The Title IX Sexual Harassment Regulations:

2021-22 Update for School District Title IX Coordinators

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About this update …

- Targeted especially for school district **Title IX Coordinators**
  - Some districts may decide to have other persons participate in this update (e.g., investigators, decision-makers, etc.).
  - Some districts may decide to use information from this update in connection with a customized local follow-up/refresher activity.
- Assumes familiarity (e.g., through completion of previous training) with the 2020 federal Title IX regulations that address sexual harassment in education programs and activities.
- Presents a condensed version of extensive Q&A guidance provided by the U.S. Department of Education in the year following the effective date of the regulations, narrowed to a K-12 focus.

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About this update …

- This update is a non-required, but recommended supplement to the Title IX training modules offered by the WASB and Boardman & Clark. However, especially if a school district directs any of its Title IX personnel to complete this update as part of their mandatory training, the materials (i.e., a PDF copy of the slides) should be posted on the school district's website with the district's other Title IX training materials.

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About this update …

The content of this update is divided into three sections:

1. Information that supplements the content of the existing Title IX training modules:
   - Clarification of some important terms/concepts
   - Implementation/practice tips and reminders
2. Considerations for the refinement of local policies and procedures, including:
   - Some sample language shared by the U.S. Department of Education's Office for Civil Rights (OCR).
3. A brief look at where the U.S. DOE/OCR appears to be headed with the Title IX sexual harassment regulations.

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Part 1

- Clarifying key terms and concepts
- Implementation tips and reminders

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Under the "unwelcome conduct" category in Title IX's definition of sexual harassment, how can a school determine whether sexual harassment "**effectively denies a person's right to equal access** to its education program or activity"?

Continued on next slide

Definitional reminder:

> "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."

The regulatory preamble tells schools to 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."

OK, but is there additional guidance that is a little more concrete and practical? See the next two slides.

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Under the "unwelcome conduct" category in Title IX's definition of sexual harassment, how can a school determine whether sexual harassment "**effectively denies a person's right to equal access** to its education program or activity"?

Continued from prior slide

- 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.
- No 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 **not** be permissible.

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Under the "unwelcome conduct" category in Title IX's definition of sexual harassment, how can a school determine whether sexual harassment "**effectively denies a person's right to equal access** to its education program or activity"?

Continued from prior slide

And, finally, some specific examples of what likely **is** sufficient:

- 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.
- A high school wrestler who quits the team following sexual harassment, but who carries on with other school activities, has likely experienced an effective denial of equal access to educational opportunities.

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Which settings are part of a school's **educational programs and activities in the United States**, such that they are covered by the 2020 amendments?

Continued on next slide

The Title IX regulations require schools to provide training to their Title IX personnel to help them accurately identify situations that require a response under Title IX. There are, of course, also settings in which Title IX does *not* apply.

A school's education program and activities include:

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 local museum).

OK. But how does a school district determine if it has "substantial control?"

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

Continued from prior slide

It is a fact-specific determination. Relevant factors to consider may include (but are not limited to) whether the school **funded, promoted, or sponsored** the event or circumstance where the alleged harassment occurred.

An example of a situation where such a determination would be necessary: An alleged incident of sexual harassment between two students in a private hotel room that occurs in a context related to a school-sponsored activity, such as an overnight school field trip or travel with a school athletics team.

The preamble to the regulations 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."

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How do the 2020 Title IX regulations apply to alleged sexual harassment that takes place electronically or on an online platform used by the school?

The regulations do not create a distinction between sexual harassment occurring in person versus online.

- 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.
- 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.

In the end, a school still must analyze the specific factual circumstances of online harassment to determine if it occurred in an education program or activity.

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Which school employees must be notified about allegations of sexual harassment for a school to be put on notice that it **must respond**? (When does a school have "**actual knowledge**" of an allegation?)

Continued on next slide

Who?

- In elementary and secondary school settings, a school must respond whenever **any school employee** has notice of sexual harassment.
- 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.
- In addition, actual knowledge also means notice of sexual harassment or alleged sexual harassment to a school's Title IX Coordinator **or to any official** of the school who has authority to institute corrective measures on behalf of the school district.
- EXCEPTION: The school does **not** have notice / actual knowledge for purposes of Title IX if the only official or employee of the school with actual knowledge is the respondent (the alleged perpetrator).

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Which school employees must be notified about allegations of sexual harassment for a school to be put on notice that it **must respond**? (When does a school have "**actual knowledge**" of an allegation?)

Continued from prior slide

How?

- The regulations do 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 or written** report of sexual harassment by a complainant **or anyone else,**
  - personal observation,
  - a newspaper article,
  - an anonymous report, or
  - various other means.

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What about independent contractors and volunteers? Would their knowledge count as "actual knowledge" on the part of the district?

