentrating in class.[19]

- Examples of specific situations that likely constitute effective denial of equal access to educational opportunities also include "a third grader who starts bed-wetting or crying at night due to sexual harassment, or a high school wrestler who quits the team but carries on with other school activities following sexual harassment."[20]

- A complainant does not need to have "already suffered loss of education before being able to report sexual harassment."[21]

- Effective denial of equal access to education does not require "that a person's total or entire educational access has been denied."[22]

- While these examples help illustrate an effective denial of access, "[n]o concrete injury is required" to prove an effective denial of equal access.[23]

- Complainants do not need to have "dropped out of school, failed a class, had a panic attack, or otherwise reached a 'breaking point'" or exhibited specific trauma symptoms to be effectively denied equal access.[24]
- "School officials turning away a complainant by deciding the complainant was 'not traumatized enough' would be impermissible."[25]

Schools may wish to include these and other examples in their internal policies, training, and communications to students and employees to help illustrate this concept.

III. Where Sexual Harassment Occurs

Question 9: Which settings are covered by the 2020 amendments?

Answer 9: The 2020 amendments apply to reports of sexual harassment in education programs and activities in the United States, including in the following settings:

1. Buildings or other locations that are part of the school's operations, including remote learning platforms;
2. Off-campus settings if the school exercised substantial control over the respondent and the context in which the alleged sexual harassment occurred (e.g., a school field trip to a museum); and
3. Off-campus buildings owned or controlled by a student organization officially recognized by a postsecondary school, such as a building owned by a recognized fraternity or sorority.[26]

For additional information, please see 34 C.F.R. § 106.44(a). For more information on how a school can determine whether it has substantial control over the respondent and context in an off-campus setting, see Question 10.

The 2020 amendments require that schools provide training to their Title IX personnel to "accurately identify situations that require a response under Title IX."[27] OCR also encourages schools to include examples of their programs and activities in each of the three areas described above in their policies, staff training, and student-oriented communications.

Please note that sexual harassment that takes place in settings outside of the United States is not covered under the 2020 amendments.[28]

Schools should also note that, under the 2020 amendments, a school may still offer "supportive measures to a complainant who reports sexual harassment that occurred outside the [school's] education program or activity, and any sexual harassment that does occur in an education program or activity must be responded to even if it related to, or happens subsequent to, sexual harassment that occurred outside the education program or activity."[29]

Question 10: How should a school determine whether it has substantial control over the respondent and context in an off-campus setting?

Answer 10: The school must make a fact-specific determination. The preamble says that it "may be helpful or useful for a [school] to consider factors applied by Federal courts to determine the scope of a [school's] education program or activity"—such as "whether the [school] funded, promoted, or sponsored the event or circumstance where the alleged harassment occurred"—but also that "no single factor is determinative" in concluding whether the school has substantial control over the respondent and the context in which the reported harassment occurred.[30]

In making this fact-specific determination, the preamble also says:

> A school "must consider whether, for example, a sexual harassment incident between two students that occurs in an off-campus apartment" or house is a "situation over which the [school] exercised substantial control [and], if so, the [school] must respond [to notice] of sexual harassment or allegations of sexual harassment that occurred there."[31]

If an incident of sexual harassment between two students in a private hotel room occurs in a context related to a school-sponsored activity, such as a school field trip or travel with a school athletics team, the school would need to consider whether it exercised substantial control over the context in which the sexual harassment occurred.[32]

The preamble adds that a school may have substantial control over an incident that occurred in a student's home, such as where "a teacher employed by a school visits a student's home ostensibly to give the student a book but in reality to instigate sexual activity with the student."[33]

Question 11: How do the 2020 amendments apply to alleged sexual harassment that takes place electronically or on an online platform used by the school?

Answer 11: In discussing Title IX and online platforms used by a school, the preamble provides this guidance to schools:

- The operations of a school "may certainly include computer and internet networks, digital platforms, and computer hardware or software owned or operated by, or used in the operations of, the [school]."[34]
- "[T]he factual circumstances of online harassment must be analyzed to determine if it occurred in an education program or activity."[35]

The preamble adds that the definition of "education program or activity" in the 2020 amendments "does not create a distinction between sexual harassment occurring in person versus online."[36]

Question 12: How do the 2020 amendments apply to alleged sexual harassment that is perpetrated by a student using a personal electronic device during class?

Answer 12: The preamble explains that "a student using a personal device to perpetrate online sexual harassment during class time may constitute a circumstance over which the [school] exercises substantial control."[37] As with in-person harassment, "the factual circumstances of online harassment must be analyzed to determine if it occurred" in circumstances "over which a school exercised substantial control over the respondent and the context."[38]

IV. When Harassment Occurred

Question 13: What is the appropriate standard for evaluating alleged sexual harassment that occurred before the 2020 amendments took effect?

Answer 13: The 2020 amendments took effect on August 14, 2020, and are not retroactive. This means that a school must follow the requirements of the Title IX statute and the regulations that were in place at the time of the alleged incident; the 2020 amendments do not apply to alleged sexual harassment occurring before August 14, 2020. This is true even if the school's response was on or after this date. In other words, if the conduct at issue in the complaint took place prior to August 14, 2020, the 2020 amendments do not apply even if the complaint was filed with a school on or after August 14, 2020.

Before August 2020, the Title IX regulations did not have specific requirements for schools related to sexual harassment. Instead, OCR had several guidance documents in place to assist schools in understanding how OCR interpreted the Department's Title IX regulations. Although the guidance documents issued in 2011 and 2014 were rescinded in 2017, and the 2001 and 2017 guidance documents were rescinded in 2020, these documents remain accessible on OCR's website for historical purposes to the extent they are helpful to schools when responding to earlier allegations of sexual harassment.[39]

V. Notice of Sexual Harassment

Question 14: Which school employees must be notified about allegations of sexual harassment for a school to be put on notice that it must respond?

Answer 14: In elementary and secondary school settings, a school must respond whenever any school employee has notice of sexual harassment.[40] This includes notice to a teacher, teacher's aide, bus driver, cafeteria worker, counselor, school resource officer, maintenance staff worker, coach, athletic trainer, or any other school employee.[41]

In postsecondary school settings, notice may be more limited in scope. The institution must respond when notice is received by the Title IX Coordinator or another official who has authority to institute corrective measures on the institution's behalf.[42] The Department is unable to

provide examples of types of individuals who have this authority because the determination of whether a person is an official who has authority to institute corrective measures on behalf of the institution depends on facts specific to that institution. A school "may, at its discretion, expressly designate specific employees as officials with this authority for purposes of Title IX sexual harassment and may inform students of such designations."[43]

The preamble explains that "the Department does not limit the manner in which [a school] may receive notice of sexual harassment." This means that the employees described above "may receive notice through an oral report of sexual harassment by a complainant or anyone else, a written report, through personal observation, through a newspaper article, through an anonymous report, or through various other means."[44]

The 2020 amendments refer to this notice of sexual harassment as "actual knowledge."

For additional information, please see 34 C.F.R. § 106.30.

Question 15: If a school trains or requires non-employees who interact with the school's students to report sexual harassment incidents, are those individuals (for example, volunteers, alumni, independent contractors) automatically considered "officials with authority to institute corrective measures" on the school's behalf?

Answer 15: No. The 2020 amendments state that at any school level—elementary, secondary, or postsecondary—"[t]he mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual [such as a volunteer parent, or alumnus] as one who has authority to institute corrective measures on behalf of the [school]."[45]

The preamble explains that "the Department does not wish to discourage [schools] from training individuals who interact with the [school's] students about how to report sexual harassment."[46] It also says that "the Department will not assume that a person is an official with authority solely based on the fact that the person has received training on how to report sexual harassment."[47] Similarly, the preamble says that "the Department will not conclude that volunteers and independent contractors are officials with authority, unless the [school] has granted the volunteers or independent contractors authority to institute corrective measures on behalf of the [school]."[48]

For additional information, please see 34 C.F.R. § 106.30.

Question 16: May a school accept reports of sexual harassment from individuals who are not associated with the school in any way?

Answer 16: Yes. A school may receive actual knowledge of sexual harassment from any person.[49] There is no requirement that the person be participating in or attempting to participate in a school program or activity to report sexual harassment.[50]

Question 17: Is a school required to respond to allegations of sexual harassment if the only employee or school official who has notice of the harassment is the alleged harasser?

Answer 17: Not under the 2020 amendments. At any school level—elementary, secondary, or postsecondary—the school does not have notice for purposes of Title IX if the only official or employee of the school with actual knowledge is the respondent.[51] The preamble explains the reason for this is that the school "will not have [an] opportunity to appropriately respond if the only official or employee who knows [of the alleged misconduct] is the respondent."[52]

For additional information, please see 34 C.F.R. § 106.30.

Question 18: Is a school required to respond if it has notice of alleged misconduct that could meet the definition of sexual harassment but is not certain whether the harassment has occurred?

Answer 18: Yes. At any school level—elementary, secondary, or postsecondary—actual knowledge refers to notice of conduct that *could* constitute sexual harassment.[53] A complainant is "an individual who is alleged to be the victim of conduct that could constitute sexual harassment" and the definition of actual knowledge refers to "allegations of sexual harassment."[54] Thus, the preamble explains that a school must respond promptly and appropriately when it receives notice of alleged facts that, if true, could be considered sexual harassment under the 2020 amendments.[55]

For additional information, please see 34 C.F.R. § 106.30.

Question 19: Does a postsecondary school have discretion to require additional employees to report allegations of sexual harassment to the school?

Answer 19: Yes. The preamble says that a postsecondary school may empower as many officials as it wishes to institute corrective measures on its behalf, including coaches and athletic trainers.[56] If any of these officials receives notice of sexual harassment allegations, the school must respond as the 2020 amendments require (see Question 20).[57] The preamble also provides this guidance:

- A postsecondary school has discretion to determine which of their employees should be mandatory reporters, and which employees may keep a student's disclosure about sexual

harassment confidential (e.g., counselors, therapists, other mental health providers, victim advocates).[58]

- Nothing in the 2020 amendments prevents a postsecondary school "from instituting [its] own polic[y] to require professors, instructors, or all employees to report to the Title IX Coordinator every incident and report of sexual harassment."[59] However, the Department will not hold a postsecondary school responsible for responding to such sexual harassment unless an employee "actually did give notice to the [school's] Title IX Coordinator" or other official with authority to institute corrective measures.[60]

- A postsecondary school may also "empower as many officials as it wishes with the requisite authority to institute corrective measures on the [school's] behalf, and notice to these officials with authority constitutes the [school's] actual knowledge."[61] A postsecondary school "may also publicize [a] list[] of officials with this authority," and OCR encourages postsecondary schools to do so, as this will assist students and others to understand which reports will require the school to respond.[62]

VI. Response to Sexual Harassment

Question 20: How must a school respond to allegations of sexual harassment?

Answer 20: When a school has actual knowledge of sexual harassment in any of its programs or activities that take place in the United States, it must "respond promptly in a manner that is not deliberately indifferent."[63] This includes schools that serve any age, grade, or level of students, from pre-K through postsecondary.

The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures, regardless of whether a formal complaint is filed, and to explain the process for filing a formal complaint.[64] For more on supportive measures, see Questions 32-34.

In addition, if a formal complaint is filed, either by the complainant or the Title IX Coordinator, a school must:

- offer supportive measures to the respondent, and

- follow the Title IX grievance process specified by the 2020 amendments.[65] For more on this process, including the requirement to offer supportive measures to the respondent, see Question 26 and Section IX.

In addition to setting out these requirements, the regulations provide that a school is deliberately indifferent "only if its response to sexual harassment is clearly unreasonable in light of the known circumstances."[66]

For more information on the obligations described in this section, please see 34 C.F.R. § 106.44(a).

Question 21: Is a school required to impose particular remedies when a respondent is found responsible for sexual harassment?

Answer 21: No. The 2020 amendments do not dictate that a school provide any particular remedies for the complainant or disciplinary sanctions for the respondent after a finding of responsibility.[67] Each school is free to make disciplinary and remedial decisions that it "believes are in the best interest of [its] educational environment."[68]

When a school finds a respondent responsible for sexual harassment under its Title IX grievance process, the school must provide remedies to the complainant that are "designed to restore or preserve equal access to the [school's] education program or activity."[69] These remedies may include the same individualized services that the school provided to the complainant as supportive measures, additional services, or different services.[70] These remedies can be disciplinary or punitive and can burden the respondent.[71] Schools are required to "[d]escribe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies,"[72] however the preamble clarifies that this requirement "is not intended to unnecessarily restrict a [school's] ability to tailor disciplinary sanctions to address specific situations."[73]

For additional information, please see 34 C.F.R. § 106.45(b)(1)(i), 34 C.F.R. § 106.45(b)(1)(vi), and 34 C.F.R. § 106.45(b)(7)(ii)(E).

