



## OCR issues Title IX Q&A guidance — a resource in an evolving landscape

By Steven M. Richard

On July 20, 2021, the Department of Education's Office for Civil Rights (OCR) issued a Title IX guidance document titled [Questions and Answers on the Title IX Regulations on Sexual Harassment \(July 2021\)](#), which provides insights regarding OCR's enforcement of Title IX while the office undertakes a review of the Title IX sexual harassment regulations that took effect on August 14, 2020. In a question-and-answer format, OCR addresses critical decision points in a school's response to alleged Title IX sexual harassment. The appendix provides examples of Title IX policy language, but OCR states the caveat that it is not endorsing any of the provisions.

OCR issued the guidance on the six-month anniversary of the Biden administration, the latest step in an evolving Title IX administrative landscape. In the early days of his administration, President Biden issued [Executive Order 13988](#), dated January 20, 2021, on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, and [Executive Order 14021](#), dated March 8, 2021, on Guaranteeing an Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity. Between June 7 and 11, OCR held a virtual national public hearing, receiving more than 280 comments on Title IX concerns. OCR has published the resulting 960-page [transcript](#). These comments supplement the more than 124,000 written submissions previously received during the Trump administration's adoption of the Title IX regulations.

Significantly, OCR has published [official notice](#) that it will begin the rulemaking process to amend the Title IX regulations by May 2022. Further, the Department of Education issued a [Notice of Interpretation](#) that OCR will "fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity." President Biden has nominated Catherine Lhamon to be assistant secretary for civil rights (the position she held during the Obama administration), and the nomination is proceeding through the Senate confirmation process along party lines.

The Q&A guidance document addresses 17 topics through 67 questions and answers. In doing so, OCR makes clear that "the 2020 amendments remain in effect." In its answers, OCR cites and quotes extensively the Title IX regulations and the preamble's explanations. OCR emphasizes that the "2020 amendments set out the minimum steps that a school must take in response to notice of

alleged sexual harassment,” and that “[a] school may take additional actions so long as those actions do not conflict with conflict with Title IX or the 2020 amendments.”

Here are some of the Q&A’s noteworthy issues and the considerations that can arise in their implementation.

### **Responding to alleged sexual misconduct that does not meet the regulation’s definition of Title IX sexual harassment**

OCR states that “Title IX is not the exclusive remedy for sexual misconduct or traumatic events that affect students.” OCR recognizes that schools retain discretion in how they will respond to alleged sexual misconduct that does not constitute Title IX sexual harassment. For uniformity, some schools apply the Title IX grievance process for all reported sexual misconduct, while others address non-Title IX sexual misconduct under codes of conduct. OCR notes that, while it does not enforce codes of conduct, it may investigate complaints that a school has applied its code differently based on sex, including sexual orientation and gender identity.

While OCR notes that schools have the discretion to apply distinct procedures to non-Title IX sexual misconduct, schools must still understand and adhere to their jurisdictions’ legislative and judicial requirements. State statutes may prescribe definitions and procedures. Federal courts have held that constitutional due process at public institutions requires the cross-examination of witnesses. Interpreting “fundamental fairness” under contract law, courts have closely scrutinized student conduct procedures. Judges have enjoined processes or vacated results for reasons such as inadequate notice, untimely or incomplete access to evidence, or the inability to confront witnesses.

### **Alleged sexual harassment that occurred before the regulations took effect**

The Title IX sexual harassment regulations took effect on August 14, 2020, and are not retroactive. OCR states that “a school must follow the requirements of the Title IX statute and the regulations that were in place at the time of the alleged incident; the 2020 amendments do not apply to alleged sexual harassment occurring before August 14, 2020. This is true even if the school’s response was on or after this date.” OCR references rescinded guidance documents, including the Obama-era April 2011 Dear Colleague Letter and April 2014 Questions & Answers, as resources for schools to consider when determining how to address alleged Title IX sexual harassment that predates the regulations.

Notwithstanding OCR’s position regarding non-retroactivity, a New York federal court enjoined a school last fall from applying its 2018 policy to a complaint regarding an incident that occurred before August 14, 2020. While the number of reports of alleged Title IX sexual harassment pre-dating the regulations will diminish as time passes, schools cannot assume that a court will agree that prior student conduct procedures, rather than a grievance process consistent with the regulations, will meet judicial approval.