- Independent contractors and volunteers are not "employees" in the ordinary usage of the term.
- The preamble explains that the Department will **not** conclude that volunteers and independent contractors are "officials with authority to institute corrective measures" on behalf of the school, unless the school has granted the particular volunteer(s) or independent contractor(s) such authority.
- The regulations state, "The 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 as one who has authority to institute corrective measures on behalf of the [school district]."

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Is a school required to accept reports of sexual harassment from individuals who are not associated with the school in any way?

Yes.

- A school may receive actual knowledge of sexual harassment from **any person**.
- There is no requirement that the person be participating in or attempting to participate in a school program or activity to **report** sexual harassment.

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Do the requirements related to sexual harassment in the Title IX regulations apply to allegations between employees of the school district?

Yes.

- The regulations cover sexual harassment allegations in cases where the complainant and respondent are both employees.
- In fact, any person in the school's education program or activity may be a complainant or respondent, regardless of whether the person is a student, employee, or otherwise affiliated with the school.
- In the employment context, school districts are generally subject to both Title VII and Title IX, and they must comply with both laws.

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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?

Yes.

- "Actual knowledge" refers to notice of conduct, or an allegation 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"
- 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 Title IX regulations.

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Is a school required to provide particular remedies or impose particular sanctions when a respondent is found responsible for sexual harassment?

The regulations do not mandate specific remedies for the complainant or disciplinary sanctions for the respondent. A school is free to make disciplinary and remedial decisions that it believes are in the best interest of its educational environment, subject to the following:

- 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."
- These remedies may include the same individualized services that the school provided to the complainant as supportive measures, additional services, or different services.
- Post-determination remedies can burden the respondent.

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Is a school required to describe the range of possible disciplinary sanctions and remedies, or list the possible disciplinary sanctions and remedies, in its written Title IX policies and procedures?

Yes.

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.

(See some of the examples in Part 2 of this update.)

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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?

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. Examples include when a complainant:

- 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;
- Has graduated but intends to apply to a new program or intends to participate in alumni programs and activities;
- Is on a leave of absence but intends to resume enrollment/participation after the leave of absence.

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 at or leave the school.

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If a complainant has not filed a formal complaint or 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?

Yes. And, in some cases, a school may be in violation of Title IX if the Title IX Coordinator does *not* do so.

- 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 persons protected by Title IX, **not just the complainant**, with an educational environment that does not discriminate based on sex.

SCENARIO: A school has actual knowledge of a pattern of alleged sexual harassment by a perpetrator in a position of authority, but no complainant has filed a formal complaint.

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If a complainant reports or discloses information that puts a school district on notice of alleged sexual harassment, but does not wish to file a formal complaint, when ***should*** the Title IX Coordinator sign a formal complaint?

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One answer to this question: The Title IX Coordinator must sign a formal complaint if the Coordinator determines that not signing a complaint would amount to a "deliberately indifferent" (i.e., clearly unreasonable) response to the known information, including having discussed the complainant's wishes.

Another answer is that, in the end, the regulations give school districts flexibility to respond appropriately to each situation, so that the regulations neither automatically override the wishes of a complainant, nor restrict a school district from investigating when specific circumstances dictate that an investigation is warranted.

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If a complainant reports or discloses information that puts a school district on notice of alleged sexual harassment, but does not wish to file a formal complaint, when ***should*** the Title IX Coordinator sign a formal complaint?

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- The decision to initiate a grievance process in situations where the complainant does not want an investigation or where the complainant intends not to participate should be made thoughtfully, intentionally, and impartially, taking into account the circumstances of the situation (including the reasons why the complainant wants or does not want the school district to investigate) and without prejudging whether alleged facts are true or not.
- The Title IX Coordinator is trained with special responsibilities that involve interacting with complainants, making the Title IX Coordinator the appropriate person to decide to initiate a grievance process on behalf of the school district.
- Other school administrators may report sexual harassment incidents to the Title IX Coordinator, and may express to the Title IX Coordinator reasons why the administrator believes that an investigation is warranted, **but the decision to initiate a grievance process is one that the Title IX Coordinator must make**.

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How can a school district address a complainant's request for confidentiality, including in instances where a Title IX Coordinator signs a formal complaint initiating an investigation into an allegation of sexual harassment?

Continued on next slide

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 may not desire to file a formal complaint or participate in a grievance process.

- Any person who desires to **report** sexual harassment without disclosing the complainant's (i.e., the alleged victim's) identity to anyone may do so. Obviously, the school district will be unable to provide supportive measures in response to such a report without knowing the complainant's identity.
- If a known complainant desires **supportive measures**, the school can, and should, keep the complainant's identity confidential (including from the respondent), **unless** disclosing the complainant's identity is necessary to provide the supportive measures.

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How can a school district address a complainant's request for confidentiality, including in instances where a Title IX Coordinator signs the formal complaint initiating an investigation into an allegation of sexual harassment?