VII. Formal Complaints

Question 22: What is a "formal complaint" under the 2020 amendments?

Answer 22: A "formal complaint" is a document filed by a complainant alleging sexual harassment against a respondent and requesting that the school investigate the allegation of sexual harassment.[74] It may be a hard copy document or an electronic document submitted via email or an online portal.[75] Whether it is a hard copy document or an electronic document, it must contain the complainant's physical or digital signature or otherwise indicate that the complainant is the person filing the formal complaint.[76] For example, an email from a student to the Title IX Coordinator that ends with the student signing their name would suffice.

A formal complaint may be filed with the school's Title IX Coordinator in person, by mail, or by email using the contact information provided by the school. A formal complaint may also be filed by any additional method designated by the school.[77] A parent or guardian who has a legal right to act on behalf of an individual may also file a formal complaint on that individual's behalf.[78] In addition, a Title IX Coordinator may initiate a formal complaint as described in Question 24.[79]

For additional information, please see 34 C.F.R. § 106.30.

Question 23: Is a school required to accept a formal complaint of sexual harassment from a complainant who is not currently enrolled in or attending the school?

Answer 23: Yes, but only if the complainant is attempting to participate in the school's education program or activity at the time they file the formal complaint.[80] Individuals who are currently participating in the school's education program or activity may also file formal complaints.[81] When a formal complaint is filed, the school must respond as described in Question 20.

The preamble gives several examples of situations of a complainant "attempting to participate" in a school's education program, including when a complainant:

(1) has withdrawn from the school due to alleged sexual harassment and expresses a desire to re-enroll if the school responds appropriately to the allegations,

(2) has graduated but intends to apply to a new program or intends to participate in alumni programs and activities,

(3) is on a leave of absence and is still enrolled as a student or intends to re-apply after the leave of absence, or

(4) has applied for admission.[82]

It is important to keep in mind that this requirement concerns a complainant's status at the time a formal complaint is filed and is not affected by a complainant's later decision to remain or leave the school.[83]

Question 24: If a complainant has not filed a formal complaint and is not participating in or attempting to participate in the school's education program or activity, may the school's Title IX Coordinator file a formal complaint?

Answer 24: Yes. A Title IX Coordinator may file a formal complaint even if the complainant is not associated with the school in any way.[84]

In some cases, a school may be in violation of Title IX if the Title IX Coordinator does not do so.[85] For example, the preamble explains that if a school "has actual knowledge of a pattern of alleged sexual harassment by a perpetrator in a position of authority," OCR may find the school to be deliberately indifferent (i.e., to have acted in a clearly unreasonable way) if the school's Title IX Coordinator does not sign a formal complaint, "even if the complainant . . . does not wish to file a formal complaint or participate in a grievance process."[86] Put simply, there are circumstances when a Title IX Coordinator may need to sign a formal complaint that obligates the school to initiate an investigation regardless of the complainant's relationship with the school or interest in participating in the Title IX grievance process. This is because the school has a Title IX obligation to provide all students, not just the complainant, with an educational environment that does not discriminate based on sex.

Question 25: If a complainant is not participating in or attempting to participate in the school's education program or activity, may a school respond to reports of sexual harassment under its own code of conduct?

Answer 25: Yes. As discussed in Question 7, a school has discretion to use its own student-conduct process to address alleged misconduct not covered by the 2020 amendments. This includes situations where a complainant is not participating in or attempting to participate in the school's education program or activity.[87] There are also circumstances when a Title IX Coordinator may need to file a formal complaint that obligates the school to initiate an investigation regardless of the complainant's relationship with the school or interest in participating in the Title IX grievance process. See Question 24.

Question 26: Is a school required to take action even if the respondent has left the school prior to the filing of a formal complaint with no plans to return?

Answer 26: Yes. As explained in the preamble, a school must always respond promptly to a complainant's report of sexual harassment when it has actual knowledge.[88] (For more on actual knowledge, see Question 14.) The Title IX Coordinator must inform the complainant about the availability of supportive measures, with or without the filing of a formal complaint, and consider the complainant's wishes regarding supportive measures. [89]

Question 27: Is a school required to dismiss a formal complaint if a respondent leaves the school?

Answer 27: No. Although a school may dismiss a formal complaint if, at any time during the grievance process, the respondent is "no longer enrolled or employed" by the school, dismissal is not required.[90] The preamble explains that a school has discretion to assess the facts and circumstances of a case before deciding whether to dismiss the complaint because the respondent has left the school.[91]

A school may consider, for example, "whether a respondent poses an ongoing risk to the [school's] community," or "whether a determination regarding responsibility provides a benefit to the complainant even where the [school] lacks control over the respondent and would be unable to issue disciplinary sanctions, or other reasons."[92]

Proceeding with the grievance process could potentially allow a school to determine the scope of the harassment, whether school employees knew about it but failed to respond, whether there is a pattern of harassment in particular programs or activities, whether multiple complainants experienced harassment by the same respondent, and what appropriate remedial actions are necessary.

Question 28: May a school use trauma-informed approaches when responding to a formal complaint?

Answer 28: Yes. A school may use trauma-informed approaches to respond to a formal complaint of sexual harassment. The preamble clarifies that the 2020 amendments do not preclude a school "from applying trauma-informed techniques, practices, or approaches," but notes that the use of such approaches must be consistent with the requirements of 34 C.F.R. § 106.45, particularly 34 C.F.R. § 106.45(b)(1)(iii).[93]

VIII. Handling Situations in Which a Party or Witness May be Unable to Participate in the Title IX Grievance Process in Person

Question 29: May a school stop offering its Title IX grievance process due to the COVID-19 pandemic?

Answer 29: No. A school must follow its policies for receiving and responding to reports of sexual harassment and may not adopt a policy of putting investigations or proceedings on hold due to COVID-19.[94]

For additional discussion of schools' ongoing Title IX obligations during the COVID-19 pandemic, please see OCR's Questions and Answers on Civil Rights and School Reopening in the COVID-19 Environment.

Question 30: How should a school proceed in the Title IX sexual harassment grievance process when a party or a witness is temporarily unable to participate due to a disability?

Answer 30: A school has "discretion to apply limited extensions of time frames during the grievance process for good cause, which may include, for example, a temporary postponement of a hearing to accommodate a disability."[95] However, when deciding whether to grant a delay or extension, a school must balance the interests of promptness, fairness to the parties, and accuracy of adjudications. The school also must promptly notify all parties of the reason for the delay and the estimated length of the delay, in addition to important updates about the investigation.[96]

Additionally, a school must not delay investigations or hearings solely because in-person interviews or hearings are not feasible. Instead, a school must use technology, as appropriate, to conduct activities remotely, in a timely and equitable manner, and consistent with the applicable law.

For additional information, please see 34 C.F.R. § 106.45(b)(1)(v).

Question 31: May a school use technology to permit participants to appear virtually in its Title IX grievance process?

Answer 31: Yes. The 2020 amendments grant a school discretion to allow participants, including witnesses, to appear at a live hearing virtually; however, technology must enable all participants to see and hear other participants,[97] with appropriate accommodations for individuals with disabilities.

For additional information, please see 34 C.F.R. § 106.45(b)(6)(i).

IX. Supportive Measures and Temporary Removal of Respondents from Campus

Question 32: Does a school have to offer supportive measures to a complainant who has not filed a formal complaint of sexual harassment?

Answer 32: Yes. The 2020 amendments specify that the school must contact the complainant to discuss the availability of, and to offer, supportive measures, regardless of whether a formal complaint is filed.[98] A school must also consider the complainant's wishes with respect to supportive measures.[99]

For additional information, please see 34 C.F.R. § 106.30 and 34 C.F.R. § 106.44(a).

Question 33: What are the supportive measures a school must offer to complainants?

Answer 33: A school must offer supportive measures that "are designed to restore or preserve equal access to the [school's] education program or activity."[100] The 2020 amendments add that these include "measures designed to protect the safety of all parties or the [school's] educational environment, or deter sexual harassment."[101] A school also must consider the complainant's wishes in determining which supportive measures to provide and may not provide supportive measures that "unreasonably burden[] the other party."[102]

A school has discretion and flexibility to determine which supportive measures are appropriate. The preamble states that a school must consider "each set of unique circumstances" to determine what individualized services would be appropriate based on the "facts and circumstances of that situation."[103]

Examples of supportive measures include "counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures."[104]

For additional information, please see 34 C.F.R. § 106.30 and 34 C.F.R. § 106.44(a).

Question 34: Is a school still required to provide supportive measures during the COVID-19 pandemic?

Answer 34: Yes. COVID-19-related disruptions do not relieve a school of its obligation to comply with Title IX. A school must continue to offer academic adjustments and supports to complainants and respondents in Title IX sexual harassment complaints.

In light of the COVID-19 pandemic, "the facts and circumstances"[105] of a given situation may require a school to provide remote counseling, or similar teletherapy option, as a supportive measure to students who are unable to access on-campus counseling services. Similarly, in a remote learning environment, supportive measures may include ensuring that parties to a complaint do not share the same online classes.

For additional discussion of schools' ongoing Title IX obligations during the COVID-19 pandemic, please see OCR's Questions and Answers on Civil Rights and School Reopening in the COVID-19 Environment.

Question 35: May a school remove a respondent from campus while a Title IX grievance process is pending if the school determines that the respondent is a threat to others?

Answer 35: Yes. The 2020 amendments specify that a school may remove a respondent from its education program or activity on an emergency basis.[106] The school must "undertake[] an individualized safety and risk analysis, determine[] that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provide[] the respondent with notice and an opportunity to challenge the decision immediately following the removal."[107] A school must also meet its obligations to students under federal disability laws.[108]

A school may also place non-student employee respondents on administrative leave while a Title IX grievance process is pending.[109] Again, the school must comply with federal disability laws, as applicable.[110]

For additional information, please see 34 C.F.R. §§ 106.44(c)-(d).

X. Presumption of No Responsibility

Question 36: The 2020 amendments require schools to presume that the respondent is not responsible for the alleged misconduct. Does this mean the school also must assume the complainant is lying or that the alleged harassment did not occur?

Answer 36: No. A school should never assume a complainant of sexual harassment is lying or that the alleged harassment did not occur.

The 2020 amendments require a school to include in its Title IX grievance process "a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process."[111] However, the preamble explains that "[t]he presumption does not imply that the alleged harassment did not occur," or that the respondent is truthful or a complainant is untruthful.[112] Instead, the preamble says that the presumption is designed to ensure that investigators and decision-makers serve impartially and do not prejudge that the respondent is responsible for the alleged harassment.[113] Schools that have relied on this presumption to decline services to a complainant or to make assumptions about a complainant's credibility have done so in error.

For examples of language related to this issue, please see Q&A Appendix Section XI.

XI. Time Frames

Question 37: What is the appropriate length of time for a school's investigation into a complaint of sexual harassment?

Answer 37: The 2020 amendments require that a school's grievance process for formal complaints of sexual harassment include reasonably prompt time frames for concluding the process, including filing and resolving appeals and for any informal resolution processes the school offers.[114] The preamble states that because the 2020 amendments specify that "the time frames designated by the [school] must account for conclusion of the entire grievance process, including appeals and any informal resolution process," no part of the process "is subject to an open-ended time frame."[115]

The preamble also explains that "the reasonableness of the time frame is evaluated in the context of the [school's] operation of an education program or activity."[116] Additionally, the preamble says that "the conclusion of the grievance process must be reasonably prompt, because students (or employees) should not have to wait longer than necessary to know the resolution of a formal complaint of sexual harassment; any grievance process is difficult for both parties, and participating in such a process likely detracts from students' ability to focus on participating in the [school's] education program or activity."[117] The preamble adds that because "victims of sexual harassment are entitled to remedies to restore or preserve equal access to education, . . . prompt resolution of a formal complaint of sexual harassment is necessary to further Title IX's nondiscrimination mandate."[118]

The preamble explains that each school "is in the best position to balance promptness with fairness and accuracy based on [its] own unique attributes and [its] experience with its own student disciplinary proceedings," and thus, each school has discretion to determine its own reasonably prompt time frames.[119] A school must resolve each formal complaint of sexual harassment according to the time frames the school has committed to in its grievance process.[120]

The Department had previously identified, but not required, a 60-day time frame, prior to appeal, for resolving sexual harassment complaints. Although that guidance is no longer in place, nothing in the 2020 amendments prohibits a school from adopting the 60-day time frame.[121]

The 2020 amendments permit a temporary delay of the grievance process or the limited extension of time frames, with good cause.[122] The 2020 amendments provide illustrations of good cause, including considerations such as the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities.[123]

For additional information, please see 34 C.F.R. § 106.45(b)(1)(v).