### **Education program and activities (including electronic and online platforms)**

OCR reminds schools that the regulations apply to reports of Title IX sexual harassment in education programs and activities in the United States, including in the following settings: (1) buildings or locations that are part of the school’s operations, including remote learning platforms;

(2) off-campus settings where the school exercised substantial control over the respondent and context in which the alleged harassment occurred; and (3) off-campus buildings owned or controlled by a student organization officially recognized by the college or university, such as a building owned by a recognized fraternity or sorority. OCR also emphasizes that schools must address behaviors over computer and internet networks, digital platforms, or computer hardware or software owned or used in the school's operations. OCR recommends that schools should include examples of their on-campus and off-campus programs and activities in their policies, trainings, and student-oriented communications.

In practice, the jurisdictional lines of demarcation are often not easily defined, especially with changes in modes of program instruction and limitations of on-campus activities necessitated by the pandemic. Schools face vexing strategic choices concerning their budgetary and operational plans for this year and beyond — when and how to return their community to campus, the extent to which virtual student and instruction and usage of remote workforces will continue, and the implementation of new hybrid models. Through consultation with key, cross-functional stakeholders, schools must reassess the full scope of their education programs or activities subject to the Title IX regulations. The Title IX jurisdictional analysis cannot rely upon purely geographic tests and must avoid drawing immovable lines.

### **Presumption of no responsibility**

Under Title IX, schools must presume that the respondent is not responsible for the alleged sexual harassment. OCR poses the question: “Does this mean the school must also assume that the complainant is lying or that the alleged harassment did not occur?” OCR responds that “[a] school should never assume that a complainant of sexual harassment is lying or that the alleged harassment did not occur.” It warns that “[s]chools that have relied upon [the presumption of non-responsibility] to decline services to a complainant or to make assumptions about a complainant's credibility have done so in error.”

In light of OCR's statements, starting with the initial response to a report and throughout a grievance process, a school must document thoroughly its balanced interactions with the parties. All participants in a school's response must assess the impacts of their decisions to avoid actual or perceived bias under highly emotional circumstances.

### **Role of the advisor in cross-examination**

OCR states that “an advisor's cross-examination role [at the live hearing] ‘is satisfied where the advisor poses questions on a party's behalf, which means that an assigned advisor could relay a party's own questions to the other party or witness.’ Thus, for example, a postsecondary school could limit the role of advisors to relaying questions drafted by their party.” OCR offers no details or suggestions regarding the practical considerations of how a school can impose such a limitation, which could impair or affect the flow and content of a live cross-examination (which may include questions based upon the testimony, as opposed to being scripted in advance). Such an imposed limitation could intrude upon the interactive strategic discourse between an advisor and party, especially where the advisor is an attorney and issues of attorney-client privilege could be implicated.

### **Consideration of disabilities**

Within the Q&A, OCR reinforces the necessity of reasonable accommodations to assist a person with a disability during the grievance process, including the possibility of temporarily postponing a

hearing. Appropriate technological accommodations should be considered proactively when conducting interviews or hearings virtually. Also, the impacts of an accommodation must be evaluated globally in the grievance process to ensure the maintenance of a level playing field for both parties.

## **Takeaways**

As OCR makes clear, “[t]his Q&A resource does not have the force and effect of law and is not meant to bind the public or regulated entities in any way. This document is intended only to provide clarity to the public regarding OCR interpretation of existing legally binding statutory and regulatory requirements. As always, OCR’s enforcement of Title IX stems from Title IX and its implementing regulations, not this or any other guidance documents.” Nonetheless, the guidance document offers a functional resource for interpretive assistance, including its appendix providing examples of policy language. The guidance encourages schools to exercise their discretion beyond the requirements of the 2020 Title IX regulations, which again constitute “the minimal steps that a school must take in response to alleged sexual harassment.”

The Q&A addresses Title IX requirements that have been front and center within Title IX, human resources departments, and student conduct offices since last May (when the Title IX regulations were first published). Applying Title IX’s statutory and regulatory provisions and aided by OCR’s guidance documents, schools must understand precisely what Title IX mandates and evaluate whether they wish to implement measures beyond the requirements of the Title IX regulations.

In sum, since the Biden administration took office on January 20, 2021, the past six months have signaled new directions in Title IX. By next year, OCR will issue amendments to the Title IX regulations (first for public comment and then adoption), which could require schools to make significant operational alterations and policy revisions. Until that time, schools must exercise adaptability as they address their still-evolving Title IX obligations.

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