Continued from prior slide

- School district must keep the identities of report-makers, complainants, respondents, and witnesses confidential in connection with Title IX processes (e.g., from persons **not** involved in a grievance process), except as permitted by FERPA, as required by law, or as necessary to carry out Title IX.
- A **complainant** (i.e., a person alleged to be the victim of sexual harassment) **cannot** file a **formal complaint anonymously**.
  - A formal complaint must contain the complainant's physical or digital signature or otherwise indicate that the complainant is the person filing the formal complaint.
  - Moreover, the school must send written notice of the allegations to **both** parties upon receiving a formal complaint. The written notice of allegations must include certain details about the allegations, including the identity of the parties, if known. Thus, **the complainant's identity will be disclosed to the respondent** in this scenario.

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How can a school district address a complainant's request for confidentiality, including in instances where a Title IX Coordinator signs the formal complaint initiating an investigation into an allegation of sexual harassment?

Continued from prior slide

- When a formal complaint is signed by a Title IX Coordinator rather than filed by a complainant:
  - If the complainant's identity is **known** to the Title IX Coordinator, it must be disclosed in the written notice of allegations that is sent to the parties.
  - 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.

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If a **complainant** is not participating in or attempting to participate in the school's education program or activity, may a school respond to a report of sexual harassment under its own code of conduct or under other policies/procedures?

Generally, yes. However:

- There are circumstances when a Title IX Coordinator may need to file a formal complaint that obligates the school to initiate an investigation.
- Keep in mind that where the alleged conduct constitutes Title IX sexual harassment, a district's available **disciplinary responses** may be limited until the district completes an investigation and reaches a determination under its Title IX grievance process (which presumes the existence of a formal complaint).

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Is a school required to take action (i.e., **respond**) even if **the respondent** has left the school, with no plans to return, prior to the filing of a formal complaint?

Yes. A school must always **respond** promptly to a complainant's report of sexual harassment when it has actual knowledge.

For example, the Title IX Coordinator must contact the complainant to discuss the availability of, and to offer, supportive measures, regardless of whether a formal complaint is filed. A school must also consider the complainant's wishes with respect to supportive measures.

Key point: The district's obligations to **respond** to a report of sexual harassment are **not** limited to using the grievance process that exists for formal complaints.

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Are there any situations where a district would ***not*** want to exercise its discretion to **dismiss** a formal complaint when **the respondent** has left the school district?

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.

- A school may consider, for example, (1) whether a respondent poses an ongoing risk to the school community, or (2) 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 (3) other reasons.
- 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, and what appropriate remedial actions are necessary.

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May a school use "trauma-informed approaches" when responding to a formal complaint?

Yes. A school may use trauma-informed approaches to respond to a formal complaint of sexual harassment.

The preamble clarifies that the 2020 regulations do not preclude a school "from applying trauma-informed techniques, practices, or approaches," but notes that when responding to a formal complaint, the use of such approaches must be consistent with the requirements of the Title IX grievance process, including requirements to:

- Treat complainants and respondents equitably;
- Not have a conflict of interest or bias for or against complainants or respondents; and
- Promote impartial investigations and adjudications.

Trauma-informed approaches could affect processes like interviews and informal resolutions, initial interventions such as supportive measures, and final outcomes such as remedies and sanctions.

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Schools must 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?

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

The presumption of non-responsibility applies until a determination regarding responsibility is made at the conclusion of the grievance process. However, the presumption does **not** imply that the alleged harassment did not occur, or that the respondent is truthful or a complainant is untruthful.

Instead, 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.

Schools may not rely on the presumption to deny services to a complainant or to judge a complainant's credibility.

(See Part 2 of this update for sample language addressing the "presumptions" that apply under Title IX.)

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A school district must ensure that any supportive measures offered to a complainant do not "**unreasonably burden**" a respondent. How much leeway do districts have in drawing that line?

If a respondent were to challenge a supportive measure as an "unreasonable burden," (e.g., via a complaint to OCR), some of the possible ways to assess such a challenge would be:

1. Does a school have a limited "right to be wrong," such that even if OCR were to decide that there was an unreasonable burden, the district's decisions would be evaluated under the "deliberate indifference" standard? OR

2. If OCR decides that there was an unreasonable burden, would that automatically translate into a conclusion that the school district violated Title IX?

The US DOE's answer in the Q&A resources appears to be that if a supportive measure imposes an unreasonable burden, it will be a violation of Title IX even if the district made the determination in good faith and OCR simply disagrees with where to draw the line.

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Has OCR given any guidance regarding what type of interim actions (i.e., prior to the determination of responsibility) would impose an "**unreasonable burden**" on the respondent or be considered an impermissible sanction?

A temporary "hold" on the release of a transcript, course/program registration, or graduation will generally be considered disciplinary, punitive, and/or unreasonably burdensome.