XII. Live Hearings and Cross-Examination

Question 38: Are all schools required to hold live hearings as part of their Title IX grievance processes?

Answer 38: Postsecondary schools must have a live hearing under the 2020 amendments.[124] A live hearing may occur virtually "with technology enabling the decision-maker[] and parties to simultaneously see and hear the party or the witness answering questions."[125] Elementary and secondary schools are not required to have a live hearing.[126]

For additional information, please see 34 C.F.R. § 106.45(b)(6).

Question 39: What is cross-examination?

Answer 39: At a live hearing, "each party's advisor [must be permitted to] to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility."[127] The 2020 amendments refer to this process of questioning as cross-examination.

The 2020 amendments explain that a party may not conduct cross-examination, but instead the party's advisor must ask the questions on their behalf.[128] The amendments also require a postsecondary school to provide an advisor to conduct cross-examination for any party who does not have their own advisor.[129]

For additional information, please see 34 C.F.R. § 106.45(b)(6).

Question 40: Since elementary and secondary schools are not required to provide a live hearing, what kind of process are they required to provide?

Answer 40: The 2020 amendments state that elementary and secondary schools "must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party."[130] In addition, the decision-maker "must explain to the party proposing the questions any decision to exclude a question as not relevant."[131]

The preamble also explains that a school may exclude as not relevant questions that are duplicative or repetitive.[132]

The 2020 amendments permit a parent or legally authorized guardian to act on behalf of the complainant or respondent.[133] Whether a parent or guardian has the legal right to act on behalf of a complainant or respondent "would be determined by State law, court orders, child custody arrangements, or other sources granting legal rights to parents or guardians."[134] If a parent or guardian has a legal right to act on a complainant or respondent's behalf, this authority applies throughout all aspects of the Title IX matter, including throughout the grievance process.[135]

For additional information, please see 34 C.F.R. § 106.45(b)(6)(ii) and 34 C.F.R. § 106.30.

Question 41: Is a postsecondary school required to provide complainants and respondents with an advisor for a live hearing?

Answer 41: Yes. The 2020 amendments require a postsecondary school to provide an advisor to conduct cross-examination for any party who does not have their own advisor.[136] The amendments also require all schools to provide the parties with the same opportunities to be accompanied by an advisor of their choice in other parts of the grievance process, but do not require a school to provide an advisor for any part of the process other than the requirement that a postsecondary school provide one for cross-examination.[137]

The preamble explains that the parties are in the best position to decide which individuals should serve as their advisors and notes that advisors may be friends, family members, an attorney, or other individuals chosen by the party or provided by the school if the party does not choose one.[138]

For additional information, please see 34 C.F.R. § 106.45(b)(5)(iv) and 34 C.F.R. § 106.45(b)(6)(i).

Question 42: Are parties and witnesses required to participate in the Title IX grievance process, including submitting to cross-examination during a live hearing at the postsecondary school level?

Answer 42: No. Parties and witnesses are not required to submit to cross-examination or otherwise participate in the Title IX grievance process.[139] For information on the consequences of not submitting to cross-examination, see Question 51.

The 2020 amendments do require schools to offer complainants supportive measures regardless of whether they participate in a grievance process and to prohibit retaliation against individuals based on their decision to participate, or not participate, in a grievance process.[140]

Question 43: May a school create its own rules for conducting a live hearing?

Answer 43: Yes. The preamble states that a school may implement rules regarding how the live hearing is conducted as long as those rules are applied equally to both parties.[141] For

example, a school "may decide whether or how to place limits on evidence introduced at a hearing that was not gathered and presented prior to the hearing."[142]

The preamble also explains that a school may adopt rules on "whether the parties may offer opening or closing statements, specify a process for making objections to the relevance of questions and evidence, [and] place reasonable time limitations on a hearing."[143] The preamble adds that a school may adopt a rule stating that duplicative questions are irrelevant.[144]

In addition, the preamble says that an advisor's cross-examination role "is satisfied where the advisor poses questions on a party's behalf, which means that an assigned advisor could relay a party's own questions to the other party or witness."[145] Thus, for example, a postsecondary school could limit the role of advisors to relaying questions drafted by their party.

For examples of language related to this issue, please see Q&A Appendix Sections V-VII.

Question 44: May a school put in place rules of decorum or other rules for advisors, parties, and witnesses to follow during a live hearing?

Answer 44: Yes. The preamble says that a school may "adopt rules of decorum" and notes that a school is "in a better position than the Department to craft rules of decorum best suited to [its] educational environment."[146]

For example, a school may prohibit advisors from questioning parties or witnesses in an abusive, intimidating, or disrespectful manner.[147]

A school also may require a party to use a different advisor if the party's advisor refuses to comply with the school's rules of decorum. For example, the preamble explains that if a party's advisor of choice yells at others in violation of a school's rules of decorum, the school may remove the advisor and require a replacement.[148] The school has this authority even when the advisor is asking a question that is relevant to the hearing. If the manner in which an advisor attempts to ask the question is harassing, intimidating, or abusive (e.g., advisor yells, screams, or comes too close to a witness), the preamble explains that a school may enforce a rule requiring that relevant questions must be asked in a respectful, non-abusive manner.[149]

For examples of language related to this issue, please see Q&A Appendix Section VI.

Question 45: Are all parties required to be physically present in the same location during the live hearing?

Answer 45: No. The 2020 amendments state that, "at the [school's] discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other."[150] Additionally, the preamble states that even if a school does not regularly hold virtual hearings, any party may request that the entire hearing, including cross-examination, be held virtually, and the school

must grant that request.[151] The party does not need to provide a reason for making this request.[152]

In addition, nothing in the 2020 amendments prohibits schools from holding virtual hearings or from having the parties participate in separate locations even if no party makes such a request, particularly in light of the operational challenges posed by the COVID-19 pandemic.[153]

For additional information, please see 34 C.F.R. § 106.45(b)(6)(i).

For examples of language related to this issue, please see Q&A Appendix Section V.

Question 46: Is a school permitted to limit the questions that may be asked by each party of the other party or witnesses?

Answer 46: Yes, and in fact the 2020 amendments require certain limitations, whether in a hearing or as part of an exchange of written questions at the elementary and secondary school level. Note that the 2020 amendments do not require a hearing at the elementary and secondary school level.[154]

Questions must be relevant. More specifically, the 2020 amendments state that questions about the complainant's prior sexual behavior are not relevant, subject to certain limitations.[155] The preamble states that any school may exclude as not relevant questions that are duplicative or repetitive.[156] For more information regarding other limitations on questioning, see Question 48.

Further, the 2020 amendments state that during cross-examination at the postsecondary school level, "only relevant cross-examination questions and other questions may be asked of a party or witness" and the decision-maker must determine the relevance of a question before a party or a witness answers.[157]

For additional information, please see 34 C.F.R. § 106.45(b)(6).

For examples of language related to this issue, please see Q&A Appendix Sections VIII and IX.

Question 47: Are questions and evidence about the complainant's sexual history relevant?

Answer 47: The 2020 amendments state that "questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged" or the "questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent."[158]

The preamble explains that the term "prior sexual behavior" refers to "sexual behavior that is unrelated" to the alleged conduct.[159] The preamble also addresses questions and evidence about sexual behavior after an alleged incident, saying that the regulations do not imply that these kinds of questions are relevant.[160] Whether sexual behavior between the complainant and

respondent might be relevant to prove consent regarding the particular allegations at issue "depends in part on a [school's] definition of consent."[161] Some schools' definitions of consent "require a verbal expression of consent," and other schools' definitions of consent "inquire whether based on circumstances the respondent reasonably understood that consent was present (or absent)."[162]

For additional information, please see 34 C.F.R. § 106.45(b)(6).

For examples of language related to this issue, please see Q&A Appendix Section IX.

Question 48: Can cross-examination include questions about an individual's medical or mental-health records?

Answer 48: Questions that seek information about any party's medical, psychological, and similar records are not permitted unless the party has given written consent.[163] Questions about other records protected by a legally recognized privilege are also not permitted unless waived by the party.[164] The preamble also explains that "[schools] (and, as applicable, parties) must follow relevant State and Federal health care privacy laws throughout the grievance process."[165]

These protections apply throughout the investigation as well as the hearing.

Question 49: May a school put measures in place to protect the well-being of the parties during the cross-examination?

Answer 49: Yes. For example, the preamble notes that a school is permitted to grant breaks to the parties during a live hearing.[166] Also, as discussed in Question 46, the 2020 amendments require a pause in the cross-examination process each time before a party or witness answers a cross-examination question in order for the decision-maker to determine if the question is relevant.[167] The preamble explains that this is to help ensure that the cross-examination includes only relevant questions and that the pace of the cross-examination does not place undue pressure on a party or a witness to answer immediately.[168]

Question 50: How do the 2020 amendments address the manner in which a decision-maker should evaluate answers to cross-examination questions?

Answer 50: The 2020 amendments do not require that answers to cross-examination questions "be in linear or sequential formats" or that any party "must recall details with certain levels of specificity."[169] The preamble adds that the 2020 amendments "protect against a party being unfairly judged due to inability to recount each specific detail of an incident in sequence" because "decision-makers must be trained to serve impartially without prejudging the facts."[170]

For examples of language related to this issue, please see Q&A Appendix Section VIII.

Question 51: What are the consequences if a party or witness does not participate in a live hearing or submit to cross-examination?

Answer 51: Postsecondary schools, which are required to provide for cross-examination at a live hearing, should keep in mind that, under the 2020 amendments, if a party or a witness does not submit to cross-examination, that individual's statements cannot be relied on by the decision-maker in determining whether the respondent engaged in the alleged sexual harassment.[171]

The preamble explains that even if a party is unable to participate at a hearing "due to death or post-investigation disability," the school's decision-makers may not rely on any statements from that individual in their decision-making about whether the respondent has committed sexual harassment in violation of school policy.[172] As discussed in Question 37, a school has "discretion to apply limited extensions of time frames during the grievance process for good cause, which may include, for example, a temporary postponement of a hearing to accommodate a disability."[173]

The decision-maker also may not draw any inference from a decision of a party or witness not to participate at the hearing, including not to submit to cross-examination.[174] This means, for example, that the decision-maker may not make any decisions about a party's credibility based on their decision not to participate in a hearing or submit to cross-examination.

Note that "police reports, medical reports and other documents and records may not be relied on to the extent they contain the statements of a party or witness who has not submitted to cross-examination."[175]

For examples of language related to this issue, please see Q&A Appendix Section X.

For additional information, please see 34 C.F.R. § 106.45(b)(6)(i).

Question 52: May a decision-maker at a postsecondary school rely on non-statement evidence, such as photographs or video images, if a party or witness does not submit to cross-examination?

Answer 52: Yes. Although a decision-maker may not rely on any statement of a party or witness who does not submit to cross-examination, other relevant evidence can still be considered to determine whether the respondent is responsible for the alleged sexual harassment.[176] The preamble explains that the term "statements" should be interpreted using its ordinary meaning, but does not include evidence, such as a videos of the incident itself, where the party or witness has no intent to make an assertion regarding whether or not the alleged harassment occurred or discuss factual details related to the alleged harassment, or where the evidence does not contain such factual assertions by the party or witness.[177] Thus, the decision-maker may rely on non-statement evidence related to the alleged prohibited conduct that is in the record, such as photographs or video images showing the underlying incident.[178]

For examples of language related to this issue, please see Q&A Appendix Section X.

Question 53: May a decision-maker at a postsecondary school rely on statements of a party, such as texts or emails, even if the party does not submit to cross-examination?

