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United States District Court, N.D. New York.

John **DOE**, Plaintiff,
v.
RENSSELAER POLYTECHNIC INSTITUTE, Defendant.

1:20-CV-1185
|
Signed 10/16/2020

Attorneys and Law Firms

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MEMORANDUM–DECISION and ORDER

DAVID N. HURD, United States District Judge

I. INTRODUCTION

***1** On Monday, September 28, 2020, the Court granted a motion for a temporary restraining order ("TRO") by plaintiff John **Doe** ("**Doe**" or "plaintiff") under Federal Rule of Civil Procedure ("Rule") 65. Essentially, plaintiff asked the Court to halt an imminent disciplinary hearing brought against him by defendant **Rensselaer Polytechnic Institute** ("RPI" or "defendant") to address a fellow student's accusation that he sexually assaulted her. Plaintiff alleges that defendant is discriminating against him on the basis of sex in contravention of Title IX of the Education Amendments of 1972 ("Title IX") through procedural irregularities in its disciplinary process and its disposal of his own Title IX sexual assault complaint. At 10:00 a.m. on Thursday, October 8, 2020, the parties presented oral argument on the question of whether that TRO should be converted into a preliminary injunction. That issue, having been fully briefed, will now be decided on the basis of the parties' submissions and oral argument.

II. BACKGROUND

At all relevant points for this case, **Doe** has been a student at RPI. Plaintiff alleges he chose defendant because it has a high-ranking engineering pedigree and the various technological assets that ranking brings with it. However, plaintiff did not choose to live on defendant's campus, instead opting to live nearby in Troy, New York.

In November of 2019, **Doe**, a senior, and female RPI freshman Jane Roe ("Roe") met through the online dating application Tinder. Dkt. 10-6 ("Roe Int. 1"), pp. 5, 9.[1] Plaintiff and Roe spoke through varied electronic media periodically throughout the end of the Fall 2019 semester and over the winter break in advance of the Spring 2020 semester. Dkt. 10-15, p. 3. Upon returning to Troy in advance of the Spring 2020 semester, plaintiff and Roe met in person and had consensual sex on multiple occasions in January of this year. *Id.* at 3, 9.

One morning after Roe had slept over at **Doe's** apartment, Roe alleges that she discovered that plaintiff had been using his cell phone to record video of her as she was dressing. Roe Int. 1, p. 6. Roe claims she was immediately disturbed by plaintiff's surreptitious filming, and asked a friend to pick her up from plaintiff's apartment. *Id.* That friend then apparently confronted plaintiff about the video, and plaintiff reassured him that the video had been deleted from the phone. *Id.*

Either late in the night of January 22 or early in the morning of January 23, 2020, Roe invited **Doe** to her dorm room again. Roe claims that she agreed to discuss with plaintiff her anger at his having filmed her, which was a conversation that she did not feel comfortable having at his off-campus apartment. Roe Int. 1, p. 6. Plaintiff alleges that he was too drunk to drive, so he walked to her residence hall and joined Roe in her room. Dkt. 10-15, p. 9. Once there, both plaintiff and Roe agree that plaintiff had multiple drinks of vodka. Dkt. 1-11 ("Plf. Appeal"), p. 2; Dkt. 10-14 ("Roe Int. 2"), pp. 7-8. Plaintiff then alleges, and based on her own eventual Title IX complaint against him Roe does not disagree, that the

two of them had consensual sex. Dkt. 1-10, p. 2 ("Roe Cmpt.").

***2** Roe and **Doe's** narratives of their encounter that night and morning diverge at approximately 3:00 a.m. To hear plaintiff tell it, Roe remained sober the entire night while she plied him with excessive amounts of alcohol. Dkt. 10-15, p. 9. He alleges that Roe eventually began to pressure him to have sex with her again, but he refused because he had only brought one condom and did not want to have unprotected sex. *Id.*

However, **Doe** eventually gave in and had sex with Roe again. Dkt. 10-15, pp. 9-10. Plaintiff claims that he remembers only pieces of this round of intercourse, but he claims to distinctly remember that Roe asked him to put his hands around her neck, even though this made him uncomfortable. *Id.* at 10. Plaintiff eventually complied, if only briefly. *Id.* Roe agrees that she requested that plaintiff put his hand on her neck and provide pressure, but she claims that this happened during their first, consensual encounter on that night. Dkt. 10-14 ("Roe Int. 2"), p. 10.

Doe further alleges that Roe then began to pressure him into having anal intercourse with her. Dkt. 10-15, p. 10. He also claims that eventually, despite his recurring protest that he did not wish to engage in intercourse without a condom, he had anal sex with Roe for "about ten seconds" before stopping because he felt uncomfortable. *Id.* Plaintiff claims that after he and Roe concluded their second intercourse, he needed to ask her to get him water because he was too drunk to get out of bed. *Id.*

Roe agrees that **Doe** had trouble getting out of her bed at one point during the night of January 22. Roe Int. 2, p. 7. She also noted during an interview with a Title IX investigator that plaintiff had been "getting kind of weird" and that he informed her he was under the influence of "a couple substances," which caused him to act "different from usual." Roe Int. 1, p. 6.

The next morning, plaintiff left Roe's room because she needed to go to class. Dkt. 10-15, p. 10. Plaintiff alleges that the psychological damage from being pressured into sex with which he was not comfortable forced him to take a medical leave from school. *Id.*

By contrast, Roe alleges in her Title IX complaint that after the initial consensual encounter, she and **Doe** began to argue. Roe Cmpt. p. 2. In the midst of this argument, she asserts that plaintiff again put his hand around her neck and squeezed—this time both in a non-sexual context and without her consent—which caused Roe to be afraid for her safety. *Id.* She further alleges that between 3:00 a.m. and 5:00 a.m., plaintiff rubbed his penis against her back, buttocks, and legs without her consent. *Id.* At her eventual interview with the Title IX investigator assigned to her case, Roe also said that she may have unwillingly engaged in sexual intercourse with plaintiff because she was afraid he would hurt her if she denied him and in the hope that if she complied he would just go to sleep and the encounter would be over. Roe Int. 1, p. 14.

But according to Roe, her compliance was not the end of it. At about 9:00 a.m. on January 23, 2020, Roe alleges that **Doe** again engaged in sexual activity with her without consent. Roe Cmpt. p. 2. Eventually, Roe complained to plaintiff that the sex was painful, at which point plaintiff apparently continued intercourse while asking her if she would like him to stop. Roe Int. 1, p. 7. Roe responded that she would, and plaintiff continued for a "couple more seconds longer" before stopping. *Id.*

***3** On January 27, 2020, Roe's resident advisor informed RPI that a sexual assault had allegedly taken place on January 23, 2020. Dkt. 11-1 ("Hardy Aff."), ¶ 6. On January 31, 2020, defendant notified **Doe** that it was initiating a Title IX investigation against him as a result of that incident. Dkt. 1-1, p. 2. On June 9, 2020, plaintiff filed his own Title IX complaint against Roe, alleging that he was too intoxicated to consent to sexual activity on the night of January 23. Dkt. 10-15, p. 9. Roe was interviewed by a Title IX investigator concerning her own complaint on February 3, 2020, Roe Int. 1, p. 1, and interviewed again concerning plaintiff's complaint on July 17, 2020, Roe Int. 2, p. 1.

On August 4, 2020, RPI concluded by a preponderance of the evidence that it was more likely than not that **Doe** violated the school's August 24, 2018 Student Sexual Misconduct Policy ("the 2018 policy") by sexually assaulting Roe. Dkt. 1-10, p. 2. As was his right, plaintiff requested a hearing to challenge the initial finding that plaintiff had violated defendant's sexual misconduct policy. Hardy Aff., ¶ 42. That same day, defendant dismissed plaintiff's Title IX complaint against Roe, finding that he had failed to establish his allegations by the same standard. Dkt. 1-9, p. 2.

In particular, RPI found that **Doe's** participation in complex conversation, recall of details, ability to leave and re-enter Roe's residence hall at 2:30 a.m. to smoke, and his failure to prove that he did not willingly consume alcohol or initiate sexual activity with Roe made his complaint insufficiently credible. *Id.* In fact, plaintiff was

recorded on a campus security camera leaving the residence hall at 2:30 a.m., and according to defendant his gait appeared steady on the captured footage, although plaintiff paused while climbing the stairs for an unknown reason. Dkt. 10-15, p. 12.

Doe timely appealed RPI's determination on August 11, 2020, requesting a hearing as to his claim's dismissal. Pl. Appeal p. 2. In particular, he argued that defendant: (1) overlooked facts in Roe's July 17, 2020 interview establishing that he had consumed alcohol and smoked marijuana before arriving at Roe's dorm, drank vodka "many times" while in her room, and "had trouble getting off" Roe's bed; (2) erroneously relied on the irrelevant determination that there was insufficient evidence that plaintiff was supplied alcohol against his will; and (3) erroneously relied on the irrelevant determination that plaintiff failed to prove he did not initiate sexual activity. *Id.* at 2-3. Defendant denied plaintiff's appeal on August 25, 2020, claiming that plaintiff had failed to demonstrate an error in the denial that would merit a hearing. Dkt. 1-12, pp. 2-4.

Meanwhile, far from the practical realities of **Doe's** dispute with RPI and Roe's allegations against him, the United States Department of Education advanced new regulations governing Title IX sexual assault and harassment proceedings (the "new Title IX rules" or "new rules") at covered **institutions**, which took effect on August 14, 2020. Dkt. 1-5, p. 2.

Practically speaking, the new rules would guarantee **Doe** eight rights, among others: (1) notice of the allegation, including sufficient details of the complaint and time to prepare a response; (2) the college being required to carry the burdens of proof and production against plaintiff; (3) a requirement that the evidence be evaluated objectively and not weighted differently for the complainant, respondent, or witnesses; (4) a presumption of his innocence; (5) notice of the applicable standard of proof; (6) plaintiff's ability to inspect and review evidence obtained as part of the investigation into the allegations; (7) the ability for plaintiff's advisor, be it an attorney or a school-provided counselor, to cross-examine witnesses; and (8) a limited right to appeal the school's ultimate determination. *See* U.S. Dep't of Educ., Secretary DeVos Takes Historic Action to Strengthen Title IX Protections for All Students (2020), https://www.ed.gov/news/press-releases/secretary-devos-takes-historic-action-strengthen-title-ix-protections-all-students (last visited Oct. 13, 2020).

***4** However, according both to the preamble of the new rules and to a blog post published by the Department of Education's Office of Civil Rights (the "OCR post"), the Department of Education "will not enforce [the new Title IX rules] retroactively." Dkt. 1-8 ("OCR Post") pp. 2-3. Instead, the OCR post states that a school will only be found to be noncompliant with Title IX if schools do not use the new rules to investigate and adjudicate instances of sexual harassment events "that allegedly occur[ed] on or after August 14, 2020." *Id.* at 3.

In acknowledgement of the new Title IX rules, RPI updated its Student Sexual Misconduct Policy on August 14, 2020 ("the 2020 policy"). Dkt. 1-4. **Doe** and his counsel, naturally interested in the new rules' additional protections for students accused of sexual assault, spoke to defendant's Title IX coordinator to request that the remainder of his investigation and his impending disciplinary hearing be conducted under the 2020 policy. Hardy Aff., ¶ 44. Citing the OCR post, defendant's Title IX coordinator responded that his hearing would follow the 2018 policy because the new rules were not retroactive. *See id.* ¶ 45.

On September 28, 2020, **Doe** filed a complaint alleging that RPI's handling of his cross-complaint against Roe and its refusal to employ the 2020 policy amounted to sex discrimination in violation of Title IX. Dkt. 1. With that complaint, plaintiff also moved for a TRO and a preliminary injunction to prevent defendant from moving forward with its hearing against him, at least under the 2018 policy. Dkt. 3. That same day, the Court granted plaintiff's TRO. Dkt. 6. On October 8, 2020, the Court heard oral argument as to whether the TRO should be converted into a preliminary injunction. Text Minute Entry Dated Oct. 8, 2020. All that is left is to decide that issue.

III. LEGAL STANDARD

The Second Circuit requires a plaintiff seeking a preliminary injunction to prove four elements: "(1) a likelihood of irreparable harm; (2) either a likelihood of success on the merits or sufficiently serious questions as to the merits plus a balance of hardships that tips decidedly in [the movant's] favor; (3) that the balance of hardships tips in [the movant's] favor regardless of the likelihood of success; and (4) that an injunction is in the public interest."[2] *Chobani, LLC v. Dannon Co.*, 157 F. Supp. 3d 190, 199 (N.D.N.Y. 2016) (analyzing changes to Second Circuit preliminary injunction standard and comparing existing standards). The movant must make a "clear showing" that each of these elements is met. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008).

IV. DISCUSSION

The principal dispute among the parties is the likelihood of **Doe's** success on the merits of his Title IX claims. The other requirements for preliminary relief are secondary concerns that will be discussed if plaintiff succeeds in showing a likelihood of his success on his claims.

A. Likelihood of Success on the Merits.

The precise likelihood of success that a plaintiff must show varies depending on whether a plaintiff seeks a mandatory injunction, which compels that a defendant act in a certain way that alters the status quo, or a prohibitive injunction, which only prevents a defendant from following the course it had originally intended and thus maintaining the state of affairs at the time the injunction is issued. *Tom Doherty Assocs. v. Saban Ent., Inc.*, 60 F.3d 27, 33-34 (2d Cir. 1995).

***5** A mandatory injunction should be granted "only upon a clear showing that the moving party is entitled to the relief requested, or where extreme or very serious damage will result from a denial of preliminary relief." *Id.* at 34. In other words, a motion for a mandatory injunction requires a showing of "a greater likelihood of success" than for a prohibitive injunction. *Id.*

But for a prohibitive injunction, a plaintiff must only "show a greater than fifty percent probability of success...." *Citigroup Glob. Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 34-35 (2d Cir. 2010). By extension, prohibitive relief may be warranted even though there remains "considerable room for doubt" about whether the plaintiff will ultimately prevail. *Eng v. Smith*, 849 F.2d 80, 82 (2d Cir. 1988) (quoting *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1025 (2d Cir. 1985)).