Removal from sports teams (and similar exclusions from school-related activities) require a fact-specific analysis, but whether the burden is "unreasonable" does not depend on whether the respondent still has access to academic programs. The analysis of the burden must consider the array of educational opportunities and benefits offered by the school district.

Changing a class schedule, for example, may more often be deemed an acceptable, reasonable burden than restricting a respondent from participating on a sports team, holding a student government position, participating in an extracurricular activity, and so forth.

IMPORTANT: Schools may consider their authority to impose an "emergency removal" or to place an employee on administrative leave in appropriate cases. See § 106.44(c) and (d)

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May a school **stop** offering supportive measures or its Title IX grievance process due to the COVID-19 pandemic?

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 other proceedings on hold due to COVID-19.

Related considerations:

- 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 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.
- A school must not delay proceedings solely because in-person proceedings 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.

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

A grievance process must include "reasonably prompt" time frames.

- 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 should be subject to an open-ended time frame.
- 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 disciplinary proceedings.
- Subject to any temporary delay in the process for **good cause** (e.g., the unavailability of a relevant person; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities) a school must resolve each formal complaint of sexual harassment according to the time frames the school has committed to in its grievance process.

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Since elementary and secondary schools are not required to provide a live hearing in the grievance process, what kind of process are they required to provide at the **decision-maker** stage?

Examples:

- The decision-making process in 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.
- The decision-maker must explain to the party proposing the questions any decision to exclude a question as not relevant.
- A school may exclude duplicative/repetitive questions as "not relevant."
- 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.

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Can a school district **compel** complainants, respondents, or witnesses to participate in the Title IX grievance process?

No. Neither parties nor witnesses are required to participate in the Title IX grievance process.

School policies and procedure must also prohibit retaliation against individuals based on their decision to participate, or not participate, in a grievance process.

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

However, a school still must offer a complainant supportive measures regardless of whether the complainant agrees to participate in a grievance process.

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Is the final investigative report admitted as evidence for consideration by the decision-maker? What about the written comments that the parties submitted in response to the investigative report—are those comments evidence at the decision-making stage?

The investigative report must contain a summary of relevant evidence gathered during the investigation of a formal complaint of sexual harassment. Prior the time of the determination of responsibility, the school district must send the investigative report to the parties and their advisors (if any) with an opportunity for the parties to respond to the investigative report.

- The Title IX regulations do **not** deem the investigative report itself, or a party's written response to it, as relevant evidence that a decision-maker *must* consider.
- **The decision-maker has an independent obligation to evaluate the relevance of available evidence, including evidence summarized in the investigative report, and to consider all other relevant evidence.** The decisionmaker may not, however, consider any evidence/information that the regulations preclude the decision-maker from considering.

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At the decision-making step, is a school permitted to limit the questions that may be asked by each party?

Yes. In fact, the Title IX regulations **require** certain limitations.

A party has a right to pose questions, but only if the questions are **relevant**.

- Questions about the complainant's sexual predisposition are not relevant.
- Subject to very limited exceptions, questions about the complainant's prior sexual behavior are not relevant.
- Repetitive questions are not relevant and may be rejected.

Questions that seek information about any party's medical, psychological, or similar records are **not** permitted unless the party has given written consent.

Questions about other records protected by a legally recognized privilege are also **not** permitted unless the party waives the privilege.

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May the investigator make recommendations in the investigative report?

Yes.

The Title IX regulations do not require or prohibit an investigator from making a recommendation with respect to a determination regarding responsibility.

The preamble to the regulations states: "The Department does not wish to prohibit the investigator from including recommended findings or conclusions in the investigative report. However, **the decision-maker is under an independent obligation to objectively evaluate relevant evidence**, and thus cannot simply defer to recommendations made by the investigator in the investigative report."

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During the decision-making phase, can the **investigator** respond to questions from a party or from the decision-maker, about the investigator's report or recommendations?

Yes. The regulations contemplate that the investigator may respond to such questions during the decision-making phase of the grievance process, provided that such questions are determined to be relevant by the decision-maker.

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Can a **Title IX Coordinator** serve as a non-decision-making procedural facilitator during the decision-making phase of the grievance process?

Yes.

Such a role for the Title IX Coordinator must be distinct and separate from the "decision-maker" whose role is to, among other obligations, objectively evaluate all relevant evidence, apply the standard of evidence to reach a determination regarding responsibility, and issue the written determination.

In performing such a role, the Title IX Coordinator (like the decision-maker and other Title IX personnel) must **not** have a conflict of interest or bias for or against complainants or respondents generally or against an individual complainant or respondent.

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May a school district divide the decision-making steps of the grievance process into a "responsibility" phase and a "sanctions" phase?

Yes, with some limitations.

