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2021 TITLE IX REGULATIONS: REVIEW OF OCR QUESTIONS AND ANSWERS

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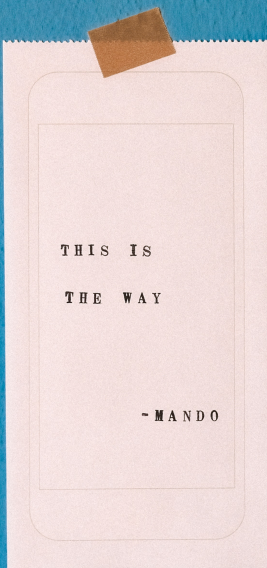


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July 2021 Questions and Answers

“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). The Department is undertaking a comprehensive review of its current Title IX regulations as amended in 2020. . . While this review is ongoing and until any new regulations go into effect, the 2020 amendments remain in effect.” (p. 1)

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The Q&A



- 56 pages
- 67 Questions and Answers
- Appendix of policy statement examples covering 17 topics

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INITIAL
THOUGHTS?

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Title IX Grievance Process (Mini-glossary)



“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.” (Mini-glossary, p. 3)

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It’s the floor and not the ceiling (Q2)

“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.”

(Question 2, p. 3)

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Responding to Non-Title IX Sexual Misconduct (Q7)



“The preamble makes clear that “Title IX is not the exclusive remedy for sexual misconduct or traumatic events that affect students.” 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.”

(Question 7, p. 6)

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Policy Example - 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 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.” (p. 55)

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“Effectively Denies” Examples (Q8)



- “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.
- 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.”
- A complainant does not need to have “already suffered loss of education before being able to report sexual harassment.”
- Effective denial of equal access to education does not require “that a person’s total or entire educational access has been denied.”
- While these examples help illustrate an effective denial of access, “[n]o concrete injury is required” to prove an effective denial of equal access.
- 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.
- “School officials turning away a complainant by deciding the complainant was ‘not traumatized enough’ would be impermissible.” 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.” (Question 8, p. 7)

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Off-campus Jurisdiction (Q10)



- “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.”
- “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.”

(Question 10, p. 9)

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Online Sexual Harassment (Q11)

“[T]he factual circumstances of online harassment must be analyzed to determine if it occurred in an education program or activity.” 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.”

(Question 11, p. 9)

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Actual Knowledge/Constitute Sexual Harassment (Q18)

“At any school level—elementary, secondary, or postsecondary—actual knowledge refers to notice of conduct that could constitute sexual harassment. 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.” 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.”

(Question 18, p. 12)

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Attempting to Participate (Q23)



"Individuals who are currently participating in the school's education program or activity may also file formal complaints. . . 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.

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."

(Question 23, p. 15)

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Policy Example - Receiving and Responding to Reports of Sexual Harassment

"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."* (p. 39)

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Trauma-informed Approaches (Q28)

“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).”

(Question 28, p. 17)

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Delay Due to Disability (Q30)



“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.” 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.

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.”

(Question 30, p. 17)

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Policy Example - Investigations

“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.” (p. 41)

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Rules of a Hearing (Q43 & Q44)

- “. . . may decide whether or how to place limits on evidence introduced at a hearing that was not gathered and presented prior to the hearing.”
- “The preamble adds that a school may adopt a rule stating that duplicative questions are irrelevant.”
- “. . . a postsecondary school could limit the role of advisors to relaying questions drafted by their party.”

(Question 43, p. 22)

- “. . . a school may prohibit advisors from questioning parties or witnesses in an abusive, intimidating, or disrespectful manner.”
- “. . . a school may enforce a rule requiring that relevant questions must be asked in a respectful, non-abusive manner.”

(Question 44, p. 23)

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Cross-examination (Q49)

“... 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. 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.” (Question 49, p. 25)



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Policy Example - The Role of the Advisor

“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.”

(p. 42)

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Policy Example - The Role of the Advisor

“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.” (p. 42)

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Policy Example - The Role of the Advisor

“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.” (p. 42)

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Participation (Q51)

“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.” (Question 51, p. 25)

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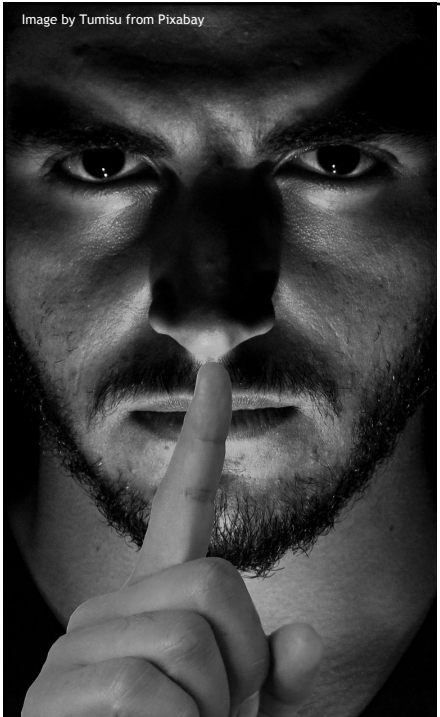
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Using Statements When the Party Does Not Submit to Cross (Q53)

“. . . 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.” (Question 53, p. 27)

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Multiple Parties' Statements (Q54)



“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.” (Question 54, p. 27)

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Policy Example - The Live Hearing (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.” (p. 43)

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Policy Example - The Live Hearing (Hearing Format)

“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.” (p. 43)

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Policy Example - The Live Hearing (Hearing Format)

“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.” (p. 43)

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Policy Example - The Live Hearing (Hearing Format)

“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.” (p. 43)

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Policy Example - 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.” (p. 44)

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Policy Example - Evidence

“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.” (p. 44)

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Policy Example - Evidence

“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.” (p. 44)

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Policy Example - Behavior During the Live Hearing

“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.” (p. 45)

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Policy Example - Protecting the Well-Being of the Parties

“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.” (p. 46)

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Policy Example - The Cross- Examination Process

“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.”
(p. 46)

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Policy Example - The Cross- Examination Process (Explaining Cross- Examination)

“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.”
(p. 46)

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Questions?