Thus, in order to know how likely **Doe's** success must be, the Court must first consider whether the injunction he requests is mandatory or prohibitive in nature. That question would do Schrödinger proud,[3] because it cannot be answered until the Court determines the scope of the injunction it would consider granting. If the Court enjoins RPI such that it must proceed with the hearing under its 2020 policy, that injunction would be mandatory, and plaintiff would need to prove a substantial probability of success on the merits. Alternatively, if the injunction were to enjoin defendant from conducting the hearing at all, that injunction would be prohibitive and plaintiff would only need to prove a probability of success greater than fifty percent.

The parties disagree what, exactly, **Doe** is seeking to enjoin. Plaintiff claimed at oral argument that he intended to compel RPI to carry out the hearing under the 2020 policy. For its part, defendant counters that an injunction, if granted, should halt proceedings in their entirety. But regardless of the parties' formulations, the scope of the injunction is ultimately the Court's own decision to make. *See Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 174 (2d Cir. 2001) (noting that district court "is vested with full discretion to determine whether to grant an injunction and its scope") (cleaned up) (citing *All. Bond Fund, Inc. v. Grupo Mexicano de Desarrollo, S.A.*, 143 F.3d 688, 692-93 (2d Cir. 1998), *reversed on other grounds sub nom. Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999)).

Thus, after some consideration, the Court will consider whether to impose the prohibitive injunction of freezing the hearing and any potential discipline altogether. Forcing RPI to conduct a hearing under the 2020 policy without a final judgment that its policies and conduct violated **Doe's** rights seems too harsh an outcome when simply halting plaintiff's hearing would protect his rights just as well with a cleaner stroke. The imminent harm plaintiff complains of—having his fate decided by an **institution** he claims is discriminating against him—would be if anything better prevented by freezing all proceedings against him than by allowing the alleged discriminator to go forward with its hearing, even with a few more procedural safeguards. Accordingly, the Court need only consider whether to enjoin defendant from proceeding with plaintiff's disciplinary hearing and thus plaintiff need only prove the greater than fifty percent likelihood of success required by prohibitive injunctions.[4] *Citigroup*, 598 F.3d at 34-35.

1. Sex Discrimination.

***6** To evaluate **Doe's** likelihood of success on his claims, the nature of the claims he is trying to prove must also be clarified. There are two. First, plaintiff alleges that RPI discriminated him on the basis of sex in violation of Title IX for electing to hold his hearing under the 2018 policy instead of the 2020 policy. Second, plaintiff claims that defendant violated Title IX by selectively enforcing its misconduct policies to his detriment by dismissing his

complaint against Roe but allowing her claim based on the same encounter to proceed.

Both of **Doe's** claims grow from Title IX's fundamental tenet that "[n]o 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[.]" 20 U.S.C. § 1681(a). As a result, Title IX bars "the imposition of university discipline where gender is a motivating factor in the decision to discipline." ***Doe*** *v. Colum. Univ.*, 831 F.3d 46, 53 (2d Cir. 2016).

For a Title IX sex discrimination claim, the Second Circuit has ruled that a university runs afoul of the statute when it: "(1) takes an adverse action against a student or employee[;] (2) in response to allegations of sexual misconduct[;] (3) following a clearly irregular investigative or adjudicative process[; and] (4) amid criticism for reacting inadequately to allegations of sexual misconduct by members of one sex[.]" *Menaker v. Hofstra Univ.*, 935 F.3d 20, 33 (2d Cir. 2019) (clarifying elements of tort first recognized in *Columbia*, 831 F.3d 46).

Additionally, both *Columbia* and *Menaker* suggest that this type of claim is to be analogized to the better-explored Title VII claim. *See Menaker*, 935 F.3d at 31 (noting that Title VII caselaw informs Title IX claims and that Title IX bars university discipline where gender is a motivating factor); *Columbia*, 831 F.3d at 53-54 (same). Accordingly, in addition to proving those four prima facie elements, a plaintiff must also prove that gender was a motivating factor in the adverse action. *Id.*

Doe's sex discrimination claim relies on the 2020 policy as evidence of both an adverse action and of a "clearly irregular investigative or adjudicative process[.]" *Menaker*, 935 F.3d at 33. As a result, the retroactivity of the new Title IX rules, and thus the question of whether defendant must use the 2020 policy to adjudicate plaintiff's hearing, is largely irrelevant to the claim. Instead, all that matters is that rather than conduct the hearing under the 2020 policy—which defendant has already designed and will implement for new Title IX complaints going forward—defendant insisted that the hearing in plaintiff's case would proceed under the 2018 policy.

In other words, whether the Department of Education would have penalized RPI for not complying with the new rules or not, it could easily have implemented the 2020 policy for **Doe's** hearing because it must implement that policy for all future Title IX complaints. Instead, defendant decided that it would be best to maintain two parallel procedures solely to ensure that at least some respondents would not have access to new rules designed to provide due process protections such as the right to cross-examination that have long been considered essential in other contexts. *See, e.g.*, *Pointer v. Texas*, 380 U.S. 400, 405 (1965) (noting that "to deprive an accused [in criminal settings] of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law").

***7** Such disregard for the inevitable administrative headaches of a multi-procedure approach certainly qualifies as evidence of an irregular adjudicative process. Similarly, the Court finds that a school's conscious and voluntary choice to afford a plaintiff, over his objection, a lesser standard of due process protections when that school has in place a process which affords greater protections, qualifies as an adverse action. That is precisely what RPI did in this case.

Doe has thus provided ample evidence to demonstrate both the elements of an adverse action and an irregular adjudicative process of his prima facie case for RPI's decision to follow the 2018 policy instead of its 2020 policy. Moreover, neither party can seriously dispute that plaintiff has been subjected to allegations of sexual misconduct. Plaintiff has thus at the very least established a reasonable probability of success on each of the first three elements of a prima facie case of discrimination under *Columbia*.

As to the fourth element, although there is little evidence in the record to date that RPI has been criticized for reacting inadequately to allegations of sexual misconduct by members of one sex, the Second Circuit has noted that "when combined with clear procedural irregularities in a university's response to allegations of sexual misconduct, even *minimal* evidence of pressure on the university to act based on invidious stereotypes will permit a plausible inference of sex discrimination." *Menaker*, 935 F.3d at 33 (emphasis in original). Accordingly, and especially given both the frequency and the publicity of universities being taken to task on this particular and serious subject, the paucity of evidence as to the fourth element at this moment does not meaningfully undermine **Doe's** probability of success at trial.

Of course, **Doe** must still show that gender was a motivating factor in RPI's decision to employ the 2018 policy instead of the 2020 policy. To defendant's point at oral argument, its decision to apply the 2018 policy for all sexual misconduct complaints filed prior to August 14,

2020 applies equally to both sexes and does not by itself provide evidence that gender played any role, let alone a motivating one, in its action.

But **Doe's** evidence of sex discrimination is not so confined as to only include RPI's conscious choice not to employ the 2020 rules to his disciplinary hearing. Rather, there are two aces up plaintiff's sleeve for that game, each tied to defendant's handling of plaintiff's complaint against Roe. First, RPI specifically noted that **Doe's** complaint against Roe was insufficiently substantiated because he failed to prove that he did not voluntarily consume alcohol and did not initiate sexual contact with Roe.

This raises a powerful inference of sex discrimination. After all, RPI's reliance on these twin findings is curious considering that even the 2018 policy makes no mention of voluntary consumption of alcohol as a factor bearing on the question of a complainant's inability to consent due to excess intoxication. Dkt. 1-2, p. 11 (defining consent under 2018 policy). Instead, that rule states that "[d]epending on the degree of intoxication, someone who is under the influence of alcohol, drugs, or other intoxicants may be incapacitated and therefore unable to consent." *Id.* Any carveout based on voluntary intoxication must be cleverly hidden indeed to hide among such plain language. *Id.*

Similarly, the 2018 policy does not provide any exceptions to the rule that "[c]onsent may be initially given but withdrawn at any time." Dkt. 1-2, p. 11. As a consequence, RPI's specific finding that **Doe** failed to prove that he did not initiate his sexual encounter with Roe is once again bizarre, since it is apparently directly contrary to defendant's own sexual misconduct policies. *Id.*

***8** In a vacuum, RPI's inventive use of its policies may not say much about the role **Doe's** gender played in the process, but Roe's complaint arising out of the same encounter was not subjected to any of these fabricated requirements. The two complaints concerned the same subject matter, of which only the two complainants had first-hand knowledge. From that duality of origin, the female's complaint proceeded without issue, the male's was struck down in part on grounds not contemplated anywhere in the policy's definition of consent. That inequitable treatment provides not inconsiderable evidence that gender was a motivating factor in RPI's treatment of **Doe**.

Second, even removing those two questionable bases from RPI's determination, the remaining evidence for and against both complaints makes defendant's differing results along gender lines seem outcome-oriented. From an evidentiary standpoint, defendant found **Doe's** complaint to be unsubstantiated based on: (1) his participation in a complex conversation; (2) his recall of details of the incident; and (3) his ability to leave Roe's room to smoke and to walk steadily at approximately 2:30 a.m., as evidenced by footage caught on a security camera. Dkt. 1-9, p. 2.

RPI's first basis appears to credit Roe's narrative of the encounter over **Doe's** without providing any reasons for doing so. Plaintiff does not describe a complex conversation at any point in his allegation, instead describing simple conversations along the lines of Roe inviting him to drink alcohol and her requests that they engage in various sex acts. Dkt. 10-15, pp. 9-10. Even Roe's first interview only described plaintiff explaining why he did not think she would care if he filmed her and then how he "g[ot] kind of weird and ... informed [her] that he was ... under the influence of a couple substances." Roe Int. 1, p. 6. Other than that, the only conversations Roe describes in that interview are plaintiff complaining of depression and his violent rage during their eventual argument. *Id.* at 13. In fact, it was only during Roe's second interview—after **Doe** had accused her—that she described him as "completely coherent" in the early morning of January 23. Roe Int. 2, p. 7.

RPI's other two remaining grounds for dismissing **Doe's** complaint fare similarly poorly when compared to the evidence that apparently sufficiently underpinned Roe's claim. For example, defendant's summary of the evidence describes plaintiff's gait as "steady" in security camera footage, but glosses over plaintiff's pausing on the stairs as he was climbing them because the reason for the pause was "not clear." Dkt. 10-15, p. 13.

By contrast, every witness interviewed for Roe's complaint told a different story of what happened between January 22 and 23 of 2020, and only one in addition to Roe herself mentioned the initial consensual sex that preceded the sexual assault that Roe alleges. *See generally id.* at 5-8. One of Roe's witnesses even stated that plaintiff "was apparently very out of it" and Roe "was allowing him ... to lay down" until he could recover enough to leave, seemingly supporting plaintiff's narrative. *Id.* at 6. And yet, Roe's complaint received the benefit of the doubt while plaintiff's did not.

Of course, the Court does not expect a person to accurately remember or relay every detail of a traumatic narrative like the ones that Roe—and plaintiff—allege. But where the allegations are so inherently intertwined

and the female's complaint is accepted, flaws and all, while the male's complaint is rejected for having similar flaws, that discrepancy lends force to the conclusion that the difference is traceable to gender discrimination.

***9** Of course, RPI might object that it is erroneous to lump together evidence of **Doe's** selective enforcement claim with his sex discrimination claim. But it would be wrong. After all, the two complaints were subject to the same investigation, see Dkt. 10-15 (summarizing evidence of both claimants' allegations), with a determination coming down on the same day, compare Dkt. 1-10 (upholding Roe's complaint against plaintiff on August 4, 2020), with Dkt. 1-9, (dismissing plaintiff's complaint against Roe on the same date). What is more, both complaints arose from the same encounter, to which only the two claimants of differing sexes were witness. Defendant's handling of these two comparators throughout this matter is thus useful to evaluate whether the complainant's sex played a role in the entirety of the relevant proceedings.

Thus, combining these two dimensions of RPI's decision to dispose of **Doe's** claim while allowing Roe's to survive, plaintiff has provided sufficient evidence to demonstrate a likelihood of success in proving that gender was a motivating factor in defendant's treatment of him since Roe first leveled her accusation.

RPI counters **Doe's** showing by arguing that he has no right to have his hearing governed by the 2018 policy because both the preamble to the new Title IX rule and the OCR post state that the Department of Education will not enforce the new rule retroactively.[5] To hear defendant tell it, the preamble and the OCR post provide it license not to impose the new rules for sexual assault allegations where the alleged assault took place before August 14, 2020. In fact, defendant argues that those statements preclude this Court from finding to the contrary because it is bound to defer to an agency's interpretations of regulations that it promulgates. *See Auer v. Robbins*, 519 U.S. 452, 459-62 (1997).

Doe fires back that the preamble does not have the force of law and that the OCR post is not due any deference because it lacks formality and does not turn on the Department of Education's substantive expertise. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019) (holding that *Auer* deference for agency's interpretations of agency regulations only applies to "an agency's authoritative, expertise-based, fair, or considered judgment" (cleaned up)).

***10** **Doe** has the better of this argument for three reasons.

First, even assuming that the preamble is entitled to deference, it would not be enforcing the new Title IX rules retroactively to use them for hearings occurring after August 14, 2020. After all, the preamble itself is unclear what it means when it discusses retroactivity.

It could mean, as RPI suggests, that the Department of Education would not sanction schools for not applying the new rules to any case where the alleged sexual assault took place before they took effect. But it could just as easily mean that schools would not face Department of Education sanctions if they did not reopen previously completed hearings that did not follow the new Title IX rules. After all, if a hearing—**Doe's**, for example—occurs under the new rules after August 14, 2020, from a certain point of view that hearing would apply the new rules prospectively because the rules were in effect before the hearing itself took place. In other words, defendant's proposed definition of retroactivity is not the only possible meaning of the word, and its argument does not powerfully sway the Court in defendant's favor.[6]

Second, **Doe** is correct that the Court is not bound to follow the OCR post because it is not an authoritative statement entitled to *Auer* deference. *Kisor*, 139 S. Ct. at 2414. As such, the OCR post's position that the relevant date for retroactivity is the date the alleged sexual assault occurred need not be the last word on the matter.

Moreover, given the logistical problems with that interpretation, the Court is not inclined to rally to that position. Under the OCR post's standard, schools may maintain two parallel proceedings until every claim of sexual misconduct allegedly occurring prior to August 14, 2020 is resolved. But it is unclear when that day would come, because there may be several claims that a sexual assault occurred prior to August 14, 2020 that have yet to be brought to a school's attention.[7] After all, under either the 2018 or 2020 policies, "[a] Complaint of Sexual Misconduct may be filed at any time, regardless of the length of time between the alleged Sexual Misconduct and the filing of the Complaint." Dkts. 1-2, p. 6; 1-4, p. 6.

