

Key Updates to Title IX Policy and Process

Consistent with guidelines released under the DeVos administration, when hearing a case related to Title IX, the following information must dictate the process.

On July 20, 2021, the Department of Education (through the Office of Civil Rights “OCR”), unveiled new guidance to help schools understand their obligations under the Betsy DeVos-era Title IX rule. The rule, which went into effect on August 14, 2020, is currently undergoing a comprehensive review based on the Executive Order issued by President Biden on April 6, 2021.

The 67-page Q&A is divided into 17 sections and provides guidance on a variety of topics covered by the 2020 Title IX amendments, focusing on language within the preamble. The guidance also includes an appendix with sample language schools can utilize (but are not required to) in creating a Title IX policy. You should review the entire Q&A here:

<https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf>

OCR makes it clear that the 2020 Title IX amendments set out the minimum steps a school must take in response to notice of alleged sexual harassment. Schools may take additional actions so long as there is no conflict with Title IX. Some key points of the guidance which apply to postsecondary institutions include:

Definition of Sexual Harassment and When/How it Occurs

- The 2020 DeVos Rule narrowed the definition of sexual harassment, requiring that conduct rise to a level a reasonable person “would find so severe, [and] pervasive, and objectively offensive that it denies a person equal educational access.”
- Schools can respond to alleged sexual misconduct that does not meet the definition of sexual harassment in the 2020 amendments.

- OCR encourages schools to develop and enforce their codes of conduct as an additional tool for ensuring safe and supportive educational environments for all students.
- Schools must provide training to Title IX personnel to accurately identify situations that require a response. OCR encourages schools to include examples of “programs and activities” in their policies, staff training and student-orientated communication for improved understanding.
- Schools must follow the requirements of the Title IX statute and the regulations in place at the time of the alleged incident. The 2020 amendments do not apply to alleged sexual harassment occurring before August 14, 2020.

Notice of Sexual Harassment

- Schools are put on notice (actual knowledge) of alleged sexual harassment by any person (not limited to a complainant) if it is a school official with authority to institute corrective action. This would include information from a newspaper article, oral report, written report, personal observation or anonymous report.
- The Department will not hold a postsecondary school responsible for responding to sexual harassment unless the employee actually gave notice to the school’s Title IX coordinator or other official with an authority to institute corrective action.

Response to Sexual Harassment

- There are no remedies schools are required to impose when a respondent is found responsible of sexual harassment. Schools are free to make disciplinary and remedial decisions that it “believes are in the best interest of [its] educational environment.”
- If a respondent is found responsible (at the conclusion of the grievance process), remedies can be disciplinary, punitive, and burdensome to the respondent if the remedy restores or preserves the complainant’s equal access to the education program or activity.

Formal Complaints

- Generally, a formal complaint must be signed. An email from a student to a Title IX Coordinator that ends with the student signing their name would suffice.
- A Title IX Coordinator may file a formal complaint even if the complainant is not associated with the school in any way.
- A school must respond to a formal complaint even if the respondent left the school prior to the filing and has no plans to return.
- The school must use technology when needed. It cannot delay investigations or hearings solely because in-person interviews are not feasible.

Supportive Measures

- The school has discretion and flexibility to determine which supportive measures are appropriate.
- A school must provide appropriate supportive measures during the covid-19 pandemic.
- Supportive measures must be provided even if the complainant does not participate in the grievance process.

Live Hearings and Cross-Examination

- Each party's advisor must be permitted to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.
- The parties are in the best position to decide which individuals should serve as their advisors. Advisors can be friends, family members, an attorney, or other individual chosen or provided by the school if the party does not choose one.
- Schools can adopt rules of decorum best suited for its education environment.
- There must be a pause after each cross-examination question for the decision-maker to determine if the question is relevant.
- Answers to cross-examination questions do not need to be "linear or sequential" and a party does not have to "recall details with certain levels of specificity."

- Police reports, medical reports and other documents and records may not be relied on to the extent they contain the statements of a party or witness who has not submitted to cross-examination.
- The decision-maker may consider a text message, email or audio or video recording created and sent by a respondent as a form of alleged sexual harassment even if the respondent does not submit to cross-examination.
- If a party or witness submits to cross-examination but does not answer a question posed by the decision-maker, the decision-maker may still rely on all of that person's statement.

Standard of Proof, Retaliation and Amnesty

- The same standard of proof (preponderance of the evidence or clear and convincing) must be applied for all formal complaints. Schools cannot use a different standard of proof for a complaint involving students and employees.
- Charges against an individual for code of conduct violations that do not involved sex discrimination or sexual harassment but arise out of the same facts or circumstances as a complaint of sexual harassment are prohibited if the charge would be retaliatory. However, if the school has a zero-tolerance policy which imposes the same punishment for such conduct regardless of the circumstances, imposing punishment would not be for the purpose of interfering with any right or privilege secured by Title IX and would not be considered retaliatory.

Forms of Sex Discrimination Other than Sexual Harassment

- The Title IX grievance process does not apply to complaints alleging discrimination based on pregnancy, different treatment based on sex, or other forms of sex discrimination. However, schools must still respond promptly and equitably to such complaints. OCR recommends that procedures should be written, easily understood and widely disseminated