Answer 53: It depends. The decision-maker may consider certain types of statements by a party where the statement itself is the alleged harassment, even if the party does not submit to cross-examination. For example, the decision-maker may consider a text message, email, or audio or video recording created and sent by a respondent as a form of alleged sexual harassment even if the respondent does not submit to cross-examination.[179] Similarly, if a complainant alleges that the respondent said, "I'll give you a higher grade in my class if you go on a date with me," the decision-maker may rely on the complainant's testimony that the respondent said those words even if the respondent does not submit to cross-examination.[180]

In these types of situations, the decision-maker is evaluating whether the statement was made or sent. In second example above, the complainant's testimony was about the fact that the respondent made the offer, and not about what the respondent intended or whether the respondent took an additional action based on the statement, such as changing the student's grade after a date.[181]

In contrast, evidence in which a party or witness comments on the interaction between the parties without engaging in harassment (e.g., email or text exchanges leading up to the alleged harassment or an admission, an apology, or other comment about the alleged harassment), would be considered statements that could not be considered unless the party or witness is cross-examined.[182]

For examples of language related to this issue, please see Q&A Appendix Section X.

Question 54: May a decision-maker rely on a video, text message, or other piece of evidence that includes statements by multiple parties or witnesses if some of them do not submit to cross-examination?

Answer 54: Yes. The preamble explains that in such cases, even if a party or witness in a text message, email, or video does not submit to cross-examination, the decision-maker may still rely on the statements by other people in that text message, email, or video who do submit to cross-examination.[183]

Question 55: May a decision-maker rely on the statements of a party or witness who submits to cross-examination, but does not answer questions posed by the decision-maker?

Answer 55: Yes. The preamble explains that cross-examination differs from questions posed by a neutral fact-finder and that if a party or witness submits to cross-examination by a party's advisor, but does not answer a question posed by the decision-maker, the decision-maker may still rely on all of that person's statements.[184] The preamble also explains that "the decision-maker still may not draw any inference about the party's credibility in making the responsibility

determination based solely on a party's refusal to answer questions posted by the decision-maker" because 34 C.F.R. § 106.45(b)(6)(i) states that no inference may be drawn based on the refusal to answer cross-examination or other questions.[185]

XIII. Standard of Proof

Question 56: What standard of proof must a school use when deciding whether a respondent is responsible for committing sexual harassment?

Answer 56: Under the 2020 amendments, a school's grievance process must state whether the standard of evidence or proof to be used to determine responsibility is the preponderance-of-the-evidence standard or the clear-and-convincing-evidence standard.[186] The preamble explains that the preponderance-of-the-evidence standard means the decision-maker must determine whether alleged facts are more likely than not to be true.[187] It also explains that the clear-and-convincing-evidence standard means the decision-maker must determine whether it is "highly probable" that the alleged facts are true.[188]

For additional information, please see 34 C.F.R. § 106.45(b)(1)(vii).

Question 57: May a school use a different standard of proof for formal complaints of sexual harassment involving students and employees?

Answer 57: No. Regardless of which standard of proof is used, a school must apply the same standard of proof to all formal complaints of sexual harassment made by a student, employee, or faculty member.[189] The preamble explains that if a school has a collective bargaining agreement in place that requires the school to use the clear-and-convincing standard for sexual harassment investigations involving employees, it is required under the 2020 amendments to use only the clear-and-convincing standard for sexual harassment investigations involving students as well.[190] In those cases, the preamble indicates that the school may work cooperatively with its employee unions to renegotiate the standard of proof used in employee sexual harassment investigations.[191]

For additional information, please see 34 C.F.R. § 106.45(b)(1)(vii).

XIV. Informal Resolution

Question 58: May a school offer an informal resolution process, including restorative justice or mediation, as a way to resolve a sexual harassment complaint?

Answer 58: Yes. The 2020 amendments state that a school is not required to offer an informal resolution process but may facilitate an informal resolution process at any time prior to reaching a determination regarding responsibility, subject to certain conditions.[192] A school is not permitted to offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.[193]

The 2020 amendments explain that they leave the term "informal process" undefined to allow a school the discretion to adopt whatever process best serves the needs of its community.[194] The amendments do not require that the parties interact directly with each other as part of an informal resolution process; mediations are often conducted with the parties in separate rooms and the mediator conversing with each party separately.[195] The parties' participation in mediation or restorative justice, if offered, should remain a decision for each individual party to make in a particular case, and neither party should be pressured to participate in the process. Schools may exercise discretion to make fact-specific determinations about whether to offer informal resolution in response to a complaint. The Department will not require the parties to attempt mediation in its enforcement of Title IX.[196]

For additional information, please see 34 C.F.R. § 106.45(b)(9).

For examples of language related to this issue, please see Q&A Appendix Section XV.

Question 59: If a school chooses to offer an informal resolution process, are there any requirements under Title IX?

Answer 59: Yes. If a school chooses to offer an informal process, the 2020 amendments require that the school obtains the complainant's and the respondent's voluntary, written consent before using any kind of "informal resolution" process, such as mediation or restorative justice.[197] With the parties' consent, schools have the freedom to allow the parties to choose an informal resolution mechanism that best suits their needs.[198] If those needs change, however, the 2020 amendments also make clear that either party may withdraw from the informal resolution process and resume the formal grievance process at any time prior to agreeing to a resolution.[199]

A school's discretion to offer an informal resolution process is also limited by the school's obligation to ensure that all persons who facilitate informal resolutions are free from conflicts of interest and bias, and are trained to serve impartially without prejudging the facts at issue.[200] For example, schools that choose to offer restorative justice as a means of an informal resolution should ensure that the restorative justice facilitators are well-trained in effective processes.[201] A school may use trauma-informed techniques during the informal resolution process.

For additional information, please see 34 C.F.R. § 106.45(b)(9).

XV. Retaliation and Amnesty

Question 60: What is retaliation, and is it prohibited under the 2020 amendments?

Answer 60: The 2020 amendments prohibit retaliation.[202] Retaliation is defined as "[i]ntimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report

or formal complaint of sexual harassment, for the purposes of interfering with any right or privilege secured by [the] Title IX [statute or regulations]."[203]

For additional information, please see 34 C.F.R. § 106.71.

Question 61: May a school discipline a complainant, respondent, or witness for violating the school's COVID-19 or other policy during a reported incident of sexual harassment?

Answer 61: No, unless the school has a policy that always imposes the same punishment for violating the COVID-19 or other policy regardless of the circumstances. The 2020 amendments prohibit "charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or formal complaint of sexual harassment [i.e., collateral conduct], for the purpose of interfering with any right or privilege secured by Title IX or [its implementing regulations]."[204]

The preamble explains that if a school punishes an individual for violations of other school policies, it will be considered retaliation if the punishment is for the purpose of interfering with any right or privilege secured by Title IX.[205] The preamble adds that if a school has a zero-tolerance policy that always imposes the same punishment for such conduct regardless of the circumstances, imposing that punishment would not be for the purpose of interfering with any right or privilege secured by Title IX and thus, would not be considered retaliation.[206]

For additional information, please see 34 C.F.R. § 106.71.

Question 62: Is a school permitted to have an amnesty policy as a way to encourage reporting of sexual harassment?

Answer 62: Yes. The preamble notes that "[t]he Department is aware that some schools have adopted 'amnesty' policies designed to encourage students to report sexual harassment."[207] Under these policies, "students who report sexual misconduct (whether as a victim or witness) will not face charges for school code of conduct violations relating to the sexual misconduct incident (e.g., underage drinking at the party where the sexual harassment occurred)."[208] "Nothing in the [2020 amendments] precludes a [school] from adopting such amnesty policies," and schools retain broad discretion to adopt such amnesty policies or to otherwise define retaliation more broadly than in the regulations.[209]

More generally, schools should keep in mind that the 2020 amendments require that a school's Title IX grievance process treat complainants and respondents equitably.[210]

Question 63: May a school punish a complainant for filing a complaint if the decision-maker finds that the respondent did not engage in the alleged sexual harassment?

Answer 63: Not without a finding of bad faith. The 2020 amendments state that "a determination regarding responsibility, alone, is not sufficient to conclude that any party made

a materially false statement in bad faith."[211] To the contrary, it might be considered retaliation for a school to penalize a student for bringing a complaint, depending on the circumstances.[212] However, if a school believes a student made a materially false statement in bad faith in the course of a Title IX grievance proceeding, it would not constitute retaliation for a school to charge that individual with a code-of-conduct violation.[213]

For additional information, please see 34 C.F.R. § 106.71.

XVI. Forms of Sex Discrimination Other Than Sexual Harassment as Defined by the 2020 Amendments

Question 64: How should a school respond to complaints alleging sex discrimination that do not include sexual harassment allegations?

Answer 64: The 2020 amendments explain that the grievance process required for formal sexual harassment complaints does not apply to complaints alleging discrimination based on pregnancy, different treatment based on sex, or other forms of sex discrimination.[214]

Instead, the 2020 amendments state that schools must respond to these complaints using the "prompt and equitable" grievance procedures that schools have been required to adopt and publish since 1975, when the original Title IX regulations were issued.[215] The 1975 regulations, which are still in place today, require schools to have a Title IX Coordinator to receive complaints of sex discrimination and require schools to respond promptly and equitably to such complaints.[216]

For additional information, please see 34 C.F.R. § 106.8(c).

Question 65: What constitutes a prompt and equitable grievance procedure under Title IX for responding to complaints of sex discrimination that do not include sexual-harassment allegations?

Answer 65: OCR has historically looked to whether and how schools have communicated information about their procedures, including where to file complaints, to students, parents/caregivers (for elementary and secondary school students), and employees. In addition, OCR has considered whether the procedures have provided for adequate, reliable, and impartial investigation of complaints; designated and reasonably prompt time frames for the complaint and resolution process; and notice to the parties of the outcome of a complaint.[217]

OCR also has historically explained that a grievance procedure cannot be prompt or equitable unless students know it exists, how it works, and how to file a complaint. Thus, the procedures should be written in language appropriate to the age of the school's students, easily understood, and widely disseminated.[218]

XVII. Religious Exemptions

Question 66: Are all schools that receive federal financial assistance required to comply with Title IX?

Answer 66: Title IX does not apply to an educational institution that is controlled by a religious organization to the extent that application of Title IX would be inconsistent with the religious tenets of the organization.[219] This religious exemption was in the text of Title IX when it was enacted in 1972. The religious exemption does not apply to public schools or to colleges or universities run by state or local governments.

A school may, at its discretion, seek an assurance of a Title IX religious exemption at any time by submitting a letter from the highest ranking official of the institution to the Assistant Secretary for Civil Rights in the Department of Education.[220] The letter must identify the provisions of the Title IX regulations that conflict with specific tenets of the religious organization.[221] A religious exemption is not a blanket exemption from Title IX, and a school's religious exemption extends only as far as the conflict between the Title IX regulations and the religious tenets of the controlling religious organization.[222] A school must comply with the Title IX regulations to the extent that compliance would not conflict with the tenets of the controlling religious organization.[223]

The 2020 amendments state that a school is not required to seek a written assurance of its religious exemption under Title IX before claiming the exemption, and the regulations state that a school can invoke a religious exemption after OCR has received a complaint regarding the school.[224] This is consistent with OCR's handling of religious exemption requests dating back more than two decades.

For additional information, please see 34 C.F.R. § 106.12.

Please visit OCR's website for additional information about religious exemptions.

Question 67: May a student file a complaint with OCR against a school that has obtained an assurance of a religious exemption from OCR?