It would thus be difficult for a school to provide any kind of timeframe for sunsetting its policies that predate the new Title IX rules when the anchoring principle keeping those policies alive is the hypothetical possibility that new sexual misconduct claims for sexual assaults that took place before August 14, 2020, could arise. The absurd—yet necessary—result of an **institution** following the OCR post's guidance to the letter would be that school's indefinite maintenance of an entire alternative procedure, perhaps behind a pane of glass labelled "Break in Case of Emergency," just in case a claim of sexual

assault allegedly occurring before August 14, 2020 should arise.

***11** Third and finally, RPI does not even follow the OCR post. Perhaps to avoid the exact sunsetting issue just described, defendant's 2020 policy makes the following indulgence: "[a] Complaint of Sexual Misconduct will be investigated and adjudicated using the procedural provisions of the Sexual Misconduct Policy ... *in effect at the time of the report* and the substantive provisions in effect at the time the conduct allegedly occurred." Dkt. 1-4, p. 6 (emphasis added). The OCR post makes no mention of a substantive/procedural distinction such that defendant can use the report date to provide a hard deadline to phase out the 2018 policy. *See* OCR Post, pp. 2-3. Instead, defendant made that decision for its own convenience, and could just as easily have decided to move forward under the 2020 policy for all cases.

Thus, even if RPI would not be subjected to Title IX consequences from the Department of Education for electing to use the date of the alleged sexual assault as the date that governs which policy it will use, it was still free to choose to use the 2020 policy. It decided not to, despite the sizeable administrative headaches that decision entails. Accordingly, **Doe** will have several viable arguments at his disposal in dealing with defendant's prospective non-discriminatory reason for not proceeding with plaintiff's hearing under the 2020 rules, and defendant's retroactivity argument does not dip plaintiff's showing of likely success on the merits below the requisite fifty-percent threshold.

RPI's final argument against **Doe's** likelihood of success is that in ***Doe*** *v.* ***Rensselaer Polytechnic Institute***, 2019 WL 181280 (N.D.N.Y. Jan. 11, 2019), Senior United States District Judge Frederick J. Scullin, Jr. found that its 2018 policy afforded accused students adequate due process rights and denied a preliminary injunction in similar circumstances. *Id.* at *7-8. But that case is fundamentally distinguishable from this one.

First, the new Title IX rules had not even been proposed when Judge Scullin's ***Doe*** case was decided, let alone had taken effect and been ready for RPI to implement. Thus, a determination that defendant's policies were sufficient prior to the new rules taking effect means little in the wake of the sea change to the protections afforded to sexual assault respondents at colleges and universities. ***Rensselaer***, 2019 WL 181280, at *7. Moreover, the plaintiff in the earlier case did not advance a sex discrimination claim with the substantial evidence **Doe** has marshaled now. *Id.* Instead, Judge Scullin only considered an attack on the procedure defendant employs, not an attack on how that procedure has been disparately applied to men. *Id.*

All told, RPI's arguments against **Doe's** evidence do not dissuade the Court from the conclusion that plaintiff has proven that he will likely succeed on his sex discrimination claim under *Columbia*. He has thus adequately proven his entitlement to a preliminary injunction on the first factor for his first claim.

2. Selective Enforcement.

The Court now turns to **Doe's** second claim that RPI selectively enforced its sexual misconduct policies by dismissing his claim against Roe while he remains saddled with her claim against him. As the name suggests, a selective enforcement claim "asserts that, regardless of the student's guilt or innocence, the severity of the penalty and/or the decision to initiate the proceeding was affected by the student's gender." *Yusuf v. Vassar Coll.*, 35 F.3d 709, 715 (2d Cir. 1994).

Essentially, then, a plaintiff must demonstrate that: (1) "similarly situated female students ... were treated differently during investigations and disciplinary proceedings concerning sexual assault"; and (2) the defendant "had the requisite discriminatory intent." ***Doe*** *v. New York Univ.*, 438 F. Supp. 3d 172, 181 (S.D.N.Y. 2020). Much like the *Columbia* sex discrimination standard described above, a defendant had the requisite discriminatory intent if sex was a motivating factor in its decision. *Yusuf*, 35 F.3d at 715.

***12** As with **Doe's** *Columbia* sex discrimination claim above, plaintiff has provided adequate evidence that gender has been a motivating factor in RPI's treatment of him throughout its investigation of Roe's sexual assault complaint and its dismissal of his own. Plaintiff has thus provided sufficient evidence of discriminatory intent to show a reasonable likelihood of success on the second element of his selective enforcement claim.

Similarly, it would be difficult to conceive of a more similarly situated female student to **Doe** than Roe, who was accused of sexual assault stemming from the same night and same incident that brought her allegations against him. Yet his claim against her was dismissed, while her claim against him remains. It does not bear repeating that the manner of that dismissal leaves plenty of room for skepticism as to whether plaintiff and Roe were treated the same.[8] Thus plaintiff has also proven the first element of that claim.

Because **Doe** has proven a likelihood of success on the merits of both his claims against RPI,[9] the Court turns to the irreparable harm inquiry.

B. Likelihood of Irreparable Harm.

A plaintiff seeking to demonstrate irreparable harm must demonstrate "an injury that is neither remote nor speculative, but actual and imminent." *Tucker Anthony Realty Corp. v. Schlesinger*, 888 F.2d 969, 975 (2d Cir. 1989). As is implied by "irreparable," money damages must be incapable of fully rectifying the injury. *Id.* And of course, the irreparable harm must be preventable by the injunction. *See Salinger v. Colting*, 607 F.3d 68, 80 (2d Cir. 2010) (charging district courts with considering whether plaintiff will suffer by losing preliminary injunction but prevailing on merits). Finally, irreparable harm must be "likely" to occur if the injunction is denied. *JSG Trading Corp. v. Tray-Wrap, Inc.*, 917 F.2d 75, 79 (2d Cir. 1990).

Doe argues that should the Court not enjoin RPI from proceeding under its 2018 policy, he would face the imminent and irreparable harm of participating in a disciplinary hearing that places his academic and professional future in jeopardy without confidence that he will not be subjected to discrimination on the basis of sex at that hearing. Defendant counters that this proposed injury is neither imminent nor irreparable.

RPI is wrong on both counts. But first things first. Defendant's position is that because **Doe** does not yet know the outcome of the hearing, the potential injury he complains of is purely speculative. However, the harm plaintiff risks by allowing defendant to use the 2018 policy is that in the absence of the important due process protections afforded by the new Title IX rules and the 2020 policy, plaintiff will be going into a hearing at which there is substantial evidence that the factfinder is biased against him based on his sex and will thus lean toward finding guilt based on his sex alone. It is the fear of gambling his future on a rigged game that plaintiff asks to be freed from, not the fear of losing the game itself.

***13** Conversely, if the Court enjoins RPI from conducting the hearing, **Doe's** fear would be allayed because he would not face that hearing until after the final determination on the merits of his case. Accordingly, plaintiff faces an imminent and definite harm that is directly tied to—and preventable by—a preliminary injunction.

RPI's argument that **Doe's** harm is not irreparable because he requests damages in his complaint is similarly unavailing. A harm is not irreparable only where damages are unavailable; a harm is irreparable because damages cannot adequately capture the value of the thing the plaintiff has lost. *See Eli Lilly & Co. v. Am. Cyanamid Co.*, 82 F.3d 1568, 1578 (Fed. Cir. 1996) (noting that plaintiff had failed to demonstrate irreparable harm because "under the specific circumstances of th[e] case" money damages "would be an adequate remedy" where calculating lost profits would allow for accurate determination of damages). Calculating the exact monetary value of plaintiff's right to be secure in his belief that his future will be decided fairly is a task far beyond this Court's capabilities, and thus plaintiff's argued imminent harm is also irreparable.

C. Balance of Hardships.

As such, the Court now turns to the balance of the hardships. **Doe** argues that the equities favor him because delaying RPI from conducting a single disciplinary hearing is a small ask to ensure that it is not discriminating against him. Moreover, he points out that defendant has already put the 2020 policy in place and there is little hardship to eventually resolving Roe's complaint against him through that mechanism.

RPI's counterargument is the following:

> To allow an individual *found to have violated* the Student Sexual Misconduct Policy to circumvent any and all university[-]based ramifications and sanctions ... would be an injustice and provide carte blanche for engaging in rape, sexual misconduct and sexual harassment without any possibility of university[-]based sanction.

Dkt. 10, p. 15 (emphasis added).

It is troubling enough that defendant frames protections for one individual's due process rights, whether that individual be male or female, as inciting campus sexual assault on a mass scale. But far worse is that by its own litigation position defendant seems already to be considering plaintiff to be guilty of violating the policy without giving him any opportunity to challenge its evidence. Needless to say, defendant's arguments on this point are ill-advised, and do little to demonstrate that the equities do not favor granting plaintiff's requested injunction.

Ultimately, **Doe** has shown that the balance of the hardships tips decidedly in his favor. After all, RPI's interest in punishing those it finds in violation of its sexual misconduct policy should be no greater than its interest in ensuring that its accused students are not unjustly punished to their lifelong detriment. Besides, it is tragically all too likely that more sexual assault complaints will follow this one. Delaying one hearing in light of some sobering evidence of discrimination against a male is an insubstantial loss for defendant, and certainly not an all-consuming one. But plaintiff only has one reputation, one career, and one life.

D. Public Interest.

"In exercising their sound discretion, courts of equity should pay particular regard [to] the public consequences in employing the extraordinary remedy of injunction." *Winter*, 555 U.S. at 24. Nevertheless, the parties both neglected to address this element. The Court will nevertheless assess the evidence on its own and determine whether granting **Doe's** injunction would align with the public interest.

***14** It is with no great difficulty that the Court resolves that issue in **Doe's** favor. Although RPI correctly noted at oral argument that Roe's rights need to be protected in this case as well, that protection cannot come at the expense of **Doe's** in the absence of a fair determination of his culpability. Moreover, that the new Title IX rules exist at all is evidence that national policymakers have determined that protecting the due process rights of those accused of sexual assault on college campuses is a matter of grave national import. There is no cause to actively impede those efforts by allowing a disciplinary hearing to move forward despite credible evidence of sex discrimination.

Of course, the most critical issue at stake in the change from the old Title IX rules to the new is that respondents accused of sexual assault have a right to cross-examine their accuser at a live hearing. The Court does not lightly disregard the potential that this change could discourage accusers from coming forward. But that policy determination has already been made by those charged to make those decisions, and second-guessing that choice is well beyond the scope of this litigation. Accordingly, the public interest would not be disserved by granting **Doe's** requested injunction. Quite the contrary. Thus, plaintiff has adequately demonstrated every requisite element of a preliminary injunction, and that injunction must follow.

V. CONCLUSION

The Court understands many of the impulses that may cause a school to favor women over men in the context this case presents. After all, claims of sexual assault like Roe's—and **Doe's**—are often difficult to prove. By their very nature, these claims typically involve a level of privacy that undercuts the availability of witnesses, to make no mention of the stigma that attaches so easily to sexual assault victims, the profound psychological trauma that inevitably follows sexual assault, or the age-old stereotypes that call listeners to disbelieve complainants—especially, historically speaking, women. Much work must be done to ensure that sexual predators are called to justice, and the Court does not shrink from that truth.

Instead, it is to this Court's grudging relief that its task is not to resolve the nettlesome question of how to properly create an environment such that women, who for far too long have been victimized by those stigmas and stereotypes, can feel secure enough to seek justice without allowing an accusation against a man to carry the day on its own. Rather, it is enough to say this: whatever answer may come to the question of how to secure the rights of an accusing woman and an accused man, that answer cannot be that all men are guilty. Neither can it be that all women are victims.

As the facts now stand, **Doe** has made a showing sufficient to establish a reasonable likelihood that RPI has come down on the opposite side of that truth, no matter how dysphonic their chosen path may be when this Court attempts to harmonize it with plaintiff's rights under Title IX. As a result, plaintiff has also made a sufficient showing that defendant has threatened his academic future in violation of his rights to equal treatment regardless of his sex, a harm that damages cannot make whole.

Against **Doe's** protected rights, RPI's showing of the equities amounts to hollow portents of rampant sexual assault and the impermissible assumption that plaintiff is already guilty despite not having so much as a hearing on a matter of grave import to his future. Plaintiff has thus proven each a likelihood of success on the merits, irreparable harm should a preliminary injunction not be granted, that the balance of the equities favors granting the injunction, and that the public interest would not be disserved by enjoining defendant from conducting its hearing against him. Accordingly, plaintiff's motion for a preliminary injunction must be granted. Defendant will be

enjoined from proceeding in its hearing against plaintiff until its treatment of plaintiff has been tested and this case has run its course.

***15** However, should both parties stipulate in writing to moving forward with the hearing under the 2020 policy, the Court would reconsider the ongoing necessity of this injunction. This allowance is not made because of any position concerning the retroactivity of the new Title IX rules. Instead, it is a recognition that **Doe** has made a showing that RPI's current regime may be discriminating against him on the basis of his sex, and if he is satisfied that the 2020 policy's additional protections would adequately shield him—which he has indicated that he believes they would—the Court would be willing to entertain allowing RPI to proceed. Barring that, this Court must be satisfied that defendant adequately protects male students like **Doe** before he can be threatened with discipline in this matter.

Therefore, it is

ORDERED THAT

1. Plaintiff John **Doe's** motion for a preliminary injunction is GRANTED;

2. Defendant **Rensselaer Polytechnic Institute** is enjoined from conducting a disciplinary hearing or otherwise imposing discipline or sanctions against plaintiff John **Doe** for Jane Roe's complaint of sexual assault until after the resolution of this case; and

3. Defendant **Rensselaer Polytechnic Institute** is directed to respond to plaintiff John **Doe's** complaint no later than Friday, October 30, 2020.

IT IS SO ORDERED.

All Citations

Slip Copy, 2020 WL 6118492

Footnotes

1 Pagination corresponds with CM/ECF.

2 The Second Circuit appears to still in the process of formally harmonizing its prior existing standards with the four-element test required by the Supreme Court in *Winter*, 555 U.S. at 20.

