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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regulations differ from any of the Department’s guidance documents (whether such documents remain in effect or are withdrawn), these final regulations, when they become effective, and not the Department’s guidance documents, are controlling.”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 recipient treat the parties equitably, which for a respondent means 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 recipient not to respond in a manner that is deliberately indifferent. 34 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 affects that 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 disciplinary sanctions imposed by the recipient against the respondent, pursuant to 34 C.F.R. § 106.45(b)(7). The issuance of a written 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 who has been 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 disclosure is made by a recipient without falling into one of the three exceptions 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 anonymous 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 must be disclosed to the 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 grievance 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 necessary to 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 of the investigative 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>.