Answer 67: Yes. Students may always file a complaint with OCR if they believe their school has violated their rights under Title IX, even if OCR has previously provided assurance to the school of a religious exemption under Title IX. After receiving the complaint, OCR would first evaluate whether the allegation is appropriate for investigation. If yes, and if the school has previously asserted a religious exemption, then OCR would determine whether the exemption applies to the alleged discrimination. If the exemption applies, OCR would dismiss the complaint. If the alleged discrimination does not fall within the school's religious exemption from Title IX, then OCR would proceed with the investigation, following OCR's Case Processing Manual.[225]

[1] You can read the 2020 amendments, entitled "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," at 85 Fed. Reg. 30,026 (May 19, 2020), https://www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf. The amendments begin on page 30,572. The Federal Register notice also includes a preamble, at pages 30,026-30,570, that clarifies OCR's interpretation of Title IX and the Title IX regulations. As discussed above, please note that the preamble itself does not have the force and effect of law.
[2] 85 Fed. Reg. at 30,063.
[3] *Id.*
[4] *Id.*
[5] 20 U.S.C. § 1092(f)(6)(A)(v).
[6] NIBRS User Manual at 40 (April 15, 2021), https://www.fbi.gov/file-repository/ucr/ucr-2019-1-nibrs-user-manua-093020.pdf/view.
[7] 34 U.S.C. § 12291(a)(10).
[8] *Id.* § 12291(a)(8).
[9] *Id*. § 12291(a)(30).
[10] 34 C.F.R. § 106.30 (definition of sexual harassment). *See also* 85 Fed. Reg. at 30,202.
[11] 85 Fed. Reg. at 30,174.
[12] *Id.*
[13] *Id*. at 30,199.
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] 34 C.F.R. § 106.31.
[18] 85 Fed. Reg. at 30,170. *See also* 34 C.F.R. § 106.30(a) (definition of sexual harassment).
[19] 85 Fed. Reg. at 30,170.
[20] *Id.*
[21] *Id.* at 30,169.
[22] *Id.*
[23] *Id.* at 30,170.
[24] *Id*.
[25] *Id.*
[26] 34 C.F.R. § 106.44(a). *See also* 85 Fed. Reg. at 30,196-98.
[27] 85 Fed. Reg. at 30,093. *See also* 34 C.F.R. § 106.45(b)(1)(iii).
[28] 34 C.F.R. § 106.8(d).
[29] 85 Fed. Reg. at 30,201.
[30] *Id*. at 30,197.
[31] *Id.* at 30,199 n.875.
[32] *Id.* at 30,200 n.877.
[33] *Id.* at 30,200.
[34] *Id.* at 30,202.
[35] *Id.*
[36] *Id.* at 30,203.
[37] *Id.* at 30,202.
[38] *Id.*
[39] U.S. Department of Education, Office for Civil Rights, Letter from Acting Assistant Secretary for Civil Rights, Kimberly M. Richey, Withdrawing Certain OCR Documents (Aug. 26, 2020), https://www2.ed.gov/policy/gen/guid/fr-200826-letter.pdf. Guidance documents previously issued by the Department that have since been withdrawn are available at https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/respolicy.html. Note that these

guidance documents, even prior to their withdrawal, do not have the force and effect of law, and are not meant to bind the public or regulated entities in any way.

[40] 34 C.F.R. §§ 106.30(a) (definition of actual knowledge), 106.44(a).

[41] 85 Fed. Reg. at 30,109, 30,115.

[42] 34 C.F.R. § 106.30(a) (definition of actual knowledge).

[43] 85 Fed. Reg. at 30,115-16, 30,120.

[44] *Id.* at 30,115.

[45] 34 C.F.R. § 106.30(a) (definition of actual knowledge); 85 Fed. Reg. at 30,043.

[46] 85 Fed. Reg. at 30,043.

[47] *Id.*

[48] *Id.*

[49] 34 C.F.R. §§ 106.8(a), 106.30(a) (definition of actual knowledge).

[50] 85 Fed. Reg. at 30,093.

[51] 34 C.F.R. § 106.30(a)

[52] 85 Fed. Reg. at 30,116.

[53] *Id.* at 30,192.

[54] *Id. See also* 34 C.F.R. § 106.30(a) (definition of complainant).

[55] 85 Fed. Reg. at 30,192.

[56] *Id.* at 30,107, 30,115, 30,523.

[57] *Id.* at 30,107.

[58] *Id.* at 30,523.

[59] *Id.* at 30,107.

[60] *Id.* at 30,115, 30,523.

[61] *Id.* at 30,107.

[62] *Id.*

[63] 34 C.F.R. § 106.44(a).

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] 34 C.F.R. § 106.45(b)(1)(i), (b)(7)(ii)(E); 85 Fed. Reg. at 30,274.

[68] 85 Fed. Reg. at 30,274.

[69] 34 C.F.R. § 106.45(b)(1)(i).

[70] *Id.*

[71] *Id.*

[72] *Id.* § 106.45(b)(1)(vi).

[73] 85 Fed. Reg. at 30,275.

[74] 34 C.F.R. § 106.30(a) (definition of formal complaint).

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.* § 106.6(g); 85 Fed. Reg. at 30,453.

[79] *Id.* § 106.30(a) (definition of formal complaint).

[80] *Id.*

[81] *Id.*

[82] 85 Fed. Reg. at 30,138, 30,198 n.869, 30,219.

[83] 34 C.F.R. § 106.30(a) (definition of formal complaint).

[84] *Id.*

[85] 34 C.F.R. §§ 106.30(a) (definition of formal complaint), 106.44(a).

[86] 85 Fed. Reg. at 30,089.

[87] 34 C.F.R. § 106.45(b)(3)(i). *See also* 85 Fed. Reg. at 30,199.

[88] 34 C.F.R. § 106.44(a).
[89] *Id.*
[90] *Id.* § 106.45(b)(3)(ii). *See also* 85 Fed. Reg. at 30,290.
[91] 85 Fed. Reg. at 30,290.
[92] *Id.*
[93] *Id.* at 30,187.
[94] *See* 34 C.F.R. § 106.45(b)(1)(v).
[95] 85 Fed. Reg. at 30,348. *See also* 34 C.F.R. § 106.45(b)(1)(v).
[96] 34 C.F.R. § 106.45(b)(1)(v).
[97] 34 C.F.R. § 106.45(b)(6)(i). *See also* 85 Fed. Reg. at 30,348.
[98] 34 C.F.R. § 106.44(a).
[99] *Id.*
[100] *Id.* § 106.30(a) (definition of supportive measures). *See also* 34 C.F.R. § 106.44(a).
[101] 34 C.F.R. § 106.30(a) (definition of supportive measures).
[102] *Id.*
[103] 85 Fed. Reg. at 30,182.
[104] *Id.* at 30,401.
[105] *Id.* at 30,182.
[106] 34 C.F.R. § 106.44(c).
[107] *Id.*
[108] *Id.* (referencing the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, and the Americans with Disabilities Act).
[109] *Id.* § 106.44(d).
[110] *Id.* (referencing Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act).
[111] *Id.* § 106.45(b)(1)(iv).
[112] 85 Fed. Reg. at 30,259.
[113] *Id.*
[114] 34 C.F.R. § 106.45(b)(1)(v).
[115] 85 Fed. Reg. at 30,269.
[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] 34 C.F.R. § 106.45(b)(1)(v).
[123] *Id.*
[124] *Id.* § 106.45(b)(6)(i).
[125] *Id.*
[126] *Id.* § 106.45(b)(6)(ii).
[127] *Id.* § 106.45(b)(6)(i).
[128] *Id.*
[129] *Id.*
[130] *Id.* § 106.45(b)(6)(ii).
[131] *Id*.
[132] 85 Fed. Reg. at 30,361.
[133] 34 C.F.R. § 106.6(g).
[134] 85 Fed. Reg. at 30,453.
[135] *Id.* at 30,122.
[136] 34 C.F.R. § 106.45(b)(6)(1).

[137] *Id.* § 106.45(b)(5)(iv).
[138] 85 Fed. Reg. at 30,297.
[139] 34 C.F.R. § 106.45(b)(6)(i).
[140] *Id*. §§ 106.44(a), 106.71. *See also* 85 Fed. Reg. at 30,324.
[141] 85 Fed. Reg. at 30,360. These rules would be in addition to any rules required under 34 C.F.R. § 106.45.
[142] *Id*. at 30,360.
[143] *Id.* at 30,361.
[144] *Id.* at 30,331.
[145] *Id.* at 30,340.
[146] *Id.* at 30,319. *See also* 34 C.F.R. § 106.45(b)(5)(iv).
[147] 85 Fed. Reg. at 30,319, 30,324, 30,331, 30,361.
[148] *Id.* at 30,320, 30,324, 30,342.
[149] *Id.*
[150] 34 C.F.R. § 106.45(b)(6)(i).
[151] *Id. See also* 85 Fed. Reg. at 30,324, 30,355-56.
[152] 34 C.F.R. § 106.45(b)(6)(i).
[153] 85 Fed. Reg. at 30,362.
[154] 34 C.F.R. § 106.45(b)(6)(ii).
[155] *Id*.
[156] 85 Fed. Reg. at 30,361.
[157] 34 C.F.R. § 106.45(b)(6)(i).
[158] *Id.*
[159] 85 Fed. Reg. at 30,354 n.1355.
[160] *Id.*
[161] *Id.* at 30,353.
[162] *Id.*
[163] 34 C.F.R. § 106.45(b)(5)(i). *See also* 85 Fed. Reg. at 30,361, 30,294.
[164] 34 C.F.R. § 106.45(b)(1)(x).
[165] 85 Fed. Reg. at 30,286.
[166] *Id.* at 30,323.
[167] *Id.* at 30,323-24.
[168] *Id.*
[169] *Id.* at 30,323.
[170] *Id.*
[171] 34 C.F.R. § 106.45(b)(6)(i).
[172] 85 Fed. Reg. at 30,348.
[173] *Id.*
[174] 34 C.F.R. § 106.45(b)(6)(i).
[175] 85 Fed. Reg. at 30,349.
[176] 34 C.F.R. § 106.45(b)(6)(i). *See also* 85 Fed. Reg. at 30,328, 30,345, 30,349, 30,361.
[177] 85 Fed. Reg. at 30,328, 30,345, 30,349, 30,361.
[178] *Id*. at 30,328, 30,345, 30,349, 30,361.
[179] *Id.* at 30,349.
[180] *Id.*
[181] *See, e.g.*, *id.* at 30,142 n.625 (acknowledging that speech, when not protected under the U.S. Constitution, may constitute actionable harassment under 34 C.F.R. § 106.30 even when speech is part of the misconduct at issue). *See also id.* at 30,349.
[182] 85 Fed. Reg. at 30,349.
[183] *Id.*
[184] *Id.*

[185] 34 C.F.R. § 106.45(b)(6)(i). *See also* 85 Fed. Reg. at 30,349 n.1341.
[186] 34 C.F.R. § 106.45(b)(1)(vii).
[187] 85 Fed. Reg. at 30,386 n.1472, 30,388 n.1480.
[188] *Id.* at 30,386 n.1473.
[189] 34 C.F.R. § 106.45(b)(1)(vii). *See also* 85 Fed. Reg. at 30,378.
[190] 85 Fed. Reg. at 30,378.
[191] *Id*.
[192] 34 C.F.R. § 106.45(b)(9).
[193] *Id.* § 106.45(b)(9)(iii).
[194] 85 Fed. Reg. at 30,401.
[195] *Id.* at 30,403.
[196] *Id.* at 30,361.
[197] 34 C.F.R. § 106.45(b)(9).
[198] 85 Fed. Reg. at 30,406.
[199] 34 C.F.R. § 106.45(b)(9).
[200] 34 C.F.R. § 106.45(b)(1)(iii).
[201] 85 Fed. Reg. at 30,401, 30,403.
[202] 34 C.F.R. § 106.71(a).
[203] *Id.*
[204] *Id.*
[205] 85 Fed. Reg. at 30,536.
[206] *Id.*
[207] *Id.*
[208] *Id.*
[209] *Id.*
[210] 34 C.F.R. § 106.45(b)(1)(i).
[211] *Id.* § 106.71(b)(2). *See also* 85 Fed. Reg. at 30,537.
[212] 34 C.F.R. § 106.71(b)(2).
[213] *Id*.
[214] *Id.* §§ 106.8(c), 106.45. *See also* 85 Fed. Reg. at 30,095, 30,129, 30,471, 30,473.
[215] 34 C.F.R. §§ 106.8(c), 106.45. *See also 85* Fed. Reg. at 30,095, 30,129, 30,461, 30,473.
[216] 34 C.F.R. §§ 106.8(a)-(c).
[217] U.S. Department of Education, Office for Civil Rights, *Revised Sexual Harassment Guidance: Sexual Harassment of Students by School Employees, Other Students, or Third Parties* at 19-20 (Jan. 19, 2001), https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf. This guidance was rescinded in 2020 but remains accessible on the Department's website for historical reference.
[218] *Id.* at 20.
[219] 20 U.S.C. § 1681(a)(3); 34 C.F.R. § 106.12.
[220] 34 C.F.R. § 106.12(b).
[221] *Id.*
[222] *Id.* § 106.12(a).
[223] *Id.*
[224] *Id.* § 106.12(b).
[225] U.S. Department of Education, Office for Civil Rights Case Processing Manual (Aug. 26, 2020), https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf.