3 Schrödinger's cat is a famous paradox in which a cat is placed in an opaque box and his life or death becomes dependent on a random event. Robert Sanders, *Watching Schrodinger's Cat Die*, Berkeley News (July 30, 2014), https://news.berkeley.edu/2014/07/30/watching-schrodingers-cat-die/ (last visited Oct. 14, 2020). The gist of the thought experiment is that the cat's fate cannot be known until after the box is opened, meaning that while the box remains closed, the cat must be thought of as simultaneously alive and dead. *Id.*

4 Framing the injunction in this way also puts it a substantial distance from being one that affords plaintiff "substantially all the relief sought" such that he must alternatively make an enhanced showing of entitlement to the injunction. *Tom Doherty*, 60 F.3d at 33-34. Although plaintiff would still be entitled to damages to redress his selective enforcement claim and his sex discrimination claim, centrally at issue in this case is whether the 2020 rules should apply to plaintiff's hearing. Mandating that the 2020 rules apply would give plaintiff a substantial portion of his requested relief, though not all of it. It would be better to avoid reaching that question in the absence of briefing, and thus the Court is strongly incentivized to limit the scope of the potential injunction as discussed above.

5 As a careful reader might note, this argument does not meaningfully address any element of a prima facie case of gender discrimination in the style of *Columbia*, nor does it provide much evidence that gender did not motivate defendant's actions. Instead, defendant's argument amounts to an allegedly non-discriminatory reason for its choice not to follow the 2020 policy in carrying out plaintiff's hearing under the framework announced in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973), which governs plaintiff's sex discrimination claims. *Columbia*, 831 F.3d at 55-56. Under that framework, a plaintiff must prove out a prima facie case that he was discriminated against, at which point he will benefit from a presumption of a discriminatory motive on the defendant's part. *Holcomb v. Iona Coll.*, 521 F.3d 130, 138 (2d Cir. 2008). A defendant may rebut that presumption through evidence of a non-discriminatory reason for the adverse action plaintiff complains of, at which point the plaintiff must show that discrimination actually motivated the defendant's adverse action. *Id.* Of course, the *McDonnell-Douglas* framework is not implicated at trial, but plaintiff must nevertheless pass through its scrutiny at summary judgment before he can reach the trial stage, and thus considering defendant's arguments for a non-discriminatory reason for its action is relevant to discussing the likelihood of plaintiff's

success. *See* *Sharkey v. Lasmo (AUL Ltd.)*, 214 F.3d 371, 374 (2d Cir. 2000) (ruling that it is error to submit *McDonnell-Douglas* instruction to the jury).

6 This logic similarly dispels defendant's argument that administrative rules are not to be read to apply retroactively unless the language of the administrative rule requires the result. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). Even if the Court needed to reach the issue of whether a failure to comply with the new Title IX rules would open defendant to sanctions—which it need not—and even if it were inclined to make such a ruling—which it is not—it could do so without holding the new rules retroactive. Instead, it could simply set the relevant time for determining whether the rule is applied retroactively at the time of the proceeding, rather than at the time of the alleged violation.

7 At oral argument, defendant claimed it has "many" such cases actually pending, let alone however many more may remain undisclosed.

8 Given the conflicting narratives at play, the inevitable implication of denying plaintiff's complaint against Roe is that her complaint against him is merited. Defendant's decision to dismiss Roe's complaint before plaintiff's final hearing was especially problematic because plaintiff's complaint against Roe cannot now be revived no matter what new evidentiary wrinkles that hearing might produce to undermine her credibility or bolster his own. Thus, to avoid the appearance of prejudging in favor of Roe, the better procedure would have been to make a final decision for both complaints at the same time and after a hearing giving both of the accused an opportunity to challenge the evidence against them.

9 Of course, because plaintiff has proven a likelihood of success on the merits, there is no need to resort to the substantial questions on the merits inquiry and its corresponding increase in the requirements for the other prongs of the preliminary injunction standard. *Chobani*, 157 F. Supp. 3d at 199.

End of Document

Federal Register Notice of Interpretation: Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*

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4000-01-U

DEPARTMENT OF EDUCATION

The Department's Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*

AGENCY: Office for Civil Rights, Department of Education.

ACTION: Notice of interpretation.

SUMMARY: The U.S. Department of Education (Department) issues this interpretation to clarify the Department's enforcement authority over discrimination based on sexual orientation and discrimination based on gender identity under Title IX of the Education Amendments of 1972 in light of the Supreme Court's decision in *Bostock v. Clayton County*. This interpretation will guide the Department in processing complaints and conducting investigations, but it does not itself determine the outcome in any particular case or set of facts.

DATES: This interpretation is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Alejandro Reyes, Director, Program Legal Group, Office for Civil Rights. Telephone: (202) 245-7272. Email: Alejandro.Reyes@ed.gov.

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SUPPLEMENTARY INFORMATION:

Background: Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, prohibits discrimination on the basis of sex in any education program or activity offered by a recipient of Federal financial assistance. The Department's Office for Civil Rights (OCR) is responsible for the Department's enforcement of Title IX.

OCR has long recognized that Title IX protects all students, including students who are lesbian, gay, bisexual, and transgender, from harassment and other forms of sex discrimination. OCR also has long recognized that Title IX prohibits harassment and other forms of discrimination against all students for not conforming to stereotypical notions of masculinity and femininity. But OCR at times has stated that Title IX's prohibition on sex discrimination does not encompass discrimination based on sexual orientation and gender identity. To ensure clarity, the Department issues this Notice of Interpretation addressing Title IX's coverage of discrimination based on sexual orientation and gender identity in light of the Supreme Court decision discussed below.

In 2020, the Supreme Court in *Bostock v. Clayton County*, 140 S. Ct. 1731, 590 U.S. ___ (2020), concluded that discrimination based on sexual orientation and discrimination based on gender identity inherently involve treating individuals differently because of their sex. It reached this conclusion in the context of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq*., which prohibits sex discrimination in employment. As noted below, courts rely on interpretations of Title VII to inform interpretations of Title IX.

The Department issues this Notice of Interpretation to make clear that the Department interprets Title IX's prohibition on sex discrimination to encompass discrimination based on sexual orientation and gender identity and to provide the reasons for this interpretation, as set out below.

Interpretation:

Title IX Prohibits Discrimination Based on Sexual Orientation and Gender Identity.

Consistent with the Supreme Court's ruling and analysis in *Bostock*, the Department interprets Title IX's prohibition on discrimination "on the basis of sex" to encompass discrimination on the basis of sexual orientation and gender identity. As was the case for the Court's Title VII analysis in *Bostock*, this interpretation flows from the statute's "plain terms." *See Bostock*, 140 S. Ct. at 1743, 1748-50. Addressing discrimination based on sexual orientation and gender identity thus fits squarely within OCR's responsibility to enforce Title IX's prohibition on sex discrimination.

I. The Supreme Court's Ruling in *Bostock*

The Supreme Court in *Bostock* held that sex discrimination, as prohibited by Title VII, encompasses discrimination based on sexual orientation and gender identity. The Court explained that to discriminate on the basis of sexual orientation or gender identity "requires an employer to intentionally treat individual employees differently because of their sex." 140 S. Ct. at 1742.[1] As the Court also explained, when an employer discriminates against a person for

[1] The Court recognized that the parties in *Bostock* each presented a definition of "sex" dating back to Title VII's enactment, with the employers' definition referring to "reproductive biology" and the employees' definition "capturing more than anatomy[.]" 140 S. Ct. at 1739. The Court did not adopt a definition, instead "assum[ing]" the definition of sex provided by the employers that the employees had accepted "for argument's sake." *Id*. As the Court made clear, it did not need to adopt either definition to conclude that discrimination "because of . . . sex" encompasses discrimination based on sexual orientation and gender identity. *Id*. ("[N]othing in our approach to these cases turns on the outcome of the parties' debate…."). Similar to the Court's interpretation of Title VII, the Department's interpretation of the

being gay or transgender, the employer necessarily discriminates against that person for "traits or actions it would not have questioned in members of a different sex." *Id*. at 1737.

The Court provided numerous examples to illustrate why "it is impossible to discriminate against a person" because of their sexual orientation or gender identity "without discriminating against that individual based on sex." *Id*. at 1741. In one example, when addressing discrimination based on sexual orientation, the Court stated:

> Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee's sex, and the affected employee's sex is a but-for cause of his discharge.

Id.

In another example, the Court showed why singling out a transgender employee for different treatment from a non-transgender (*i.e.,* cisgender) employee is discrimination based on sex:

> [T]ake an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee

scope of discrimination "on the basis of sex" under Title IX does not require the Department to take a position on the definition of sex, nor do we do so here.

identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision.

Id. at 1741-42.

II. *Bostock*'s Application to Title IX

For the reasons set out below, the Department has determined that the interpretation of sex discrimination set out by the Supreme Court in *Bostock*—that discrimination "because of . . . sex" encompasses discrimination based on sexual orientation and gender identity—properly guides the Department's interpretation of discrimination "on the basis of sex" under Title IX and leads to the conclusion that Title IX prohibits discrimination based on sexual orientation and gender identity.

a. *There is textual similarity between Title VII and Title IX.*

Like Title VII, Title IX prohibits discrimination based on sex.

Title IX provides, with certain exceptions: "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…." 20 U.S.C. § 1681(a).

Title VII provides, with certain exceptions: "It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex[] . . .; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any

individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex[] . . . ." 42 U.S.C. § 2000e-2(a). (Title VII also prohibits discrimination based on race, color, religion, and national origin.)

Both statutes prohibit sex discrimination, with Title IX using the phrase "on the basis of sex" and Title VII using the phrase "because of" sex. The Supreme Court has used these two phrases interchangeably. In *Bostock*, for example, the Court described Title VII in this way: "[I]n Title VII, Congress outlawed discrimination in the workplace *on the basis of* race, color, religion, sex, or national origin." 140 S. Ct. at 1737 (emphasis added); *id.* at 1742 ("[I]ntentional discrimination *based on sex* violates Title VII…." (emphasis added)); *see also Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005) ("[W]hen a funding recipient retaliates against a person *because* he complains of sex discrimination, this constitutes intentional 'discrimination' '*on the basis of* sex,' in violation of Title IX." (second emphasis added)); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986) ("[W]hen a supervisor sexually harasses a subordinate *because of* the subordinate's sex, that supervisor 'discriminate[s]' *on the basis of sex.*" (emphasis added)).

In addition, both statutes specifically protect *individuals* against discrimination. In *Bostock*, 140 S. Ct. at 1740-41, the Court observed that Title VII "tells us three times—including immediately after the words 'discriminate against'—that our focus should be on individuals." The Court made a similar observation about Title IX, which uses the term *person*, in *Cannon v. University of Chicago*, 441 U.S. 677, 704 (1979), stating that "Congress wanted to avoid the use of federal resources to support discriminatory practices [and] to provide *individual* citizens effective protection against those practices." *Id.* (emphasis added).

Further, the text of both statutes contains no exception for sex discrimination that is associated with an individual's sexual orientation or gender identity. As the Court stated in *Bostock*, "when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule." 140 S. Ct. at 1747. The Court has made a similar point regarding Title IX: "[I]f we are to give Title IX the scope that its origins dictate, we must accord it a sweep as broad as its language." *N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 521 (1982) (citations and internal alterations omitted). It also bears noting that, in interpreting the scope of Title IX's prohibition on sex discrimination the Supreme Court and lower Federal courts have often relied on the Supreme Court's interpretations of Title VII. *See, e.g.*, *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 75 (1992); *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007); *Frazier v. Fairhaven Sch. Comm*., 276 F.3d 52, 66 (1st Cir. 2002); *Gossett v. Oklahoma ex rel. Bd. of Regents for Langston Univ.*, 245 F.3d 1172, 1176 (10th Cir. 2001).

Moreover, the Court in *Bostock* found that "no ambiguity exists about how Title VII's terms apply to the facts before [it]"—i.e., allegations of discrimination in employment against several individuals based on sexual orientation or gender identity. 140 S. Ct. at 1749. After reviewing the text of Title IX and Federal courts' interpretation of Title IX, the Department has concluded that the same clarity exists for Title IX. That is, Title IX prohibits recipients of Federal financial assistance from discriminating based on sexual orientation and gender identity in their education programs and activities. The Department also has concluded for the reasons described in this Notice that, to the extent other interpretations may exist, this is the best interpretation of the statute.

In short, the Department finds no persuasive or well-founded basis for declining to apply *Bostock*'s reasoning — discrimination "because of . . . sex" under Title VII encompasses discrimination based on sexual orientation and gender identity — to Title IX's parallel prohibition on sex discrimination in federally funded education programs and activities.

b. Additional case law recognizes that the reasoning of Bostock *applies to Title IX and that differential treatment of students based on gender identity or sexual orientation may cause harm.*

Numerous Federal courts have relied on *Bostock* to recognize that Title IX's prohibition on sex discrimination encompasses discrimination based on sexual orientation and gender identity. *See, e.g.*, *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020), *as amended* (Aug. 28, 2020), *reh'g en banc denied*, 976 F.3d 399 (4th Cir. 2020), *petition for cert filed*, No. 20-1163 (Feb. 24, 2021); *Adams v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286, 1305 (11th Cir. 2020), *petition for reh'g en banc pending*, No. 18-13592 (Aug. 28, 2020); *Koenke v. Saint Joseph's Univ.*, No. CV 19-4731, 2021 WL 75778, at *2 (E.D. Pa. Jan. 8, 2021); *Doe v. Univ. of Scranton*, No. 3:19-CV-01486, 2020 WL 5993766, at *11 n.61 (M.D. Pa. Oct. 9, 2020).

The Department also concludes that the interpretation set forth in this Notice is most consistent with the purpose of Title IX, which is to ensure equal opportunity and to protect individuals from the harms of sex discrimination. As numerous courts have recognized, a school's policy or actions that treat gay, lesbian, or transgender students differently from other students may cause harm. *See, e.g.*, *Grimm*, 972 F.3d at 617-18 (describing injuries to a transgender boy's physical and emotional health as a result of denial of equal treatment); *Adams*, 968 F.3d at 1306-07 (describing "emotional damage, stigmatization and shame" experienced by a transgender boy as

a result of being subjected to differential treatment); *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ*., 858 F.3d 1034, 1044-46, 1049-50 (7th Cir. 2017) (describing physical and emotional harm to a transgender boy who was denied equal treatment); *Dodds v. U.S. Dep't of Educ*., 845 F.3d 217, 221-22 (6th Cir. 2016) (describing "substantial and immediate adverse effects on the daily life and well-being of an eleven-year-old" transgender girl from denial of equal treatment); *Doe*, 2020 WL 5993766, at **1-3 (describing harassment and physical targeting of a gay college student that interfered with the student's educational opportunity); *Harrington ex rel. Harrington v. City of Attleboro*, No. 15-CV-12769-DJC, 2018 WL 475000, at **6-7 (D. Mass. Jan. 17, 2018) (describing "'wide-spread peer harassment' and physical assault [of a lesbian high school student] because of stereotyping animus focused on [the student's] sex, appearance, and perceived or actual sexual orientation").

c. *The U.S. Department of Justice's Civil Rights Division has concluded that* Bostock*'s analysis applies to Title IX.*

The U.S. Department of Justice's Civil Rights Division issued a Memorandum from Principal Deputy Assistant Attorney General for Civil Rights Pamela S. Karlan to Federal Agency Civil Rights Directors and General Counsels regarding Application of *Bostock v. Clayton County* to Title IX of the Education Amendments of 1972 (Mar. 26, 2021), https://www.justice.gov/crt/page/file/1383026/download.

