

Questions & Answers

Questions and Answers on the Title IX Regulations on Sexual Harassment (July 2021) (Updated June 28, 2022)



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EDUCATION

Office for Civil Rights

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**Questions and Answers on the Title IX Regulations on
Sexual Harassment and Appendix (July 2021) (Updated
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Please note:

The Department of Education's Office for Civil Rights will update the Questions and Answers below as needed.

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Questions 42, 51-54: Some aspects of the answers to these questions about the postsecondary hearing requirements in the 2020 amendments to the Title IX regulations have been revised in light of the federal district court ruling in *Victim Rights Law Center et al. v. Cardona*, No. 1:20-cv-11104, 2021 WL 3185743 (D. Mass. July 28, 2021), appeals pending (1st Cir). The court's ruling vacated a part of the regulation at 34 C.F.R. § 106.45(b)(6)(i), which prohibited a decision-maker at a postsecondary school from considering statements not subject to cross-examination. Questions A through D below were also added to Section XII to provide postsecondary schools with additional updated information in light of the court's decision.

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Please note: This Appendix was updated to indicate language in example policies that should no longer be relied upon following the federal district court ruling in *Victim Rights Law Center et al. v. Cardona*, No. 1:20-cv-11104, 2021 WL 3185743 (D. Mass. July 28, 2021), *appeals pending* (1st Cir), which vacated the language in 34 C.F.R. § 106.45(b)(6)(i) prohibiting a decision-maker at a postsecondary school from considering statements not subject to cross-examination.

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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. Definition of Sexual Harassment

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

Please note: As a result of a federal district court order issued on July 28, 2021,¹ the part of the 2020 amendments that states: "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," 34 C.F.R. § 106.45(b)(6)(i), has been set aside. In light of the district court's decision, Q&As 51-54 (as well as the reference to Question 51 in Answer 42) are no longer applicable. OCR has added Questions A through D to this section to provide additional clarification regarding the court's decision.

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

¹ *Victim Rights Law Center et al. v. Cardona*, No. 1:20-cv-11104, 2021 WL 3185743 (D. Mass. July 28, 2021), *appeals pending* (1st Cir.).

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 [The strike-through below indicates Q&As that are no longer applicable in light of *Victim Rights Law Center et al. v. Cardona*, No. 1:20-cv-11104, 2021 WL 3185743 (D. Mass. July 28, 2021), *appeals pending* (1st Cir.)] ~~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.

[The strike-through below indicates that Q&As 51-54 are no longer applicable in light of *Victim Rights Law Center et al. v. Cardona*, No. 1:20-cv-11104, 2021 WL 3185743 (D. Mass. July 28, 2021), *appeals pending* (1st Cir.)] OCR has added Q&As A-D below to provide postsecondary schools with additional updated information in light of the court's decision.

~~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 solely 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 solely on their decision not to participate in a hearing or submit to cross-examination.~~