Appendix to
Questions and Answers on the Title IX Regulations on Sexual Harassment (July 2021)

This Appendix accompanies Questions and Answers on the Title IX Regulations on Sexual Harassment (July 2021) from the U.S. Department of Education's Office for Civil Rights. This Appendix responds to schools' requests for examples of Title IX procedures that may be adaptable to their own circumstances and helpful in implementing the 2020 amendments to the Department's Title IX regulations.[1] Schools that receive federal funds are obligated to implement these regulations, with some limited exceptions described in the statute and regulations.

The Appendix includes examples for elementary and secondary schools and postsecondary schools. It is not comprehensive but addresses many areas in which questions arise.

Important notes:

- Schools may use the example policy language in this Appendix to guide the creation of their own policies but are not required to do so. The Department does not endorse these provisions in particular, nor does it prefer or support these examples as compared with others that schools may use.
- Other than any statutory and regulatory requirements included below, the contents of this Appendix do not have the force and effect of law and are not meant to bind the public. This Appendix is intended only to provide clarity to the public regarding how OCR interprets existing requirements under the law or agency policies.
- Adoption of one or more of the examples from this Appendix alone does not demonstrate compliance with Title IX. If OCR investigates a discrimination complaint, OCR will make a fact-specific determination regarding whether a school's Title IX policies and procedures, and their implementation, complies with the law.
- The example policy language does not address policies or procedures that may be required to comply with Title VII of the Civil Rights Act of 1964, which prohibits sex discrimination in employment. As the 2020 amendments state: "Nothing in [these regulations] may be read in derogation of any individual's rights under title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq*. or any regulations promulgated thereunder." 34 C.F.R. § 106.6(f).

Please also note that this Appendix focuses on procedures for addressing reports and complaints of sexual harassment, including sexual violence, because the regulations themselves focus on procedures.

[1] The Department issued the regulations to implement Title IX of the Education Amendments Act of 1972. The Department's current Title IX regulations are in 34 C.F.R. Part 106, which is available at https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=f12a46d66326f0c23de5edac094d253d&mc=true&n=pt34.1.106&r=PART&ty=HTML.

The examples are excerpted from the policies at a variety of schools across the United States, and OCR has edited them for readability and consistency.

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Many of the sections below include multiple examples to illustrate choices that different schools have made about communicating their procedures to students and their communities. The 2020 amendments do not necessarily require the approaches in the examples here and, again, the Department does not endorse these provisions in particular, nor does it prefer or support these examples as compared with others that schools may use.

The 2020 amendments impose some different requirements for elementary and secondary schools, as compared to postsecondary schools. In light of this, we have noted where examples track requirements for elementary and secondary schools, postsecondary schools, or both. For more information on these differences, please see the Title IX Q&A.

I. Receiving and Responding to Reports of Sexual Harassment

Example Policies Used by Elementary and Secondary Schools and Postsecondary Schools

- Example Policy 1: When a complaint or report of sexual harassment is made under this school's policy, the Title IX Coordinator (or designee) will: (1) confidentially contact the complainant to offer supportive measures, consider the complainant's wishes with respect to supportive measures, and inform them of the availability of supportive measures with or without filing a formal complaint; (2) explain the process for how to file a formal complaint; (3) inform the complainant that any report made in good faith will not result in discipline; and (4) respect the complainant's wishes with respect to whether to investigate unless the Title IX Coordinator determines it is necessary to pursue the complaint in light of a health or safety concern for the community.
- Example Policy 2: Choosing to make a report, file a formal complaint, and/or meet with the Title IX Coordinator after a report or formal complaint has been made, and deciding how to proceed, can be a process that unfolds over time. You do not have to decide whether to pursue a formal complaint or to name the other party/ies at the time of the report. Reporting does not mean you wish to pursue a formal complaint—it may mean you would like help accessing resources and supportive measures. You do not have to pursue a formal complaint to take advantage of the supportive measures available to you.

Example Policy Used by Elementary and Secondary Schools

- Example Policy 1: The district must respond whenever any District employee has been put on actual notice of any sexual harassment or allegations of sexual harassment as

defined in this district's policy. This mandatory obligation is in addition to the child abuse mandatory reporting obligation under state law.

II. Supportive Measures

Example Policies Used by Elementary and Secondary Schools and Postsecondary Schools

- Example Policy 1: Supportive measures are short-term measures that are designed to restore or preserve access to the school's education program or activity. Examples of supportive measures include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures.
- Example Policy 2: Supportive measures are available regardless of whether the complainant chooses to pursue any action under this school's policy, including before and after the filing of a formal complaint or where no formal complaint has been filed. Supportive measures are available to the complainant, respondent, and as appropriate, witnesses or other impacted individuals. The Title IX Coordinator will maintain consistent contact with the parties to ensure that safety and emotional and physical well-being are being addressed. Generally, supportive measures are meant to be short-term in nature and will be re-evaluated on a periodic basis. To the extent there is a continuing need for supportive measures after the conclusion of the resolution process, the Title IX Coordinator will work with appropriate school resources to provide continued assistance to the parties.
- Example Policy 3: Supportive measures are provided based on an individualized assessment of the needs of the individual. They may include, but are not limited to: facilitating access to medical and counseling services, assistance in arranging the rescheduling of exams and assignments, academic support services, assistance in requesting long-term academic accommodations if the individual qualifies as an individual with a disability, allowing either a complainant or respondent to drop a class in which both parties are enrolled, a mutual "no contact order," and any other reasonably supportive measure that does not unreasonably burden the other party's access to education and that serves the goals of this policy.
- Example Policy 4: The school will make available supportive measures with or without the filing of a formal complaint. These supports will be available to both parties, free of charge. These supports are non-disciplinary and non-punitive individualized services designed to offer support without being unreasonably burdensome. They are meant to restore access to education, protect student and employee safety, and/or deter future acts of sexual harassment. Supportive measures are temporary and flexible, based on

the needs of the individual and may include counseling, extensions of deadlines or course-related adjustments, restrictions on contact between parties (must be applied equally to both parties), leaves of absence, and increased security and monitoring of certain areas of the school.

III. Investigations

Example Policies Used by Elementary and Secondary Schools and Postsecondary Schools

- Example Policy 1: Once a formal Title IX complaint is filed, an investigator will be assigned and the parties will be treated equitably, including in the provision of supportive measures and remedies. They will receive notice of the specifics of the allegations as known, and as any arise during the investigation. The investigator will be unbiased and free from conflicts of interest and will objectively review the complaint, any evidence, and any information from witnesses, expert witnesses, and the parties. If the investigator conducts interviews, the parties will be provided time to prepare and will receive notice of the time/date/location/participants/purpose for the interviews.
- Example Policy 2: Upon receipt of a formal Title IX complaint, the Title IX Coordinator will appoint an Investigator to investigate the allegations subject to the formal grievance process. The investigation may include, among other things, interviewing the complainant, the respondent, and any witnesses; reviewing law enforcement investigation documents if applicable; reviewing relevant student or employment files (preserving confidentiality wherever necessary); and gathering and examining other relevant documents, social media, and evidence.

Example Policies Used by Elementary and Secondary Schools

- Example Policy 1: The Investigator will attempt to collect all relevant information and evidence. While the Investigator will have the burden of gathering evidence, it is crucial that the parties present evidence and identify witnesses to the Investigator so that they may be considered during the investigation. While all evidence gathered during the investigative process and obtained through the exchange of written questions will be considered, the decision-maker may in their discretion grant lesser weight to last-minute information or evidence introduced through the exchange of written questions that was not previously presented for investigation by the Investigator.
- Example Policy 2: The decision-maker will facilitate a written question and answer period between the parties. Each party may submit their written questions for the other party and witnesses to the decision-maker for review. The questions must be relevant to the case. The decision-maker will determine if the questions submitted are relevant and will then forward the relevant questions to the other party or witnesses for a response. The decision-maker can then review all the responses, determine what is relevant or not

relevant, and issue a decision as to whether the Respondent is responsible for the alleged sexual harassment.

IV. The Role of the Advisor

Example Policies Used by Postsecondary Schools[2]

- Example Policy 1: The role of the advisor is narrow in scope: the advisor may attend any interview or meeting connected with the grievance process that the party whom they are advising is invited to attend, but the advisor may not actively participate in interviews and may not serve as a proxy for the party. The advisor may attend the hearing and may conduct cross-examination of the other party and any witnesses at the hearing; otherwise, the advisor may not actively participate in the hearing.
- Example Policy 2: During meetings and hearings, the advisor may talk quietly with the student or pass notes in a non-disruptive manner. The advisor may not intervene in meetings with the school. In addition, while advisors may provide guidance and assistance throughout the process, all written submissions must be authored by the student.
- Example Policy 3: The advisor may provide advice and consultation to the parties or parties' witnesses outside of the conduct of the live hearing to assist parties in handling the formal resolution process.

V. The Live Hearing Process

Example Policies Used by Postsecondary Schools[3]

A. Before the hearing

- Example Policy 1: In order to promote a fair and expeditious hearing, the parties and their advisors will attend a pre-hearing conference with the decision-maker. The pre-hearing conference assures that the parties and their advisors understand the hearing process and allows for significant issues to be addressed in advance of the hearing.

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[2] While elementary and secondary schools may choose to permit parties to have an advisor, the 2020 amendments only require an advisor at the postsecondary school level due to the cross-examination requirement. See the Question 41 in the Q&A for more information.

[3] While elementary and secondary schools may choose to use a live hearing, the 2020 amendments only require a live hearing with cross-examination at the postsecondary school level. See Section XII in the Q&A for more information.

B. Hearing Format

- Example Policy 1: While the hearing is not intended to be a repeat of the investigation, the parties will be provided with an equal opportunity for their advisors to conduct cross-examination of the other party and of relevant witnesses. A typical hearing may include: brief opening remarks by the decision-maker; questions posed by the decision-maker to one or both of the parties; cross-examination by either party's advisor of the other party and relevant witnesses; and questions posed by the decision-maker to any relevant witnesses.
- Example Policy 2: The parties and witnesses will address only the decision-maker, and not each other. Only the decision-maker and the parties' advisors may question witnesses and parties.
- Example Policy 3: When it is an individual's turn to appear before the decision-maker, that person will appear separately before the panel and may bring notes for their reference. The decision-maker may ask any individual for a copy of or to inspect their notes. The complainant and respondent may be accompanied by or may otherwise be in contact with their advisor at all times. If the hearing is conducted wholly or partially through video conference, an administrator will ensure that each party has the opportunity to appear before or speak directly to the hearing panel and to appropriately participate in the questioning process.
- Example Policy 4: At the request of either party, the decision-maker will allow the parties and/or witnesses to be visually separated during the hearing. This may include, but is not limited to, the use of videoconference and/or any other appropriate technology. To assess credibility, the decision-maker must have sufficient access to the complainant, respondent, and any witnesses presenting information; if the decision-maker is sighted, then the decision-maker must be able to see them.
- Example Policy 5: Parties will be able to see and hear (or, if deaf or hard of hearing, to access through auxiliary aids or services) all questioning and testimony at the hearing, if they choose to. Witnesses (other than the parties) will attend the hearing only for their own testimony.
- Example Policy 6: The school will ensure that students with disabilities have an equal opportunity to participate in, and benefit from the school's Title IX grievance process, consistent with the requirements of Section 504 of the Rehabilitation Act of 1973. The school will also ensure that English learner students can participate meaningfully and equally in the school's Title IX grievance process, as required by Title VI of the Civil Rights Act of 1964 and the Equal Educational Opportunities Act of 1974.