The regulations do not preclude a school from using one decision-maker to reach the determination regarding responsibility, and having another decision-maker determine appropriate remedies (for a complainant) or appropriate disciplinary sanctions (for a respondent).

However, the end result must be a single, unified written determination that includes **both** the determination of responsibility and, if appropriate, any remedies and sanctions. According to the US DOE, "The issuance of a written determination cannot be a piecemeal process that is broken down into chronologically occurring sub-parts."

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If a complainant or respondent are no longer students, and are not attempting to participate in the school's education programs or activities, do they still have a right to **appeal** the decision?

- The Title IX regulations grant complainants and respondents equal rights to appeal, and to participate in any filed appeal.
- The regulations do **not** condition those rights on whether a complainant or respondent is enrolled or employed by the school district, participating in the school district's education programs or activities, or otherwise has an affiliation or relationship to the school district.
- As far as the complainant, a complainant who wishes to file a formal complaint must be participating or attempting to participate in the school's education program or activity **at the time they file**. Once this requirement is satisfied at the time of filing, it is not affected by a complainant's later decision to leave the school.

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May a school put in place rules of decorum or other rules for advisors, parties, and witnesses to follow?

Yes. For example, a school may prohibit advisors from participating in an abusive, intimidating, or disrespectful manner.

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.

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May a school district delegate some of the functions required by the Title IX regulations to an outside entity, such as a consortium of schools?

Yes. In particular, many of the elements of the investigation and decision-making processes lend themselves to delegation.

Some applicable limits on delegation:

- The Title IX Coordinator(s) must always be an employee of the school district, and a Title IX Coordinator must **not** serve as a decision-maker in the grievance process.
- The school district remains ultimately responsible for ensuring compliance with the legal obligations established by the Title IX regulations.
- All persons involved in the Title IX processes must have received all required training.
- *See also the slide, above, regarding having different decision-makers make the determination of responsibility versus the determination of remedies and sanctions.*

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

The **grievance process** required for formal sexual harassment complaints does **not** apply to complaints alleging discrimination based on pregnancy, different treatment based on sex, or other forms of sex discrimination.

Instead, Title IX regulations state that schools must:

- Have a Title IX Coordinator to receive complaints of any such "non-harassment" sex discrimination, and
- Respond to these complaints using the "prompt and equitable" **grievance procedures** that schools have been required to adopt and publish for many years.

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

OCR has considered whether the procedures have provided for adequate, reliable, and impartial investigation of complaints; designated and reasonably prompt time frames for the complaint and resolution process; and notice to the parties of the outcome of a complaint.

OCR has also explained that a grievance procedure cannot be prompt or equitable unless affected persons know it exists, how it works, and how to file a complaint. Therefore:

- OCR has historically looked to whether and how schools have communicated information about their procedures, including where to file complaints, to students, parents/caregivers (for elementary and secondary school students), and employees.
- The procedures should be written in language appropriate to the age of the school's students, easily understood, and widely disseminated.

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

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. This may include, for example, reported sexual misconduct that:

(1) occurs outside of a school's "education program or activity";

(2) occurs outside of the United States; or

(3) causes harm in the school environment that does not fit within Title IX's unique definition of sexual harassment.

Title IX's sexual harassment regulations 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.

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If an allegation of misconduct does **not** meet Title IX's definition of sexual harassment, can a district's designated Title IX personnel still participate in the processing of the report/complaint and follow procedures similar to Title IX "grievance process"?

The Title IX regulations do **not** preclude a school from using the same Title IX personnel (including the Title IX Coordinator, investigators, and decision-makers) to review and investigate allegations of misconduct that fall outside the scope of Title IX.

Similarly, the regulations do **not** preclude a school from using a grievance process that complies with § 106.45 with respect to allegations that fall outside the scope of Title IX.

HOWEVER, neither the WASB nor Boardman & Clark has recommended using the Title IX grievance process in situations where it is not mandatory to do so. A school may respond to non-Title IX misconduct under disciplinary procedures that do not comply with §106.45.

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May a school discipline a complainant, respondent, or witness for engaging in conduct during a reported incident of sexual harassment if that conducted violated a separate code of conduct provision or policy?

The regulations prohibit "charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or formal complaint of sexual harassment [i.e., collateral conduct], for the purpose of interfering with any right or privilege secured by Title IX or [its implementing regulations]."

The preamble explains that if a school punishes an individual for violations of other school policies, it will be considered retaliation if the punishment is for the purpose of interfering with any right or privilege secured by Title IX.

The preamble adds that if a school has a zero tolerance policy that always imposes the same punishment for such conduct regardless of the circumstances, imposing that punishment would **not** be for the purpose of interfering with any right or privilege secured by Title IX and thus, would not be considered retaliation.

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

Yes.

The Department is aware that some schools have adopted "amnesty" policies designed to encourage students to report sexual harassment. Under these policies, students who report sexual misconduct (whether as a victim or witness) will not face consequences for school code of conduct violations relating to the sexual misconduct incident.