The memorandum stated that, after careful consideration, including a review of case law, "the Division has determined that the best reading of Title IX's prohibition on discrimination 'on the basis of sex' is that it includes discrimination on the basis of gender identity and sexual orientation." Indeed, "the Division ultimately found nothing persuasive in the statutory text,

legislative history, or caselaw to justify a departure from *Bostock*'s textual analysis and the Supreme Court's longstanding directive to interpret Title IX's text broadly."

III. Implementing this Interpretation

Consistent with the analysis above, OCR will fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity in education programs and activities that receive Federal financial assistance from the Department. As with all other Title IX complaints that OCR receives, any complaint alleging discrimination based on sexual orientation or gender identity also must meet jurisdictional requirements as defined in Title IX and the Department's Title IX regulations, other applicable legal requirements, as well as the standards set forth in OCR's Case Processing Manual, www.ed.gov/ocr/docs/ocrcpm.pdf.[2]

Where a complaint meets applicable requirements and standards as just described, OCR will open an investigation of allegations that an individual has been discriminated against because of their sexual orientation or gender identity in education programs or activities. This includes allegations of individuals being harassed, disciplined in a discriminatory manner, excluded from, denied equal access to, or subjected to sex stereotyping in academic or extracurricular opportunities and other education programs or activities, denied the benefits of such programs or activities, or otherwise treated differently because of their sexual orientation or gender identity. OCR carefully reviews allegations from anyone who files a complaint, including students who

[2] Educational institutions that are controlled by a religious organization are exempt from Title IX to the extent that compliance would not be consistent with the organization's religious tenets. *See* 20 U.S.C. § 1681(a)(3).

identify as male, female or nonbinary; transgender or cisgender; intersex; lesbian, gay, bisexual, queer, heterosexual, or in other ways.

While this interpretation will guide the Department in processing complaints and conducting investigations, it does not determine the outcome in any particular case or set of facts. Where OCR's investigation reveals that one or more individuals has been discriminated against because of their sexual orientation or gender identity, the resolution of such a complaint will address the specific compliance concerns or violations identified in the course of the investigation.

This interpretation supersedes and replaces any prior inconsistent statements made by the Department regarding the scope of Title IX's jurisdiction over discrimination based on sexual orientation and gender identity. This interpretation does not reinstate any previously rescinded guidance documents.

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Dated:

_____

Suzanne B. Goldberg
Acting Assistant Secretary for Civil Rights

Q&A

Questions & Answers

Questions and Answers on the Title IX Regulations on Sexual Harassment (July 2021)

UNITED STATES
DEPARTMENT
OF EDUCATION

Office for Civil Rights

July 20, 2021

Questions and Answers on the Title IX Regulations on Sexual Harassment and Appendix (July 2021)
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QUESTIONS AND ANSWERS

APPENDIX

Questions and Answers on the Title IX Regulations on Sexual Harassment (July 2021)

Ensuring equal access to education for all students—from pre-K through elementary and secondary schools and postsecondary institutions—is at the heart of the mission of the U.S. Department of Education's Office for Civil Rights. This includes protecting rights of students and others to an educational environment free from discrimination based on sex, including discrimination in the form of sexual harassment and discrimination based on sexual orientation or gender identity, as guaranteed by Title IX of the Education Amendments of 1972.

This question-and-answer resource describes OCR's interpretation of schools' responsibilities under Title IX, and the Department's current implementing regulations related to sexual harassment, as enforced by OCR. The focus here is on questions related to the most recent amendments to the regulations in 2020 (the 2020 amendments).[1] The Department is undertaking a comprehensive review of its current Title IX regulations as amended in 2020, following President Biden's *Executive Order on Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity*. While this review is ongoing and until any new regulations go into effect, the 2020 amendments remain in effect.

This Q&A does not address policies or procedures under Title VII of the Civil Rights Act of 1964, which prohibits sex discrimination in employment. As the 2020 amendments state: "Nothing in [these regulations] may be read in derogation of any individual's rights under title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* or any regulations promulgated thereunder." 34 C.F.R. § 106.6(f).

For additional information about Title IX, please also see OCR's Title IX and Sex Discrimination Webpage and OCR's Sex Discrimination FAQ Webpage. You can find the Department's Title IX regulations, including the 2020 amendments, at 34 C.F.R. Part 106.

This Q&A has 17 sections and provides information on a variety of topics covered by the 2020 amendments, including the definition of sexual harassment, how a school can obtain notice of sexual harassment, a school's response to allegations of sexual harassment, and how a school must process formal complaints of sexual harassment, including live hearings and cross-examination.

- Preamble references: Please note that where appropriate, this Q&A refers to the preamble to the 2020 amendments, which clarifies OCR's interpretation of Title IX and the regulations. You can find citations to specific preamble sections in the endnotes of this Q&A. The preamble itself does not have the force and effect of law.

- Q&A Appendix: OCR provides an appendix to accompany this Q&A, with examples of policy provisions from various schools. These examples may be helpful as schools continue their work to implement the requirements of the 2020 amendments.

Who can file a discrimination complaint – and how to file: Anyone can file a complaint with OCR, including students, parents and guardians, community members, and others who experience or observe discrimination in education programs or activities. To file a complaint, please use this online form. For more information, see How to File a Discrimination Complaint with the Office for Civil Rights and this short video on How to File a Complaint with the Office for Civil Rights.

Additional questions? Please note that this Q&A addresses many important issues but is not comprehensive. We recognize that you might have additional questions and invite you to send them to OCR at ocr@ed.gov.

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Please note: This 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's 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 other guidance documents.

A mini-glossary for this Q&A:

This Q&A is geared towards recipients of federal financial assistance that are educational institutions and uses the term "schools" to refer to all such recipients, including school districts, colleges, and universities. It also includes several terms that are commonly used in Title IX grievance processes for formal complaints of sexual harassment. Here is information about what those terms mean in this document:

Allegation:	An assertion that someone has engaged in sexual harassment.
Complainant:	The person who has experienced the alleged sexual harassment. This person is considered a complainant regardless of whether they choose to file a formal complaint of sexual harassment under Title IX.

Respondent:	The person accused of the alleged sexual harassment.
Reporter:	The person who reports sexual harassment to the school. This may be the complainant but may also be someone else (also known as a "third party" reporter).
Title IX grievance process:	This is the formal name used in the Title IX regulations for a school's process for addressing formal complaints of sexual harassment under Title IX.
Actual knowledge:	When a school receives notice of alleged misconduct that meets the definition of "sexual harassment" under the Title IX regulations, as described below, the school has "actual knowledge" and must respond appropriately. Additional information regarding how schools receive notice and have "actual knowledge" is discussed in Question 14.

I. General Obligations

Question 1: What did the 2020 amendments change about the Department's Title IX regulations?

Answer 1: The Department's Title IX regulations were first issued in 1975, reissued in 1980, and then amended after that, including in 2006 and 2020. Prior to 2020, the regulations set out requirements under Title IX for educational programs and activities that receive federal financial aid, but they did not include specific requirements related to sexual harassment. Instead, OCR had several guidance documents in place to assist schools in understanding how OCR interpreted the Department's Title IX regulations. The 2020 amendments added specific, legally binding steps that schools must take in response to notice of alleged sexual harassment.

Question 2: Is a school permitted to take steps in response to reports of sexual harassment that go beyond those set out in the 2020 amendments?

Answer 2: Yes. The 2020 amendments set out the minimum steps that a school must take in response to notice of alleged sexual harassment. A school may take additional actions so long as those actions do not conflict with Title IX or the 2020 amendments. The preamble provides this additional guidance:

> A school "remain[s] free to adopt best practices for supporting survivors and standards of competence for conducting impartial grievance processes, while meeting obligations imposed under the [2020 amendments]."[2]

Question 3: What does the Department expect from schools regarding prevention of sexual harassment?

Answer 3: The 2020 amendments focus on "setting forth requirements for [schools'] responses to sexual harassment."[3] However, the preamble also says that "the Department agrees with commenters that educators, experts, students, and employees should also endeavor to *prevent* sexual harassment from occurring in the first place."[4] OCR encourages schools to undertake prevention efforts that best serve the needs, values, and environment of their own educational communities.

Question 4: Are there any differences in the 2020 amendments' requirements for elementary and secondary schools and postsecondary schools?

Answer 4: Yes. Although the 2020 amendments have many of the same requirements for elementary and secondary and postsecondary schools, there are two requirements that differ – notice and live hearings.

- Notice: Any time an elementary or secondary school employee has notice that sexual harassment might have occurred, the school must respond. Notice requirements are more limited for postsecondary school employees. See Section V for more information on notice requirements.
- Live hearing: Only postsecondary schools are required to provide for a live hearing with the opportunity for cross-examination to be conducted by each party's advisor of choice. For more information on live hearings and cross-examination, see Section XII.

II. Definition of Sexual Harassment

Question 5: What is the definition of sexual harassment in the 2020 amendments?

Answer 5: The 2020 amendments define sexual harassment to include certain types of unwelcome sexual conduct, sexual assault, dating violence, domestic violence, and stalking. Here is the full definition in the regulations:

> Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:
>
> > (1) An employee of the [school] conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
> >
> > (2) 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; or

(3) 'Sexual assault' as defined in 20 U.S.C. 1092(f)(6)(A)(v), 'dating violence' as defined in 34 U.S.C. 12291(a)(10), 'domestic violence' as defined in 34 U.S.C. 12291(a)(8), or 'stalking' as defined in 34 U.S.C. 12291(a)(30).

For additional information, please see 34 C.F.R. § 106.30.

When unwelcome conduct on the basis of sex meets one or more of these three categories, the conduct is considered to be sexual harassment under the 2020 amendments. Here is some additional information about each category:

- The first category is commonly referred to as "quid pro quo" sexual harassment, meaning that a school employee offers something to an individual in exchange for sexual conduct.
- The second category incorporates the definition of sexual harassment set out by the Supreme Court in a case about when a school may be required to pay financial compensation in a lawsuit for sexual harassment by one student toward another student. The case is *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999).
- The third category refers to definitions in the Clery Act and the Violence Against Women Act (VAWA). The Clery Act is a federal law that requires colleges and universities that participate in the federal student financial aid programs to provide current and prospective students and employees, the public, and the Department with crime statistics and information about campus crime prevention programs and policies. VAWA is a federal law administered by the U.S. Departments of Justice (DOJ) and Health and Human Services (HHS) that supports comprehensive responses to domestic violence, sexual assault, dating violence, and stalking.

  Definitions under the Clery Act: The Clery Act defines sexual assault as a forcible or nonforcible offense under the uniform crime reporting system of the Federal Bureau of Investigation.[5] This system includes the National Incident-Based Reporting System (NIBRS), which defines forcible sex offenses to include any sexual act, including rape, sodomy, sexual assault with an object, or fondling "directed against another person, without the consent of the victim including instances where the victim is incapable of giving consent." Please see Question 6 explaining that the 2020 amendments do not require schools to use a particular definition of consent. NIBRS also includes incest and statutory rape as "nonforcible" sex offenses.[6] Conduct that fits within any of these definitions under NIBRS is considered a type of sexual harassment in the 2020 amendments.

  Definitions under VAWA: The 2020 amendments refer to the following definitions of dating violence, domestic violence, and stalking in VAWA:

  - Dating violence includes violence committed by a person who has been in a social relationship of a romantic or intimate nature with the complainant; the existence

of such a relationship shall be determined based on consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.[7]

- Domestic violence includes felony or misdemeanor crimes of violence committed by: a current or former spouse or intimate partner of the complainant, a person with whom the complainant shares a child, a person who is cohabitating with or has cohabitated with the complainant as a spouse or intimate partner, a person similarly situated to a spouse of the complainant under the jurisdiction's domestic or family violence laws, or any other person against a complainant who is protected under the domestic or family violence laws of the jurisdiction.[8]

- Stalking is defined as engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for their own safety or the safety of others or to suffer substantial emotional distress.[9] The 2020 amendments cover instances of stalking based on sex—including stalking that occurs online or through messaging platforms, commonly known as cyber-stalking—when it occurs in the school's education program or activity.[10]

Question 6: Do schools need to adopt a particular definition of consent for determining whether conduct is "unwelcome" under the definition of sexual harassment in the 2020 amendments?

Answer 6: No. The preamble states that the Department will not require a school to adopt a particular definition of consent.[11] The preamble explains that a school has the flexibility to choose a definition of consent that "best serves the unique needs, values, and environment of the [school's] own educational community."[12]

Question 7: May a school respond to alleged sexual misconduct that does not meet the definition of sexual harassment in the 2020 amendments?

Answer 7: Yes. The preamble makes clear that "Title IX is not the exclusive remedy for sexual misconduct or traumatic events that affect students."[13] 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.[14] This may include, for example, reported sexual misconduct that a) occurs outside of a school's education program or activity; b) occurs outside of the United States; or c) causes harm in the school environment that does not fit within the definition set out above in Question 5.[15]

The preamble also says that "nothing in the final regulations precludes [a school] 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."[16]

Put simply, Title IX's sexual harassment regulation 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. OCR encourages schools to develop and enforce their codes as an additional tool for ensuring safe and supportive educational environments for all students. OCR does not enforce school codes of conduct but may investigate complaints that a school's code of conduct treated students differently based on sex, including sexual orientation or gender identity.[17]

For examples of school codes that address sexual misconduct not covered by Title IX, please see Q&A Appendix Section XVI.