C. Evidence

- Example Policy 1: The hearing is an opportunity for the parties to address the decision-maker. The parties may address any information in the investigative report, submit supplemental statements in response to the investigative report or, at the time of any sanction, provide verbal impact and mitigation statements. The school will make all evidence gathered available to the parties at the hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination. In reaching a determination, the decision-maker will meet with the complainant, respondent, investigator, and any relevant witnesses, but the decision-maker may not conduct their own investigation.
- Example Policy 2: The parties will have the opportunity to present the evidence they submitted, subject to any exclusions determined by the decision-maker. Generally, the parties may not introduce evidence, including witness testimony, at the hearing that they did not identify during the pre-hearing process. However, the decision-maker has discretion to accept or exclude additional evidence presented at the hearing. In addition, the parties are expected not to spend time on undisputed facts or evidence that would be duplicative.
- Example Policy 3: Courtroom rules of evidence and procedure will not apply. The decision-maker will generally consider, that is rely on, all evidence that they determine to be relevant and reliable. Throughout the hearing, the decision-maker will: (1) Exclude evidence including witness testimony that is, for example, irrelevant in light of the policy violation(s) charged, relevant only to issues not in dispute, or unduly repetitive, and will require rephrasing of questions that violate the rules of conduct; (2) Decide any procedural issues for the hearing; and/or (3) Make any other determinations necessary to promote an orderly, productive, and fair hearing that complies with the rules of conduct.

D. Confidentiality

- Example Policy 1: All live hearings will be closed to the public and witnesses will be present only during their testimony. For live hearings that use technology, the decision-maker shall ensure that appropriate protections are in place to maintain confidentiality.
- Example Policy 2: The hearing is a closed proceeding and is not open to the public. All participants involved in a hearing are expected to respect the seriousness of the matter and the privacy of the individuals involved. The school's expectation of privacy during the hearing process should not be understood to limit any legal rights of the parties during or after the resolution. The school may not, by federal law, prohibit the

complainant from disclosing the final outcome of a formal complaint process (after any appeals are concluded). All other conditions for disclosure of hearing records and outcomes are governed by the school's obligations under the Family Educational Rights and Privacy Act (FERPA), any other applicable privacy laws, and professional ethical standards.

E. Decision-makers asking questions of the parties or witnesses

- Example Policy 1: The decision-maker may question the parties and witnesses, but they may refuse to respond.

VI. Behavior During the Live Hearing/Rules of Decorum

Example Policies Used by Postsecondary Schools

- Example Policy 1: The school will require all parties, advisors, and witnesses to maintain appropriate decorum throughout the live hearing. Participants at the live hearing are expected to abide by the decision-maker's directions and determinations, maintain civility, and avoid emotional outbursts and raised voices. Repeated violations of appropriate decorum will result in a break in the live hearing, the length of which will be determined by the decision-maker. The decision-maker reserves the right to appoint a different advisor to conduct cross-examination on behalf of a party after an advisor's repeated violations of appropriate decorum or other rules related to the conduct of the live hearing.
- Example Policy 2: The hearing will be conducted in a respectful manner that promotes fairness and accurate factfinding and that complies with the rules of conduct.
- Example Policy 3: The school (including any official acting on behalf of the school such as an investigator or a decision-maker) has the right at all times to determine what constitutes appropriate behavior on the part of an advisor and to take appropriate steps to ensure compliance with this policy.
- Example Policy 4: Parties and advisors may take no action at the hearing that a reasonable person would see as intended to intimidate that person (whether party, witness, or official) into not participating in the process or meaningfully modifying their participation in the process.

VII. Protecting the Well-Being of the Parties During the Live Hearing/Investigation

Example Policies Used by Postsecondary Schools

- Example Policy 1: Each participating individual will have access to a private room for the duration of the hearing if the hearing is in person and may choose to participate in the proceedings via video conference.
- Example Policy 2: The decision-maker will discuss measures available to protect the well-being of parties and witnesses at the hearing. These may include, for example, use of lived names and pronouns during the hearing, including names appearing on a screen; a party's right to have their support person available to them at all times during the hearing (in addition to their advisor); and a hearing participant's ability to request a break during the hearing, except when a question is pending.

Example Policy Used by Elementary and Secondary Schools

- Example Policy 1: To the greatest extent possible, and subject to Title IX, the school will make reasonable accommodations in an investigation to avoid potential re-traumatization of a child and to avoid any potential interference with an investigation by the Department of Child and Family Services or a law enforcement agency.
- Example Policy 2: The school will ensure that students with disabilities have an equal opportunity to participate in, and benefit from the school's Title IX grievance process, consistent with the requirements of Section 504 of the Rehabilitation Act of 1973. The school will also ensure that English learner students can participate meaningfully and equally in the school's Title IX grievance process, as required by Title VI of the Civil Rights Act of 1964 and the Equal Educational Opportunities Act of 1974.

VIII. The Cross-Examination Process

Example Policies Used by Postsecondary Schools

A. Explaining Cross-Examination

- Example Policy 1: The parties' advisors will have the opportunity to cross examine the other party (and witnesses, if any). Such cross-examination must be conducted directly, orally, and in real time by the party's advisor and never by a party personally.
- Example Policy 2: Each party's advisor may pose relevant questions to the opposing party and witnesses (including the Investigative Team).
- Example Policy 3: Each party will prepare their questions, including any follow-up questions, for the other party and witnesses, and will provide them to their advisor. The advisor will ask the questions as the party has provided them, and may not ask questions that the advisor themselves have developed without their party.

- Example Policy 4: The role of the advisor at the live hearing is to conduct cross-examination on behalf of a party. The advisor is not to represent a party, but only to relay the party's cross-examination questions that the party wishes to have asked of the other party and witnesses. Advisors may not raise objections or make statements or arguments during the live hearing.

B. Relevant questions only/Decision-maker reviews all questions

- Example Policy 1: Only relevant questions may be asked of a party or witness. Before a complainant, respondent, or witness responds to a question, the decision-maker will first determine whether the question is relevant and explain any decision to exclude a question as not relevant.
- Example Policy 2: When a party's advisor is asking questions of the other party or a witness, the decision-maker will determine whether each question is relevant before the party or witness answers it, will exclude any that are not relevant or unduly repetitive, and will require rephrasing of any questions that violate the rules of conduct. If the decision-maker determines that a question should be excluded as not relevant, they will explain their reasoning.
- Example Policy 3: Only relevant cross-examination questions and follow-up questions, including those that challenge credibility, may be asked. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker first must determine whether the question is relevant or cumulative and must explain any decision to exclude a question that is not relevant or is cumulative.

IX. <u>Restrictions on Considering a Complainant's or Respondent's Sexual History</u>

Example Policies Used by Elementary and Secondary Schools and Postsecondary Schools

- Example Policy 1: The investigator will not, as a general rule, consider the sexual history of a complainant or respondent. However, in limited circumstances, sexual history may be directly relevant to the investigation. As to complainants: While the investigator will never assume that a past sexual relationship between the parties means the complainant consented to the specific conduct under investigation, evidence of how the parties communicated consent in past consensual encounters may help the investigator understand whether the respondent reasonably believed consent was given during the encounter under investigation. Further, evidence of specific past sexual encounters may be relevant to whether someone other than respondent was the source of relevant physical evidence. As to respondents: Sexual history of a respondent might be relevant to show a pattern of behavior by respondent or resolve another issue of importance in

the investigation. Sexual history evidence that is being proffered to show a party's reputation or character will never be considered relevant on its own.

- Example Policy 2: An individual's character or reputation with respect to other sexual activity is not relevant and will not be considered as evidence. Similarly, an individual's prior or subsequent sexual activity is typically not relevant and will only be considered as evidence under limited circumstances. For example, prior sexual history may be relevant to explain the presence of a physical injury or to help resolve other questions raised in the investigation. It may also be relevant to show that someone other than the respondent committed the conduct alleged by the complainant. The investigator will determine the relevance of this information, and both parties will be informed in writing if evidence of prior sexual history is deemed relevant.
- Example Policy 3: Where the parties have a prior sexual relationship and the existence of consent is at issue, the sexual history between the parties may be relevant to help understand the manner and nature of communications between the parties and the context of the relationship, which may have bearing on whether consent was sought and given during the incident in question. Even in the context of a relationship, however, consent to one sexual act does not, by itself, constitute consent to another sexual act; in addition, consent on one occasion does not, by itself, constitute consent on a subsequent occasion. The investigator will determine the relevance of this information and both parties will be informed if evidence of prior sexual history is deemed relevant.

X. Situations in Which a Party or Witness Does Not Participate in a Live Hearing or in Cross-examination

Example Policies Used by Postsecondary Schools

- Example Policy 1: If the complainant, the respondent, or a witness informs the school that they will not attend the hearing (or will attend but refuse to be cross-examined), the school's Title IX Coordinator may determine that the hearing may still proceed. The decision-maker may not, however: (a) rely on any statement or information provided by that non-participating individual in reaching a determination regarding responsibility; or (b) draw any adverse inference in reaching a determination regarding responsibility based solely on the individual's absence from the hearing (or their refusal to be cross-examined).
- Example Policy 2: Neither the complainant nor the respondent is required to participate in the resolution process outlined in these procedures. The school will not draw any adverse inferences from a complainant's or respondent's decision not to participate or

to remain silent during the process. An investigator or decision-maker, in the investigation or the hearing respectively, will reach findings and conclusions based on the information available.

- Example Policy 3: If a party does not submit to cross-examination, the decision-maker cannot rely on any prior statements made by that party in reaching a determination regarding responsibility, but may reach a determination regarding responsibility based on evidence that does not constitute a statement by that party. The decision-maker may also consider evidence created by the party where the evidence itself constituted the alleged prohibited conduct. Such evidence may include, by way of example but not limitation, text messages, e-mails, social media postings, audio or video recordings, or other documents or digital media created and sent by a party as a form of alleged sexual harassment, or as part of an alleged course of conduct that constitutes stalking. The decision-maker cannot draw an inference about the responsibility for a policy violation based solely on a party's absence from the hearing or refusal to answer cross-examination or other questions.
- Example Policy 4: A statement is a person's intent to make factual assertions, including evidence that contains a person's statement(s). Party or witness statements, police reports, Sexual Assault Nurse Examiner (SANE) reports, medical reports, and other records may not be relied upon in making a final determination after the completion of a live hearing to the extent that they contain statements of a party or witness who has not submitted to cross-examination. However, the decision-maker cannot draw any inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or their refusal to answer cross-examination questions.

XI. Presumptions about Complainants, Respondents, and Witnesses

Example Policies Used by Elementary and Secondary Schools and Postsecondary Schools

- Example Policy 1: The school presumes that reports of prohibited conduct are made in good faith. A finding that the alleged behavior does not constitute a violation of this school's policy or that there is insufficient evidence to establish that the alleged conduct occurred as reported does not mean that the report was made in bad faith.
- Example Policy 2: All formal sexual misconduct complaints are assumed to be made in good faith. However, if the evidence establishes that the formal complaint was intentionally falsely made, corrective/disciplinary action may be taken, up to and including suspension, expulsion, or termination. This does not include allegations

that are made in good faith but are ultimately shown to be erroneous or do not result in a policy violation determination.

- Example Policy 3: The respondent is presumed to be not responsible for the alleged conduct until a determination regarding responsibility is made by the decision-maker.
- Example Policy 4: An individual's status as a respondent will not be considered a negative factor during consideration of the grievance. Respondents are entitled to, and will receive the benefit of, a presumption that they are not responsible for the alleged conduct until the grievance process concludes and a determination regarding responsibility is issued. Similarly, credibility determinations will not be based on a person's status as a complainant, respondent, or witness.

XII. Determination Regarding Responsibility

Example Policies Used by Elementary and Secondary Schools and Postsecondary Schools

- Example Policy 1: The school will review the evidence provided by all parties and will make a final determination of responsibility after the investigation. The decision-maker will not be the Title IX Coordinator, the investigator, or any other individual who may have a conflict of interest. The final determination will be provided to the parties at the same time, with appeal rights provided. It will explain if any policies were violated, the steps and methods taken to investigate, the findings of the investigation, conclusions about the findings, the ultimate determination and the reasons for it, any disciplinary sanctions that will be imposed on the respondent, and any remedies available to the complainant to restore or preserve equal access.
- Example Policy 2: The decision-maker will issue a written determination following the review of evidence. The written determination will include: (1) identification of allegations potentially constituting sexual harassment as defined in 34 C.F.R. § 106.30; (2) a description of the procedural steps taken from the receipt of the complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, and methods used to gather evidence; (3) findings of fact supporting the determination, conclusions regarding the application of this formal grievance process to the facts; (4) a statement of, and rationale for, the result as to each allegation, including any determination regarding responsibility, any disciplinary sanctions the decision-maker imposed on the respondent that directly relate to the complainant, and whether remedies designed to restore or preserve equal access to the school's education program or activity will be provided to the complainant; and (5) procedures and permissible bases for the parties to appeal the determination. The written determination will be provided to the parties simultaneously. Remedies and supportive measures that do not impact the respondent should not be disclosed in the

written determination; rather the determination should simply state that remedies will be provided to the complainant.