Note: K-12 districts rarely include such provisions in their local policies. The authority to consider an "amnesty" provision is different from a conclusion that they will always be desirable or always function as intended.

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Is a school district required to notify a parent or guardian of reported sexual harassment that affects that parent or guardian's student?

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 school may need to notify a parent or legal guardian so that the school 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 schools 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 school 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.

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What happens to Title IX records following the required seven-year retention period specified in the federal regulations?

While the final regulations require certain records to be kept for seven years, nothing in the final regulations prevents school districts from keeping their records for a longer period of time if the school district wishes or due to other legal obligations.

The extensive record-keeping obligations under the regulations are found primarily in §106.45(b)(10).

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If a school district uses contractors/consultants to provide the training required for Title IX personnel, such that the school district does not own or control the training materials, is the district still required to post the training materials on its website?

Yes.

In such a circumstance, a school district would need to secure permission from the contractor/consultant to publish the training materials, or alternatively, the district could create its own training materials over which the district has ownership and control.

Similarly, a school district still needs to post its training materials if it participates in a consortium or otherwise delegates investigative or adjudicative functions. In a consortium scenario, the posting obligations may be satisfied by publishing training materials by way of hosting these documents on a shared website, so long as they are publicly available.

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Part 2

WASB
WISCONSIN ASSOCIATION OF SCHOOL BOARDS

- Considerations for the refinement of local policies and procedures

BoardmanClark

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About Part 2 of this update…

- When a slide in Part 2 provides sample language attributed to the OCR Q&A, it is from the Q&A dated July 20, 2021. As conveyed in that OCR Q&A document:
  - The samples provided are not intended to be comprehensive. (i.e., the examples address discrete issues that would be part of a comprehensive policy/procedure approach to Title IX).
  - Schools may use the example policy language to guide the creation of their own policies but are not required to do so. OCR does not endorse these provisions in particular, nor does it prefer or support these examples as compared with others.
  - Adoption of one or more of the examples does not, by itself, demonstrate compliance with Title IX.
- A school considering any of the examples needs to ensure the example fits into the entirety of its local policies/procedures.

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Sample language from the OCR Q&A related to complainant reports of sexual harassment and the related rights of a complainant

"Choosing to make a report, file a formal complaint, and/or meet with the Title IX Coordinator after a report or formal complaint has been made, and deciding how to proceed, can be a process that unfolds over time. You do not have to decide whether to pursue a formal complaint or to name the other party/ies at the time of the report. Reporting does not mean you wish to pursue a formal complaint—it may mean you would like help accessing resources and supportive measures. You do not have to pursue a formal complaint to take advantage of the supportive measures available to you."

- Language similar to the excerpt above might also be incorporated in notices/information that that Title IX Coordinator provides to a complainant as part of the Coordinator's duty to contact each complainant.

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Sample language from the OCR Q&A related to the concept of "supportive measures."

"Supportive measures are available regardless of whether the complainant chooses to pursue any action under this school's policy, including before and after the filing of a formal complaint or where no formal complaint has been filed."

"These supports will be available to both parties, free of charge. These supports are non-disciplinary and non-punitive individualized services designed to offer support without being unreasonably burdensome. They are meant to restore access to education, protect student and employee safety, and/or deter future acts of sexual harassment. Supportive measures are temporary and flexible, based on the needs of the individual and may include [examples are given] … ."

"Generally, supportive measures are meant to be short-term in nature and will be re-evaluated on a periodic basis. To the extent there is a continuing need for supportive measures after the conclusion of the resolution process, the Title IX Coordinator will work with appropriate school resources to provide continued assistance to the parties."

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Clearly define "day" or "days" in connection with deadlines / time frames.

- The regulations do not require a specific method of calculating "days."
- The time frames referred to in the Title IX regulations may be measured by calendar days, business days, school days, or any other reasonable method that works best with the school's administrative operations.
- Due to the high potential for ambiguity and inconsistency in the use of the term, provide an express definition of "days" when the term is used without any further descriptor, and carefully and consistently use clarifying descriptors (e.g., "school days") when the district wishes to adopt and give notice of a specific usage.
- See also the slide, above, addressing: What is the appropriate length of time for a school's investigation into a complaint of sexual harassment?

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Sample language from the OCR Q&A for defining the standard of proof.

A school's grievance process must state whether the standard of evidence or proof to be used to determine responsibility is the preponderance-of-the-evidence standard or the clear-and-convincing-evidence standard.

- The preponderance-of-the-evidence standard (**the most common and choice and the choice recommended by many school attorneys**) means, "The decision-maker must determine whether alleged facts are more likely than not to be true."
- The clear-and-convincing-evidence standard means, "The decision-maker must determine whether it is "highly probable" that the alleged facts are true."