Question 8: How can a school determine whether sexual harassment "effectively denies a person's right to equal access to its education program or activity" under the "unwelcome conduct" category in the definition of sexual harassment in the 2020 amendments? (See the definition in Question 5.)

Answer 8: The preamble explains that to determine whether a person has been effectively denied equal access to a school's education program or activity, a school must 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."[18]

The preamble provides this additional guidance to schools:

- 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.[19]

- Examples of specific situations that likely constitute effective denial of equal access to educational opportunities also include "a third grader who starts bed-wetting or crying at night due to sexual harassment, or a high school wrestler who quits the team but carries on with other school activities following sexual harassment."[20]

- A complainant does not need to have "already suffered loss of education before being able to report sexual harassment."[21]

- Effective denial of equal access to education does not require "that a person's total or entire educational access has been denied."[22]

- While these examples help illustrate an effective denial of access, "[n]o concrete injury is required" to prove an effective denial of equal access.[23]

- 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.[24]
- "School officials turning away a complainant by deciding the complainant was 'not traumatized enough' would be impermissible."[25]

Schools may wish to include these and other examples in their internal policies, training, and communications to students and employees to help illustrate this concept.

III. Where Sexual Harassment Occurs

Question 9: Which settings are covered by the 2020 amendments?

Answer 9: The 2020 amendments apply to reports of sexual harassment in education programs and activities in the United States, including in the following settings:

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 museum); and
3. Off-campus buildings owned or controlled by a student organization officially recognized by a postsecondary school, such as a building owned by a recognized fraternity or sorority.[26]

For additional information, please see 34 C.F.R. § 106.44(a). For more information on how a school can determine whether it has substantial control over the respondent and context in an off-campus setting, see Question 10.

The 2020 amendments require that schools provide training to their Title IX personnel to "accurately identify situations that require a response under Title IX."[27] OCR also encourages schools to include examples of their programs and activities in each of the three areas described above in their policies, staff training, and student-oriented communications.

Please note that sexual harassment that takes place in settings outside of the United States is not covered under the 2020 amendments.[28]

Schools should also note that, under the 2020 amendments, a school may still offer "supportive measures to a complainant who reports sexual harassment that occurred outside the [school's] education program or activity, and any sexual harassment that does occur in an education program or activity must be responded to even if it related to, or happens subsequent to, sexual harassment that occurred outside the education program or activity."[29]

Question 10: How should a school determine whether it has substantial control over the respondent and context in an off-campus setting?

Answer 10: The school must make a fact-specific determination. The preamble says that it "may be helpful or useful for a [school] to consider factors applied by Federal courts to determine the scope of a [school's] education program or activity"—such as "whether the [school] funded, promoted, or sponsored the event or circumstance where the alleged harassment occurred"—but also that "no single factor is determinative" in concluding whether the school has substantial control over the respondent and the context in which the reported harassment occurred.[30]

In making this fact-specific determination, the preamble also says:

> A school "must consider whether, for example, a sexual harassment incident between two students that occurs in an off-campus apartment" or house is a "situation over which the [school] exercised substantial control [and], if so, the [school] must respond [to notice] of sexual harassment or allegations of sexual harassment that occurred there."[31]

If an incident of sexual harassment between two students in a private hotel room occurs in a context related to a school-sponsored activity, such as a school field trip or travel with a school athletics team, the school would need to consider whether it exercised substantial control over the context in which the sexual harassment occurred.[32]

The preamble 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."[33]

Question 11: How do the 2020 amendments apply to alleged sexual harassment that takes place electronically or on an online platform used by the school?

Answer 11: In discussing Title IX and online platforms used by a school, the preamble provides this guidance to schools:

- 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]."[34]
- "[T]he factual circumstances of online harassment must be analyzed to determine if it occurred in an education program or activity."[35]

The preamble adds that the definition of "education program or activity" in the 2020 amendments "does not create a distinction between sexual harassment occurring in person versus online."[36]

Question 12: How do the 2020 amendments apply to alleged sexual harassment that is perpetrated by a student using a personal electronic device during class?

Answer 12: The preamble explains that "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."[37] As with in-person harassment, "the factual circumstances of online harassment must be analyzed to determine if it occurred" in circumstances "over which a school exercised substantial control over the respondent and the context."[38]

IV. When Harassment Occurred

Question 13: What is the appropriate standard for evaluating alleged sexual harassment that occurred before the 2020 amendments took effect?

Answer 13: The 2020 amendments took effect on August 14, 2020, and are not retroactive. This means 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. In other words, if the conduct at issue in the complaint took place prior to August 14, 2020, the 2020 amendments do not apply even if the complaint was filed with a school on or after August 14, 2020.

Before August 2020, the Title IX regulations did not have specific requirements for schools related to sexual harassment. Instead, OCR had several guidance documents in place to assist schools in understanding how OCR interpreted the Department's Title IX regulations. Although the guidance documents issued in 2011 and 2014 were rescinded in 2017, and the 2001 and 2017 guidance documents were rescinded in 2020, these documents remain accessible on OCR's website for historical purposes to the extent they are helpful to schools when responding to earlier allegations of sexual harassment.[39]

V. Notice of Sexual Harassment

Question 14: Which school employees must be notified about allegations of sexual harassment for a school to be put on notice that it must respond?

Answer 14: In elementary and secondary school settings, a school must respond whenever any school employee has notice of sexual harassment.[40] 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.[41]

In postsecondary school settings, notice may be more limited in scope. The institution must respond when notice is received by the Title IX Coordinator or another official who has authority to institute corrective measures on the institution's behalf.[42] The Department is unable to

provide examples of types of individuals who have this authority because the determination of whether a person is an official who has authority to institute corrective measures on behalf of the institution depends on facts specific to that institution. A school "may, at its discretion, expressly designate specific employees as officials with this authority for purposes of Title IX sexual harassment and may inform students of such designations."[43]

The preamble explains that "the Department does 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 report of sexual harassment by a complainant or anyone else, a written report, through personal observation, through a newspaper article, through an anonymous report, or through various other means."[44]

The 2020 amendments refer to this notice of sexual harassment as "actual knowledge."

For additional information, please see 34 C.F.R. § 106.30.

Question 15: If a school trains or requires non-employees who interact with the school's students to report sexual harassment incidents, are those individuals (for example, volunteers, alumni, independent contractors) automatically considered "officials with authority to institute corrective measures" on the school's behalf?

Answer 15: No. The 2020 amendments state that at any school level—elementary, secondary, or postsecondary—"[t]he 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 [such as a volunteer parent, or alumnus] as one who has authority to institute corrective measures on behalf of the [school]."[45]

The preamble explains that "the Department does not wish to discourage [schools] from training individuals who interact with the [school's] students about how to report sexual harassment."[46] It also says that "the Department will not assume that a person is an official with authority solely based on the fact that the person has received training on how to report sexual harassment."[47] Similarly, the preamble says that "the Department will not conclude that volunteers and independent contractors are officials with authority, unless the [school] has granted the volunteers or independent contractors authority to institute corrective measures on behalf of the [school]."[48]

For additional information, please see 34 C.F.R. § 106.30.

Question 16: May a school accept reports of sexual harassment from individuals who are not associated with the school in any way?

Answer 16: Yes. A school may receive actual knowledge of sexual harassment from any person.[49] There is no requirement that the person be participating in or attempting to participate in a school program or activity to report sexual harassment.[50]

Question 17: Is a school required to respond to allegations of sexual harassment if the only employee or school official who has notice of the harassment is the alleged harasser?

Answer 17: Not under the 2020 amendments. At any school level—elementary, secondary, or postsecondary—the school does not have notice for purposes of Title IX if the only official or employee of the school with actual knowledge is the respondent.[51] The preamble explains the reason for this is that the school "will not have [an] opportunity to appropriately respond if the only official or employee who knows [of the alleged misconduct] is the respondent."[52]

For additional information, please see 34 C.F.R. § 106.30.

Question 18: 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?

Answer 18: Yes. At any school level—elementary, secondary, or postsecondary—actual knowledge refers to notice of conduct that *could* constitute sexual harassment.[53] A complainant is "an individual who is alleged to be the victim of conduct that could constitute sexual harassment" and the definition of actual knowledge refers to "allegations of sexual harassment."[54] Thus, the preamble explains that a school must respond promptly and appropriately when it receives notice of alleged facts that, if true, could be considered sexual harassment under the 2020 amendments.[55]

For additional information, please see 34 C.F.R. § 106.30.

Question 19: Does a postsecondary school have discretion to require additional employees to report allegations of sexual harassment to the school?

Answer 19: Yes. The preamble says that a postsecondary school may empower as many officials as it wishes to institute corrective measures on its behalf, including coaches and athletic trainers.[56] If any of these officials receives notice of sexual harassment allegations, the school must respond as the 2020 amendments require (see Question 20).[57] The preamble also provides this guidance:

- A postsecondary school has discretion to determine which of their employees should be mandatory reporters, and which employees may keep a student's disclosure about sexual

harassment confidential (e.g., counselors, therapists, other mental health providers, victim advocates).[58]

- Nothing in the 2020 amendments prevents a postsecondary school "from instituting [its] own polic[y] to require professors, instructors, or all employees to report to the Title IX Coordinator every incident and report of sexual harassment."[59] However, the Department will not hold a postsecondary school responsible for responding to such sexual harassment unless an employee "actually did give notice to the [school's] Title IX Coordinator" or other official with authority to institute corrective measures.[60]

- A postsecondary school may also "empower as many officials as it wishes with the requisite authority to institute corrective measures on the [school's] behalf, and notice to these officials with authority constitutes the [school's] actual knowledge."[61] A postsecondary school "may also publicize [a] list[] of officials with this authority," and OCR encourages postsecondary schools to do so, as this will assist students and others to understand which reports will require the school to respond.[62]

VI. Response to Sexual Harassment

Question 20: How must a school respond to allegations of sexual harassment?

Answer 20: When a school has actual knowledge of sexual harassment in any of its programs or activities that take place in the United States, it must "respond promptly in a manner that is not deliberately indifferent."[63] This includes schools that serve any age, grade, or level of students, from pre-K through postsecondary.

The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures, regardless of whether a formal complaint is filed, and to explain the process for filing a formal complaint.[64] For more on supportive measures, see Questions 32-34.

In addition, if a formal complaint is filed, either by the complainant or the Title IX Coordinator, a school must:

- offer supportive measures to the respondent, and

- follow the Title IX grievance process specified by the 2020 amendments.[65] For more on this process, including the requirement to offer supportive measures to the respondent, see Question 26 and Section IX.

In addition to setting out these requirements, the regulations provide that a school is deliberately indifferent "only if its response to sexual harassment is clearly unreasonable in light of the known circumstances."[66]

For more information on the obligations described in this section, please see 34 C.F.R. § 106.44(a).

Question 21: Is a school required to impose particular remedies when a respondent is found responsible for sexual harassment?

Answer 21: No. The 2020 amendments do not dictate that a school provide any particular remedies for the complainant or disciplinary sanctions for the respondent after a finding of responsibility.[67] Each school is free to make disciplinary and remedial decisions that it "believes are in the best interest of [its] educational environment."[68]

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."[69] These remedies may include the same individualized services that the school provided to the complainant as supportive measures, additional services, or different services.[70] These remedies can be disciplinary or punitive and can burden the respondent.[71] Schools are required to "[d]escribe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies,"[72] 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."[73]

For additional information, please see 34 C.F.R. § 106.45(b)(1)(i), 34 C.F.R. § 106.45(b)(1)(vi), and 34 C.F.R. § 106.45(b)(7)(ii)(E).

VII. Formal Complaints

Question 22: What is a "formal complaint" under the 2020 amendments?

Answer 22: A "formal complaint" is a document filed by a complainant alleging sexual harassment against a respondent and requesting that the school investigate the allegation of sexual harassment.[74] It may be a hard copy document or an electronic document submitted via email or an online portal.[75] Whether it is a hard copy document or an electronic document, it must contain the complainant's physical or digital signature or otherwise indicate that the complainant is the person filing the formal complaint.[76] For example, an email from a student to the Title IX Coordinator that ends with the student signing their name would suffice.

A formal complaint may be filed with the school's Title IX Coordinator in person, by mail, or by email using the contact information provided by the school. A formal complaint may also be filed by any additional method designated by the school.[77] A parent or guardian who has a legal right to act on behalf of an individual may also file a formal complaint on that individual's behalf.[78] In addition, a Title IX Coordinator may initiate a formal complaint as described in Question 24.[79]

For additional information, please see 34 C.F.R. § 106.30.

Question 23: 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?

Answer 23: 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.[80] Individuals who are currently participating in the school's education program or activity may also file formal complaints.[81] When a formal complaint is filed, the school must respond as described in Question 20.

The preamble gives several examples of situations of a complainant "attempting to participate" in a school's education program, including when a complainant:

(1) has withdrawn from the school due to alleged sexual harassment and expresses a desire to re-enroll if the school responds appropriately to the allegations,

(2) has graduated but intends to apply to a new program or intends to participate in alumni programs and activities,

(3) is on a leave of absence and is still enrolled as a student or intends to re-apply after the leave of absence, or

(4) has applied for admission.[82]

It is important to keep in mind that this requirement concerns a complainant's status at the time a formal complaint is filed and is not affected by a complainant's later decision to remain or leave the school.[83]

Question 24: If a complainant has not filed a formal complaint and 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?

Answer 24: Yes. A Title IX Coordinator may file a formal complaint even if the complainant is not associated with the school in any way.[84]

In some cases, a school may be in violation of Title IX if the Title IX Coordinator does not do so.[85] For example, the preamble explains that if a school "has actual knowledge of a pattern of alleged sexual harassment by a perpetrator in a position of authority," OCR may find the school to be deliberately indifferent (i.e., to have acted in a clearly unreasonable way) if the school's Title IX Coordinator does not sign a formal complaint, "even if the complainant . . . does not wish to file a formal complaint or participate in a grievance process."[86] Put simply, 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 students, not just the complainant, with an educational environment that does not discriminate based on sex.

Question 25: If a complainant is not participating in or attempting to participate in the school's education program or activity, may a school respond to reports of sexual harassment under its own code of conduct?

Answer 25: Yes. As discussed in Question 7, a school has discretion to use its own student-conduct process to address alleged misconduct not covered by the 2020 amendments. This includes situations where a complainant is not participating in or attempting to participate in the school's education program or activity.[87] There are also circumstances when a Title IX Coordinator may need to file 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. See Question 24.

Question 26: Is a school required to take action even if the respondent has left the school prior to the filing of a formal complaint with no plans to return?