XIII. Sanctions and Remedies

Example Policies Used by Elementary and Secondary Schools and Postsecondary Schools

- Example Policy 1: The school will take reasonable steps to address any violations of this policy and to restore or preserve equal access to the school's education programs or activities. Sanctions for a finding of responsibility depend upon the nature and gravity of the misconduct, any record of prior discipline for similar violations, or both. The range of potential sanctions and corrective actions that may be imposed on a student includes, but is not limited to the following: [list of possible sanctions decided on by the school].
- Example Policy 2: When a respondent is found responsible for the prohibited behavior as alleged, sanctions are based on the severity and circumstances of the behavior. Disciplinary actions or consequences can range from a conference with the respondent and a school official through suspension or expulsion. When a respondent is found responsible for the prohibited behavior as alleged, remedies must be provided to the complainant. Remedies are designed to maintain the complainant's equal access to education and may include supportive measures or remedies that are punitive or would pose a burden to the respondent.
- Example Policy 3: Whatever the outcome of the investigation, hearing, or appeal, the complainant and respondent may request ongoing or additional supportive measures. Ongoing supportive measures that do not unreasonably burden a party may be considered and provided even if the respondent is found not responsible.
- Example Policy 4: The role of the Title IX Coordinator following the receipt of the written determination from the decision-maker is to facilitate the imposition of sanctions, if any, the provision of remedies, if any, and to otherwise complete the formal resolution process. The appropriate school official, after consultation with the Title IX Coordinator, will determine the sanctions imposed and remedies provided, if any. The Title IX Coordinator must provide written notice to the parties simultaneously. The school must disclose to the complainant the sanctions imposed on the respondent that directly relate to the complainant when such disclosure is necessary to ensure equal access to the school's education program or activity.
- Example Policy 5: For students with disabilities: If a decision-maker has determined that the respondent has engaged in sexual harassment and prior to consideration of imposing a long-term suspension, reassignment, or recommendation for expulsion, the following shall occur, and timelines will be extended accordingly: (1) For any student with an Individualized Education Program (IEP), or that a school has knowledge may be a child with a disability, the decision-maker will make a referral to the school to conduct a

manifestation determination review (MDR). The MDR team meeting shall convene as soon as reasonably possible and make available to the decision-maker the MDR decision and written rationale in no later than ten school days; (2) For any student with a disability covered by Section 504, the decision-maker will make a referral to have a knowledgeable committee convene a Section 504 Causality Review. The causality review meeting shall convene as soon as reasonably possible and make available to the decision-maker the causality review decision and written rationale in no later than ten school days; (3) Before a student with a disability is suspended, reassigned, or recommended for expulsion, the principal of the school will consult with the student's case manager, review the student's IEP, and take into account any special circumstances regarding the student. The IEP team will consider the parents' views and any preference for the reassignment location along with any location proposed by school staff at the meeting. It is the duty of the IEP team at its meeting to discuss, propose, and decide upon the educational placement, consistent with the disciplinary decision. Accordingly, the IEP team will consider the views of all members, including the parents, at the meeting.

XIV. Appeals

Example Policies Used by Elementary and Secondary Schools and Postsecondary Schools

- Example Policy 1: Each party may appeal (1) the dismissal of a formal complaint or any included allegations and/or (2) a determination regarding responsibility. To appeal, a party must submit their written appeal within five business days of being notified of the decision, including the grounds for the appeal. The grounds for appeal are as follows: Procedural irregularity that affected the outcome of the matter (i.e., a failure to follow the institution's own procedures); New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against an individual party, or for or against complainants or respondents in general, that affected the outcome of the matter. The submission of an appeal stays any sanctions for the pendency of an appeal. Supportive measures and remote learning opportunities remain available during the pendency of the appeal. If a party appeals, the school will as soon as practicable notify the other party in writing of the appeal; however the time for appeal shall be offered equitably to all parties and shall not be extended for any party solely because the other party filed an appeal. Appeals will be decided by an individual, who will be free of conflict of interest and bias, and will not serve as investigator, Title IX Coordinator, or decision-maker in the same matter.
- Example Policy 2: Appeals are available after a complaint dismissal or after a final determination is made. Appeals can be made due to procedural irregularities in the

investigation affecting the outcome, new evidence becoming available, or due to bias or a conflict of interest by Title IX personnel that may have affected the outcome. Appeal requests must be made within 30 days of the school's final determination and include the rationale for the appeal. Parties will be given an opportunity to submit a written statement in support of or against the final determination. A new decision-maker will issue the final decision at the same time to each party.

- Example Policy 3: The complainant and respondent have an equal opportunity to appeal the policy violation determination and any sanctions. The school administers the appeal process, but is not a party and does not advocate for or against any appeal. A party may appeal only on the following grounds and the appeal should identify the reason(s) why the party is appealing: (1) there was a procedural error in the hearing process that materially affected the outcome; procedural error refers to alleged deviations from school policy, and not challenges to policies or procedures themselves; (2) there is new evidence that was not reasonably available at the time of the hearing and that could have affected the outcome; (3) the decision-maker had a conflict of interest or bias that affected the outcome; (4) the determination regarding the policy violation was unreasonable based on the evidence before the decision-maker; this ground is available only to a party who participated in the hearing; and (5) the sanctions were disproportionate to the hearing officer's findings. The appeal must be submitted within 10 business days following the issuance of the notice of determination. The appeal must identify the ground(s) for appeal and contain specific arguments supporting each ground for appeal. The school will notify the other party of the appeal, and that other party will have an opportunity to submit a written statement in response to the appeal, within three business days. The school will also inform the parties that they have an opportunity to meet with the appeal officer separately to discuss the proportionality of the sanction. The appeal officer, who will not be the same person as the Title IX Coordinator, investigator, or decision-maker, will decide the appeal considering the evidence presented at the hearing, the investigation file, and the appeal statements of both parties. In disproportionate sanction appeals, they may also consider any input the parties provided during the meeting. The appeal officer will summarize their decision in a written report that will be sent to the complainant and respondent within 10 business days of receiving the appeal.

XV. Informal Resolution

Example Policies Used by Elementary and Secondary Schools and Postsecondary Schools

- Example Policy 1: Informal resolution is available only after a formal complaint has been filed, prior to a determination of responsibility, and if the complainant and respondent voluntarily consent to the process in writing. Informal resolution is not available in cases in which an employee is alleged to have sexually harassed a student. Informal resolution

may involve agreement to pursue individual or community remedies, including targeted or broad-based educational programming or training; supported direct conversation or interaction with the respondent; mediation; indirect action by the Title IX Coordinator; and other forms of resolution that can be tailored to the needs of the parties. With the voluntary consent of the parties, informal resolution may be used to agree upon disciplinary sanctions. Disciplinary action will only be imposed against a respondent where there is a sufficient factual foundation and both the complainant and the respondent have agreed to forego the additional procedures set forth in this school's policy and accept an agreed upon sanction. Any person who facilitates an informal resolution will be trained and free from conflicts of interest or bias for or against either party.

- Example Policy 2: The informal resolution process is only available where the complainant has filed a formal sexual harassment complaint that involves parties of the same status (e.g., student-student or employee-employee) and the parties voluntarily request in writing to resolve the formal complaint through the informal resolution process. Within five workdays of receiving a written request to start the informal resolution process, the school will appoint an official to facilitate an effective and appropriate resolution. The Title IX Coordinator may serve as the facilitator. Within five workdays of such appointment, the parties may identify to the Title IX Coordinator in writing any potential conflict of interest or bias posed by such facilitator to the matter. The Title IX Coordinator will consider the information and appoint another facilitator if a material conflict of interest or bias exists. The facilitator will request a written statement from the parties to be submitted within 10 workdays. Each party may request that witnesses are interviewed, but the school shall not conduct a full investigation as part of the informal resolution process. The facilitator will hold a meeting(s) with the parties and coordinate the informal resolution measures. Each party may have one advisor of their choice during the meeting, but the advisor may not speak on the party's behalf. The informal resolution process should be completed within 30 workdays in most cases, unless good cause exists to extend the time. The parties will be notified in writing and given the reason for the delay and an estimated time of completion. Any resolution of a formal complaint through the informal resolution process must address the concerns of the complainant and the responsibility of the school to address alleged violations of its policy, while also respecting the due process rights of the respondent. Informal resolution process remedies include mandatory training, reflective writing assignment, counseling, written counseling memorandum by an employee's supervisor, suspension, termination, or expulsion, or other methods designed to restore or preserve equal access to the school's education programs or activities. At the conclusion of meetings, interviews, and the receipt of statements, the facilitator will write an informal resolution report and provide the parties with the informal resolution report simultaneously. At any time prior to resolving a formal complaint through the informal resolution process,

either party may withdraw in writing from the informal resolution process and resume or begin the formal resolution process.

- Example Policy 3: The Title IX Coordinator will determine whether it is appropriate to offer the parties informal resolution in lieu of a formal investigation of the complaint. In the event that the Title IX Coordinator determines that informal resolution is appropriate, the parties will be provided written notice disclosing: the allegations, the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared. Both parties must provide voluntary, written consent to the informal resolution process.

XVI. Addressing Conduct That the School Deems to be Sexual Harassment but Does Not Meet the Definition of Sexual Harassment Under the Title IX Regulations

Example Policies Used by Elementary and Secondary Schools and Postsecondary Schools

- Example Policy 1: It is important to note that conduct that does not meet the criteria under Title IX may violate other federal or state laws or school policies regarding student misconduct or may be inappropriate and require an immediate response in the form of supportive measures and remedies to prevent its recurrence and address its effects.
- Example Policy 2: This school adopts a “two-pronged” approach. All conduct not covered under the current definition of sexual harassment, including sexual misconduct, will be addressed by the principal under the student code of conduct. Title IX procedures will be reserved only for those alleged actions that fall under the Title IX definition of sexual harassment.
- Example Policy 3: The Title IX Coordinator shall investigate the allegations in all formal complaints. The Title IX Coordinator must dismiss the formal complaint if the conduct alleged in the formal complaint would not constitute sexual harassment as defined in this school’s policy even if proved, or is outside the jurisdiction of the school, i.e., the conduct did not involve an education program or activity of the school, or did not occur against a person in the United States. The Title IX Coordinator shall forward the formal complaint to an appropriate school official that will determine whether the conduct alleged in the formal complaint violates a separate policy or code of conduct.

- Example Policy 4: In May of 2020, the U.S. Department of Education issued new regulations for colleges and universities that address sexual assault and other sexual misconduct. These regulations cover certain specific forms of sexual misconduct. To comply with these regulations, this school has revised its existing policy for those types of misconduct. In addition, this school maintains its existing Sexual Misconduct Policy for other types of sexual misconduct that are not covered by the new regulations. Both policies are important to creating and supporting a school community that rejects all forms of sexual misconduct.
- Example Policy 5: The Title IX regulations direct the school's response to some, but not all, of the forms of prohibited behavior in this school's Title IX policy. Allegations in a Title IX formal complaint related to behavior that occurs outside of the education program or activity or outside the United States, or behavior that would not meet the definition of Title IX sexual harassment as defined in this school's Title IX policy, must be dismissed. Both the complainant and respondent may appeal the dismissal of any allegations under Title IX. However, in keeping with the school's educational mission and commitment to fostering a learning, living, and working environment free from discrimination, harassment, and retaliation, this school will still move forward with an investigation or formal resolution under the same resolution process for all forms of prohibited behavior under this school's Title IX policy. In this instance, this school is using its Title IX policy as a code of conduct to address behavior that occurred outside of the education program or activity or outside of the United States, even though the behavior falls outside of Title IX jurisdiction under the Department of Education's 2020 amendments.

XVII. Parent and Guardian Rights

Example Policy Used by Elementary and Secondary Schools

- Example Policy 1: Consistent with the applicable laws of the jurisdiction in which the school is located, a student's parent or guardian must be permitted to exercise the rights granted to their child under this school's policy, whether such rights involve requesting supportive measures, filing a formal complaint, or participating in a grievance process. A student's parent or guardian must also be permitted to accompany the student to meetings, interviews, and hearings, if applicable, during a grievance process in order to exercise rights on behalf of the student. The student may have an advisor of choice who is a different person from the parent or guardian.

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