Reminder: A school must apply the same standard of proof to all formal complaints of Title IX sexual harassment, whether made by (or made against) a student or an employee.

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Do **not** include language stating, "If a party or a witness does not participate in the grievance process, that individual's statements cannot be relied on by the decision-maker in determining whether the respondent engaged in the alleged sexual harassment."

First, this entire concept was tied to the live hearings that postsecondary institutions were required to hold.

Second, a recent court ruling cast doubt on the concept even as to postsecondary institutions.

Third, it departs even from some well-established exceptions to the hearsay rules of evidence that apply in civil court cases.

Fourth, it likely departs from the rules that the school district would apply in matters such as student expulsion cases or employee termination hearings or grievances. Most districts have an interest in avoiding such differences except where strictly necessary.

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Sample language from the OCR Q&A that explains the general rule of non-relevance of the parties' past sexual history, as well as limited exceptions to the general rule.

Sample 1

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

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Sample language from the OCR Q&A that explains the general rule of non-relevance of the parties' past sexual history, as well as limited exceptions to the general rule. (edited where indicated by […])

Sample 2

[Except as permitted by the federal Title IX regulations, the investigator will not consider evidence regarding the complainant's sexual predisposition or prior sexual behavior sexual history. In limited circumstances, sexual history may be directly relevant to the investigation. For example,] "[w]here the parties have a prior sexual relationship and the existence of consent is at issue, the sexual history between the parties may be relevant to help understand the manner and nature of communications between the parties and the context of the relationship, which may have bearing on whether consent was sought and given during the incident in question. Even in the context of a relationship, however, consent to one sexual act does not, by itself, constitute consent to another sexual act; in addition, consent on one occasion does not, by itself, constitute consent on a subsequent occasion. The investigator will determine the relevance of this information and both parties will be informed if evidence of prior sexual history is deemed relevant."

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Definitions of "consent" when an allegation of harassment involves sexual contact or sexual assault

According to OCR:

- 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)."
- 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."
- Consent is sometimes irrelevant (e.g., in a case of alleged sexual contact between an employee and a minor).

There can be advantages to expressly defining "consent" in advance within the district's written policies and procedures so that there is no question as to the locally-applicable standard.

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Sample language from the OCR Q&A regarding the "presumptions" built into the reporting and complaint processes (edited where indicated by […])

"The school presumes that reports [and formal complaints] of prohibited conduct are made in good faith. A finding that the alleged behavior does not constitute a violation of this school's policy or that there is insufficient evidence to establish that the alleged conduct occurred as reported does not mean that the report was made in bad faith." " … However, if the evidence establishes that the [report or] formal complaint was intentionally falsely made, corrective/disciplinary action may be taken, up to and including suspension, expulsion, or termination."

"An individual's status as a respondent will not be considered a negative factor during consideration of the [allegations]. Respondents are entitled to, and will receive the benefit of, a presumption that they are not responsible for the alleged conduct until the grievance process concludes and a determination regarding responsibility is issued. Similarly, credibility determinations will not be based on a person's status as a complainant, respondent, or witness."

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Sample language from the OCR Q&A regarding sanctions and remedies following a determination of responsibility (edited where indicated by […])

Example 1:

"The school will take reasonable steps to address any violations of this policy and to restore or preserve equal access to the school's education programs or activities. Sanctions for a finding of responsibility depend upon the nature and gravity of the misconduct, any record of prior discipline for similar violations, or both.

The range of potential sanctions and corrective actions that may be imposed on a student includes, but is not limited to the following: [list of possible sanctions decided on by the school]."

[The range of potential sanctions and corrective actions that may be imposed on an employee or other non-student includes, but is not limited to the following: [list of possible sanctions decided on by the school]].

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Sample language from the OCR Q&A regarding sanctions and remedies following a determination of responsibility (edited where indicated by […])

Example 2:

"When a respondent is found responsible for the prohibited behavior as alleged, sanctions are based on the severity and circumstances of the behavior. [Insert examples of the of possible sanctions.] When a respondent is found responsible for the prohibited behavior as alleged, remedies must also be provided to the complainant. Remedies are designed to maintain the complainant's equal access to education and may include supportive measures or remedies that are punitive or would pose a burden to the respondent."

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Sample language from the OCR Q&A regarding sanctions and remedies following a determination of responsibility

Example 3:

"Whatever the outcome of the investigation, hearing, or appeal, the complainant and respondent may request ongoing or additional supportive measures. Ongoing supportive measures that do not unreasonably burden a party may be considered and provided even if the respondent is found not responsible."

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Sample language from the OCR Q&A regarding sanctions and remedies following a determination of responsibility (edited where indicated by […])

Example 4:

"… The school must disclose to the complainant the sanctions imposed on the respondent that directly relate to the complainant when such disclosure is necessary to ensure equal access to the school's education program or activity."