Answer 26: Yes. As explained in the preamble, a school must always respond promptly to a complainant's report of sexual harassment when it has actual knowledge.[88] (For more on actual knowledge, see Question 14.) The Title IX Coordinator must inform the complainant about the availability of supportive measures, with or without the filing of a formal complaint, and consider the complainant's wishes regarding supportive measures. [89]

Question 27: Is a school required to dismiss a formal complaint if a respondent leaves the school?

Answer 27: No. Although a school may dismiss a formal complaint if, at any time during the grievance process, the respondent is "no longer enrolled or employed" by the school, dismissal is not required.[90] The preamble explains that 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.[91]

A school may consider, for example, "whether a respondent poses an ongoing risk to the [school's] community," or "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 other reasons."[92]

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, whether multiple complainants experienced harassment by the same respondent, and what appropriate remedial actions are necessary.

Question 28: May a school use trauma-informed approaches when responding to a formal complaint?

Answer 28: Yes. A school may use trauma-informed approaches to respond to a formal complaint of sexual harassment. The preamble clarifies that the 2020 amendments do not preclude a school "from applying trauma-informed techniques, practices, or approaches," but notes that the use of such approaches must be consistent with the requirements of 34 C.F.R. § 106.45, particularly 34 C.F.R. § 106.45(b)(1)(iii).[93]

VIII. Handling Situations in Which a Party or Witness May be Unable to Participate in the Title IX Grievance Process in Person

Question 29: May a school stop offering its Title IX grievance process due to the COVID-19 pandemic?

Answer 29: 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 proceedings on hold due to COVID-19.[94]

For additional discussion of schools' ongoing Title IX obligations during the COVID-19 pandemic, please see OCR's Questions and Answers on Civil Rights and School Reopening in the COVID-19 Environment.

Question 30: How should a school proceed in the Title IX sexual harassment grievance process when a party or a witness is temporarily unable to participate due to a disability?

Answer 30: A school has "discretion to apply limited extensions of time frames during the grievance process for good cause, which may include, for example, a temporary postponement of a hearing to accommodate a disability."[95] However, when deciding whether to grant a delay or extension, a school must balance the interests of promptness, fairness to the parties, and accuracy of adjudications. The school also must promptly notify all parties of the reason for the delay and the estimated length of the delay, in addition to important updates about the investigation.[96]

Additionally, a school must not delay investigations or hearings solely because in-person interviews or hearings are not feasible. Instead, a school must use technology, as appropriate, to conduct activities remotely, in a timely and equitable manner, and consistent with the applicable law.

For additional information, please see 34 C.F.R. § 106.45(b)(1)(v).

Question 31: May a school use technology to permit participants to appear virtually in its Title IX grievance process?

Answer 31: Yes. The 2020 amendments grant a school discretion to allow participants, including witnesses, to appear at a live hearing virtually; however, technology must enable all participants to see and hear other participants,[97] with appropriate accommodations for individuals with disabilities.

For additional information, please see 34 C.F.R. § 106.45(b)(6)(i).

IX. Supportive Measures and Temporary Removal of Respondents from Campus

Question 32: Does a school have to offer supportive measures to a complainant who has not filed a formal complaint of sexual harassment?

Answer 32: Yes. The 2020 amendments specify that the school must contact the complainant to discuss the availability of, and to offer, supportive measures, regardless of whether a formal complaint is filed.[98] A school must also consider the complainant's wishes with respect to supportive measures.[99]

For additional information, please see 34 C.F.R. § 106.30 and 34 C.F.R. § 106.44(a).

Question 33: What are the supportive measures a school must offer to complainants?

Answer 33: A school must offer supportive measures that "are designed to restore or preserve equal access to the [school's] education program or activity."[100] The 2020 amendments add that these include "measures designed to protect the safety of all parties or the [school's] educational environment, or deter sexual harassment."[101] A school also must consider the complainant's wishes in determining which supportive measures to provide and may not provide supportive measures that "unreasonably burden[] the other party."[102]

A school has discretion and flexibility to determine which supportive measures are appropriate. The preamble states that a school must consider "each set of unique circumstances" to determine what individualized services would be appropriate based on the "facts and circumstances of that situation."[103]

Examples of supportive measures include "counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures."[104]

For additional information, please see 34 C.F.R. § 106.30 and 34 C.F.R. § 106.44(a).

Question 34: Is a school still required to provide supportive measures during the COVID-19 pandemic?

Answer 34: Yes. COVID-19-related disruptions do not relieve a school of its obligation to comply with Title IX. A school must continue to offer academic adjustments and supports to complainants and respondents in Title IX sexual harassment complaints.

In light of the COVID-19 pandemic, "the facts and circumstances"[105] of a given situation may require a school to provide remote counseling, or similar teletherapy option, as a supportive measure to students who are unable to access on-campus counseling services. Similarly, in a remote learning environment, supportive measures may include ensuring that parties to a complaint do not share the same online classes.

For additional discussion of schools' ongoing Title IX obligations during the COVID-19 pandemic, please see OCR's Questions and Answers on Civil Rights and School Reopening in the COVID-19 Environment.

Question 35: May a school remove a respondent from campus while a Title IX grievance process is pending if the school determines that the respondent is a threat to others?

Answer 35: Yes. The 2020 amendments specify that a school may remove a respondent from its education program or activity on an emergency basis.[106] The school must "undertake[] an individualized safety and risk analysis, determine[] that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provide[] the respondent with notice and an opportunity to challenge the decision immediately following the removal."[107] A school must also meet its obligations to students under federal disability laws.[108]

A school may also place non-student employee respondents on administrative leave while a Title IX grievance process is pending.[109] Again, the school must comply with federal disability laws, as applicable.[110]

For additional information, please see 34 C.F.R. §§ 106.44(c)-(d).

X. Presumption of No Responsibility

Question 36: The 2020 amendments require schools to 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?

Answer 36: No. A school should never assume a complainant of sexual harassment is lying or that the alleged harassment did not occur.

The 2020 amendments require a school to include in its Title IX grievance process "a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process."[111] However, the preamble explains that "[t]he presumption does not imply that the alleged harassment did not occur," or that the respondent is truthful or a complainant is untruthful.[112] Instead, the preamble says that 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.[113] Schools that have relied on this presumption to decline services to a complainant or to make assumptions about a complainant's credibility have done so in error.

For examples of language related to this issue, please see Q&A Appendix Section XI.

XI. Time Frames

Question 37: What is the appropriate length of time for a school's investigation into a complaint of sexual harassment?

Answer 37: The 2020 amendments require that a school's grievance process for formal complaints of sexual harassment include reasonably prompt time frames for concluding the process, including filing and resolving appeals and for any informal resolution processes the school offers.[114] The preamble states that because the 2020 amendments specify that "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 "is subject to an open-ended time frame."[115]

The preamble also explains that "the reasonableness of the time frame is evaluated in the context of the [school's] operation of an education program or activity."[116] Additionally, the preamble says that "the conclusion of the grievance process must be reasonably prompt, because students (or employees) should not have to wait longer than necessary to know the resolution of a formal complaint of sexual harassment; any grievance process is difficult for both parties, and participating in such a process likely detracts from students' ability to focus on participating in the [school's] education program or activity."[117] The preamble adds that because "victims of sexual harassment are entitled to remedies to restore or preserve equal access to education, . . . prompt resolution of a formal complaint of sexual harassment is necessary to further Title IX's nondiscrimination mandate."[118]

The preamble explains that 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 student disciplinary proceedings," and thus, each school has discretion to determine its own reasonably prompt time frames.[119] A school must resolve each formal complaint of sexual harassment according to the time frames the school has committed to in its grievance process.[120]

The Department had previously identified, but not required, a 60-day time frame, prior to appeal, for resolving sexual harassment complaints. Although that guidance is no longer in place, nothing in the 2020 amendments prohibits a school from adopting the 60-day time frame.[121]

The 2020 amendments permit a temporary delay of the grievance process or the limited extension of time frames, with good cause.[122] The 2020 amendments provide illustrations of good cause, including considerations such as the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities.[123]

For additional information, please see 34 C.F.R. § 106.45(b)(1)(v).

XII. Live Hearings and Cross-Examination

Question 38: Are all schools required to hold live hearings as part of their Title IX grievance processes?

Answer 38: Postsecondary schools must have a live hearing under the 2020 amendments.[124] A live hearing may occur virtually "with technology enabling the decision-maker[] and parties to simultaneously see and hear the party or the witness answering questions."[125] Elementary and secondary schools are not required to have a live hearing.[126]

For additional information, please see 34 C.F.R. § 106.45(b)(6).

Question 39: What is cross-examination?

Answer 39: At a live hearing, "each party's advisor [must be permitted to] to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility."[127] The 2020 amendments refer to this process of questioning as cross-examination.

The 2020 amendments explain that a party may not conduct cross-examination, but instead the party's advisor must ask the questions on their behalf.[128] The amendments also require a postsecondary school to provide an advisor to conduct cross-examination for any party who does not have their own advisor.[129]

For additional information, please see 34 C.F.R. § 106.45(b)(6).

Question 40: Since elementary and secondary schools are not required to provide a live hearing, what kind of process are they required to provide?

Answer 40: The 2020 amendments state that 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."[130] In addition, the decision-maker "must explain to the party proposing the questions any decision to exclude a question as not relevant."[131]

The preamble also explains that a school may exclude as not relevant questions that are duplicative or repetitive.[132]

The 2020 amendments permit a parent or legally authorized guardian to act on behalf of the complainant or respondent.[133] Whether a parent or guardian has the legal right to act on behalf of a complainant or respondent "would be determined by State law, court orders, child custody arrangements, or other sources granting legal rights to parents or guardians."[134] 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.[135]

For additional information, please see 34 C.F.R. § 106.45(b)(6)(ii) and 34 C.F.R. § 106.30.

Question 41: Is a postsecondary school required to provide complainants and respondents with an advisor for a live hearing?

Answer 41: Yes. The 2020 amendments require a postsecondary school to provide an advisor to conduct cross-examination for any party who does not have their own advisor.[136] The amendments also require all schools to provide the parties with the same opportunities to be accompanied by an advisor of their choice in other parts of the grievance process, but do not require a school to provide an advisor for any part of the process other than the requirement that a postsecondary school provide one for cross-examination.[137]

The preamble explains that the parties are in the best position to decide which individuals should serve as their advisors and notes that advisors may be friends, family members, an attorney, or other individuals chosen by the party or provided by the school if the party does not choose one.[138]

For additional information, please see 34 C.F.R. § 106.45(b)(5)(iv) and 34 C.F.R. § 106.45(b)(6)(i).

Question 42: Are parties and witnesses required to participate in the Title IX grievance process, including submitting to cross-examination during a live hearing at the postsecondary school level?

Answer 42: No. Parties and witnesses are not required to submit to cross-examination or otherwise participate in the Title IX grievance process.[139] For information on the consequences of not submitting to cross-examination, see Question 51.

The 2020 amendments do require schools to offer complainants supportive measures regardless of whether they participate in a grievance process and to prohibit retaliation against individuals based on their decision to participate, or not participate, in a grievance process.[140]

Question 43: May a school create its own rules for conducting a live hearing?

Answer 43: Yes. The preamble states that a school may implement rules regarding how the live hearing is conducted as long as those rules are applied equally to both parties.[141] For

example, a school "may decide whether or how to place limits on evidence introduced at a hearing that was not gathered and presented prior to the hearing."[142]

The preamble also explains that a school may adopt rules on "whether the parties may offer opening or closing statements, specify a process for making objections to the relevance of questions and evidence, [and] place reasonable time limitations on a hearing."[143] The preamble adds that a school may adopt a rule stating that duplicative questions are irrelevant.[144]

In addition, the preamble says that an advisor's cross-examination role "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."[145] Thus, for example, a postsecondary school could limit the role of advisors to relaying questions drafted by their party.

For examples of language related to this issue, please see Q&A Appendix Sections V-VII.

Question 44: May a school put in place rules of decorum or other rules for advisors, parties, and witnesses to follow during a live hearing?

Answer 44: Yes. The preamble says that a school may "adopt rules of decorum" and notes that a school is "in a better position than the Department to craft rules of decorum best suited to [its] educational environment."[146]

For example, a school may prohibit advisors from questioning parties or witnesses in an abusive, intimidating, or disrespectful manner.[147]

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. For example, the preamble explains that if a party's advisor of choice yells at others in violation of a school's rules of decorum, the school may remove the advisor and require a replacement.[148] The school has this authority even when the advisor is asking a question that is relevant to the hearing. If the manner in which an advisor attempts to ask the question is harassing, intimidating, or abusive (e.g., advisor yells, screams, or comes too close to a witness), the preamble explains that a school may enforce a rule requiring that relevant questions must be asked in a respectful, non-abusive manner.[149]

For examples of language related to this issue, please see Q&A Appendix Section VI.

Question 45: Are all parties required to be physically present in the same location during the live hearing?

Answer 45: No. The 2020 amendments state that, "at the [school's] discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other."[150] Additionally, the preamble states that even if a school does not regularly hold virtual hearings, any party may request that the entire hearing, including cross-examination, be held virtually, and the school

must grant that request.[151] The party does not need to provide a reason for making this request.[152]

In addition, nothing in the 2020 amendments prohibits schools from holding virtual hearings or from having the parties participate in separate locations even if no party makes such a request, particularly in light of the operational challenges posed by the COVID-19 pandemic.[153]

For additional information, please see 34 C.F.R. § 106.45(b)(6)(i).

For examples of language related to this issue, please see Q&A Appendix Section V.

Question 46: Is a school permitted to limit the questions that may be asked by each party of the other party or witnesses?

Answer 46: Yes, and in fact the 2020 amendments require certain limitations, whether in a hearing or as part of an exchange of written questions at the elementary and secondary school level. Note that the 2020 amendments do not require a hearing at the elementary and secondary school level.[154]

Questions must be relevant. More specifically, the 2020 amendments state that questions about the complainant's prior sexual behavior are not relevant, subject to certain limitations.[155] The preamble states that any school may exclude as not relevant questions that are duplicative or repetitive.[156] For more information regarding other limitations on questioning, see Question 48.

Further, the 2020 amendments state that during cross-examination at the postsecondary school level, "only relevant cross-examination questions and other questions may be asked of a party or witness" and the decision-maker must determine the relevance of a question before a party or a witness answers.[157]

For additional information, please see 34 C.F.R. § 106.45(b)(6).