["Remedies and supportive measures that do not impact the respondent should not be disclosed in the written determination; rather the determination should simply state that remedies will be provided to the complainant."]

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Sample language from the OCR Q&A regarding sanctions and remedies **when a student with a disability is involved**. (edited where indicated by […])

"For students with disabilities: If a decision-maker has determined that the respondent has engaged in sexual harassment and prior to consideration of imposing a long-term suspension, reassignment, or recommendation for expulsion, the following shall occur, and timelines will be extended accordingly: (1) For any student with an Individualized Education Program (IEP), or that a school has knowledge may be a child with a disability, the decision-maker will make a referral to the school to conduct a manifestation determination review (MDR). The MDR team meeting shall convene as soon as reasonably possible and make available to the decision-maker the MDR decision and written rationale in no later than ten school days; (2) For any student with a disability covered by Section 504, the decision-maker will make a referral to have a knowledgeable committee convene a Section 504 Causality Review. The causality review meeting shall convene as soon as reasonably possible and make available to the decision-maker the causality review decision and written rationale in no later than ten school days; (3) Before a student with a disability is suspended, reassigned, or recommended for expulsion, the principal of the school will consult with the student's case manager, review the student's IEP [if applicable], and take into account any special circumstances regarding the student. … [For any student with an Individualized Education Program (IEP)], it is the duty of the IEP team at its meeting to discuss, propose, and decide upon the educational placement, consistent with the disciplinary decision. ..."

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Sample language from the OCR Q&A regarding appeals procedures

The OCR Q&A from July 2021 (Appendix Section XIV) contains lengthy examples of language that addresses appeal procedures:

- Example 1 and Example 2 both restrict appeals to the mandatory grounds for appeal that are required under the regulations.
- Example 3 allows appeals by the parties on two additional, discretionary grounds:
  1. The determination regarding the policy violation was unreasonable based on the evidence before the decision-maker; and
  2. The sanctions were disproportionate to the hearing officer's findings.

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Sample language from the OCR Q&A addressing rights of parents and guardians (edited where indicated by […])

"Consistent with the applicable [state] laws …, a student's parent or guardian must be permitted to exercise the rights granted to their child under this school's policy, whether such rights involve requesting supportive measures, filing a formal complaint, or participating in a grievance process. A student's parent or guardian must also be permitted to accompany the student to meetings, interviews, and hearings, if applicable, during a grievance process in order to exercise rights on behalf of the student. [A student who is a party to a formal complaint is entitled to] an advisor of [their] choice who [may be] a different person from the parent or guardian."

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Sample language from the OCR Q&A that addresses alleged misconduct that the school concludes does **not** fall under the purview of the federal Title IX regulations (edited where indicated by […])

"The Title IX Coordinator must dismiss [a] formal complaint [for purposes of Title IX] [to the extent] the conduct alleged in the formal complaint would not constitute sexual harassment as defined by [the federal Title IX regulations] even if proved, or is outside the [Title IX] jurisdiction of the school, i.e., the conduct did not involve an education program or activity of the school, or did not occur against a person in the United States. [As to any allegations dismissed on this basis, the] Title IX Coordinator shall forward the complaint to an appropriate school official [to] determine whether the conduct alleged in the formal complaint [may violate] a separate policy or code of conduct [provision] [or separate District directive]. [The District may pursue a resolution of such allegations through appropriate procedures.]"

- There are many possible ways to address this issue, and this is just one example.

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Part 3

- A look at where the U.S. DOE appears to be headed with Title IX

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Pending US DOE review of the 2020 amendments to the Title IX regulations

Under the Biden administration, the **U.S. Department of Education has announced** that it is undertaking a comprehensive review of the Title IX regulations (including the 2020 amendments to the regulations) and that it may pursue amendments to the regulations at some point.

The administration's current target for issuing new proposed rules is around mid-2022. However, even if the formal amendment process begins in that time frame, it would take many months to complete.

In the meantime, the 2020 Title IX regulations remain in full effect **except** for a provision affecting the procedures of postsecondary institutions (i.e., colleges and universities) that was vacated by a federal court decision that was issued during the summer of 2021. A short **summary of that federal court case** was issued by the U.S. Department of Education on August 24, 2021.

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Sources

- The current federal Title IX regulations as published in the e-CFR
- U.S. Department of Education "Q&A" guidance on the Title IX regulations
  - July 2021; https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf
  - January 2021 Part 1; https://www2.ed.gov/about/offices/list/ocr/docs/qa-titleix-part1-20210115.pdf
  - January 2021 Part 2; https://www2.ed.gov/about/offices/list/ocr/docs/qa-titleix-part2-20210115.pdf
  - September 2020; https://www2.ed.gov/about/offices/list/ocr/docs/qa-titleix-20200904.pdf

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