For examples of language related to this issue, please see Q&A Appendix Sections VIII and IX.

Question 47: Are questions and evidence about the complainant's sexual history relevant?

Answer 47: The 2020 amendments state that "questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged" or 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."[158]

The preamble explains that the term "prior sexual behavior" refers to "sexual behavior that is unrelated" to the alleged conduct.[159] The preamble also addresses questions and evidence about sexual behavior after an alleged incident, saying that the regulations do not imply that these kinds of questions are relevant.[160] 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."[161] 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)."[162]

For additional information, please see 34 C.F.R. § 106.45(b)(6).

For examples of language related to this issue, please see Q&A Appendix Section IX.

Question 48: Can cross-examination include questions about an individual's medical or mental-health records?

Answer 48: Questions that seek information about any party's medical, psychological, and similar records are not permitted unless the party has given written consent.[163] Questions about other records protected by a legally recognized privilege are also not permitted unless waived by the party.[164] The preamble also explains that "[schools] (and, as applicable, parties) must follow relevant State and Federal health care privacy laws throughout the grievance process."[165]

These protections apply throughout the investigation as well as the hearing.

Question 49: May a school put measures in place to protect the well-being of the parties during the cross-examination?

Answer 49: Yes. For example, the preamble notes that a school is permitted to grant breaks to the parties during a live hearing.[166] Also, as discussed in Question 46, the 2020 amendments require a pause in the cross-examination process each time before a party or witness answers a cross-examination question in order for the decision-maker to determine if the question is relevant.[167] The preamble explains that this is to help ensure that the cross-examination includes only relevant questions and that the pace of the cross-examination does not place undue pressure on a party or a witness to answer immediately.[168]

Question 50: How do the 2020 amendments address the manner in which a decision-maker should evaluate answers to cross-examination questions?

Answer 50: The 2020 amendments do not require that answers to cross-examination questions "be in linear or sequential formats" or that any party "must recall details with certain levels of specificity."[169] The preamble adds that the 2020 amendments "protect against a party being unfairly judged due to inability to recount each specific detail of an incident in sequence" because "decision-makers must be trained to serve impartially without prejudging the facts."[170]

For examples of language related to this issue, please see Q&A Appendix Section VIII.

Question 51: What are the consequences if a party or witness does not participate in a live hearing or submit to cross-examination?

Answer 51: Postsecondary schools, which are required to provide for cross-examination at a live hearing, should keep in mind that, under the 2020 amendments, if a party or a witness does not submit to cross-examination, that individual's statements cannot be relied on by the decision-maker in determining whether the respondent engaged in the alleged sexual harassment.[171]

The preamble explains that even if a party is unable to participate at a hearing "due to death or post-investigation disability," the school's decision-makers may not rely on any statements from that individual in their decision-making about whether the respondent has committed sexual harassment in violation of school policy.[172] As discussed in Question 37, a school has "discretion to apply limited extensions of time frames during the grievance process for good cause, which may include, for example, a temporary postponement of a hearing to accommodate a disability."[173]

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.[174] 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 in a hearing or submit to cross-examination.

Note that "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."[175]

For examples of language related to this issue, please see Q&A Appendix Section X.

For additional information, please see 34 C.F.R. § 106.45(b)(6)(i).

Question 52: May a decision-maker at a postsecondary school rely on non-statement evidence, such as photographs or video images, if a party or witness does not submit to cross-examination?

Answer 52: Yes. Although a decision-maker may not rely on any statement of a party or witness who does not submit to cross-examination, other relevant evidence can still be considered to determine whether the respondent is responsible for the alleged sexual harassment.[176] The preamble explains that the term "statements" should be interpreted using its ordinary meaning, but does not include evidence, such as a videos of the incident itself, where the party or witness has no intent to make an assertion regarding whether or not the alleged harassment occurred or discuss factual details related to the alleged harassment, or where the evidence does not contain such factual assertions by the party or witness.[177] Thus, the decision-maker may rely on non-statement evidence related to the alleged prohibited conduct that is in the record, such as photographs or video images showing the underlying incident.[178]

For examples of language related to this issue, please see Q&A Appendix Section X.

Question 53: May a decision-maker at a postsecondary school rely on statements of a party, such as texts or emails, even if the party does not submit to cross-examination?

Answer 53: It depends. The decision-maker may consider certain types of statements by a party where the statement itself is the alleged harassment, even if the party does not submit to cross-examination. For example, 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.[179] Similarly, if a complainant alleges that the respondent said, "I'll give you a higher grade in my class if you go on a date with me," the decision-maker may rely on the complainant's testimony that the respondent said those words even if the respondent does not submit to cross-examination.[180]

In these types of situations, the decision-maker is evaluating whether the statement was made or sent. In second example above, the complainant's testimony was about the fact that the respondent made the offer, and not about what the respondent intended or whether the respondent took an additional action based on the statement, such as changing the student's grade after a date.[181]

In contrast, evidence in which a party or witness comments on the interaction between the parties without engaging in harassment (e.g., email or text exchanges leading up to the alleged harassment or an admission, an apology, or other comment about the alleged harassment), would be considered statements that could not be considered unless the party or witness is cross-examined.[182]

For examples of language related to this issue, please see Q&A Appendix Section X.

Question 54: May a decision-maker rely on a video, text message, or other piece of evidence that includes statements by multiple parties or witnesses if some of them do not submit to cross-examination?

Answer 54: Yes. The preamble explains that in such cases, even if a party or witness in a text message, email, or video does not submit to cross-examination, the decision-maker may still rely on the statements by other people in that text message, email, or video who do submit to cross-examination.[183]

Question 55: May a decision-maker rely on the statements of a party or witness who submits to cross-examination, but does not answer questions posed by the decision-maker?

Answer 55: Yes. The preamble explains that cross-examination differs from questions posed by a neutral fact-finder and that if a party or witness submits to cross-examination by a party's advisor, but does not answer a question posed by the decision-maker, the decision-maker may still rely on all of that person's statements.[184] The preamble also explains that "the decision-maker still may not draw any inference about the party's credibility in making the responsibility

determination based solely on a party's refusal to answer questions posted by the decision-maker" because 34 C.F.R. § 106.45(b)(6)(i) states that no inference may be drawn based on the refusal to answer cross-examination or other questions.[185]

XIII. Standard of Proof

Question 56: What standard of proof must a school use when deciding whether a respondent is responsible for committing sexual harassment?

Answer 56: Under the 2020 amendments, 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.[186] The preamble explains that the preponderance-of-the-evidence standard means the decision-maker must determine whether alleged facts are more likely than not to be true.[187] It also explains that the clear-and-convincing-evidence standard means the decision-maker must determine whether it is "highly probable" that the alleged facts are true.[188]

For additional information, please see 34 C.F.R. § 106.45(b)(1)(vii).

Question 57: May a school use a different standard of proof for formal complaints of sexual harassment involving students and employees?

Answer 57: No. Regardless of which standard of proof is used, a school must apply the same standard of proof to all formal complaints of sexual harassment made by a student, employee, or faculty member.[189] The preamble explains that if a school has a collective bargaining agreement in place that requires the school to use the clear-and-convincing standard for sexual harassment investigations involving employees, it is required under the 2020 amendments to use only the clear-and-convincing standard for sexual harassment investigations involving students as well.[190] In those cases, the preamble indicates that the school may work cooperatively with its employee unions to renegotiate the standard of proof used in employee sexual harassment investigations.[191]

For additional information, please see 34 C.F.R. § 106.45(b)(1)(vii).

XIV. Informal Resolution

Question 58: May a school offer an informal resolution process, including restorative justice or mediation, as a way to resolve a sexual harassment complaint?

Answer 58: Yes. The 2020 amendments state that a school is not required to offer an informal resolution process but may facilitate an informal resolution process at any time prior to reaching a determination regarding responsibility, subject to certain conditions.[192] A school is not permitted to offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.[193]

The 2020 amendments explain that they leave the term "informal process" undefined to allow a school the discretion to adopt whatever process best serves the needs of its community.[194] The amendments do not require that the parties interact directly with each other as part of an informal resolution process; mediations are often conducted with the parties in separate rooms and the mediator conversing with each party separately.[195] The parties' participation in mediation or restorative justice, if offered, should remain a decision for each individual party to make in a particular case, and neither party should be pressured to participate in the process. Schools may exercise discretion to make fact-specific determinations about whether to offer informal resolution in response to a complaint. The Department will not require the parties to attempt mediation in its enforcement of Title IX.[196]

For additional information, please see 34 C.F.R. § 106.45(b)(9).

For examples of language related to this issue, please see Q&A Appendix Section XV.

Question 59: If a school chooses to offer an informal resolution process, are there any requirements under Title IX?

Answer 59: Yes. If a school chooses to offer an informal process, the 2020 amendments require that the school obtains the complainant's and the respondent's voluntary, written consent before using any kind of "informal resolution" process, such as mediation or restorative justice.[197] With the parties' consent, schools have the freedom to allow the parties to choose an informal resolution mechanism that best suits their needs.[198] If those needs change, however, the 2020 amendments also make clear that either party may withdraw from the informal resolution process and resume the formal grievance process at any time prior to agreeing to a resolution.[199]

A school's discretion to offer an informal resolution process is also limited by the school's obligation to ensure that all persons who facilitate informal resolutions are free from conflicts of interest and bias, and are trained to serve impartially without prejudging the facts at issue.[200] For example, schools that choose to offer restorative justice as a means of an informal resolution should ensure that the restorative justice facilitators are well-trained in effective processes.[201] A school may use trauma-informed techniques during the informal resolution process.

For additional information, please see 34 C.F.R. § 106.45(b)(9).

XV. Retaliation and Amnesty

Question 60: What is retaliation, and is it prohibited under the 2020 amendments?

Answer 60: The 2020 amendments prohibit retaliation.[202] Retaliation is defined as "[i]ntimidation, threats, coercion, or discrimination, including 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 complaint of sex discrimination, or a report

or formal complaint of sexual harassment, for the purposes of interfering with any right or privilege secured by [the] Title IX [statute or regulations]."[203]

For additional information, please see 34 C.F.R. § 106.71.

Question 61: May a school discipline a complainant, respondent, or witness for violating the school's COVID-19 or other policy during a reported incident of sexual harassment?

Answer 61: No, unless the school has a policy that always imposes the same punishment for violating the COVID-19 or other policy regardless of the circumstances. The 2020 amendments 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]."[204]

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.[205] 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.[206]

For additional information, please see 34 C.F.R. § 106.71.

Question 62: Is a school permitted to have an amnesty policy as a way to encourage reporting of sexual harassment?

Answer 62: Yes. The preamble notes that "[t]he Department is aware that some schools have adopted 'amnesty' policies designed to encourage students to report sexual harassment."[207] Under these policies, "students who report sexual misconduct (whether as a victim or witness) will not face charges for school code of conduct violations relating to the sexual misconduct incident (e.g., underage drinking at the party where the sexual harassment occurred)."[208] "Nothing in the [2020 amendments] precludes a [school] from adopting such amnesty policies," and schools retain broad discretion to adopt such amnesty policies or to otherwise define retaliation more broadly than in the regulations.[209]

More generally, schools should keep in mind that the 2020 amendments require that a school's Title IX grievance process treat complainants and respondents equitably.[210]

Question 63: May a school punish a complainant for filing a complaint if the decision-maker finds that the respondent did not engage in the alleged sexual harassment?

Answer 63: Not without a finding of bad faith. The 2020 amendments state that "a determination regarding responsibility, alone, is not sufficient to conclude that any party made

a materially false statement in bad faith."[211] To the contrary, it might be considered retaliation for a school to penalize a student for bringing a complaint, depending on the circumstances.[212] However, if a school believes a student made a materially false statement in bad faith in the course of a Title IX grievance proceeding, it would not constitute retaliation for a school to charge that individual with a code-of-conduct violation.[213]

For additional information, please see 34 C.F.R. § 106.71.

XVI. Forms of Sex Discrimination Other Than Sexual Harassment as Defined by the 2020 Amendments

Question 64: How should a school respond to complaints alleging sex discrimination that do not include sexual harassment allegations?

Answer 64: The 2020 amendments explain that 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.[214]

Instead, the 2020 amendments state that schools must respond to these complaints using the "prompt and equitable" grievance procedures that schools have been required to adopt and publish since 1975, when the original Title IX regulations were issued.[215] The 1975 regulations, which are still in place today, require schools to have a Title IX Coordinator to receive complaints of sex discrimination and require schools to respond promptly and equitably to such complaints.[216]

For additional information, please see 34 C.F.R. § 106.8(c).

Question 65: 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?

Answer 65: 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. In addition, 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.[217]

OCR also has historically explained that a grievance procedure cannot be prompt or equitable unless students know it exists, how it works, and how to file a complaint. Thus, the procedures should be written in language appropriate to the age of the school's students, easily understood, and widely disseminated.[218]

XVII. Religious Exemptions

Question 66: Are all schools that receive federal financial assistance required to comply with Title IX?

Answer 66: Title IX does not apply to an educational institution that is controlled by a religious organization to the extent that application of Title IX would be inconsistent with the religious tenets of the organization.[219] This religious exemption was in the text of Title IX when it was enacted in 1972. The religious exemption does not apply to public schools or to colleges or universities run by state or local governments.

A school may, at its discretion, seek an assurance of a Title IX religious exemption at any time by submitting a letter from the highest ranking official of the institution to the Assistant Secretary for Civil Rights in the Department of Education.[220] The letter must identify the provisions of the Title IX regulations that conflict with specific tenets of the religious organization.[221] A religious exemption is not a blanket exemption from Title IX, and a school's religious exemption extends only as far as the conflict between the Title IX regulations and the religious tenets of the controlling religious organization.[222] A school must comply with the Title IX regulations to the extent that compliance would not conflict with the tenets of the controlling religious organization.[223]

The 2020 amendments state that a school is not required to seek a written assurance of its religious exemption under Title IX before claiming the exemption, and the regulations state that a school can invoke a religious exemption after OCR has received a complaint regarding the school.[224] This is consistent with OCR's handling of religious exemption requests dating back more than two decades.

For additional information, please see 34 C.F.R. § 106.12.

Please visit OCR's website for additional information about religious exemptions.

Question 67: May a student file a complaint with OCR against a school that has obtained an assurance of a religious exemption from OCR?

Answer 67: Yes. Students may always file a complaint with OCR if they believe their school has violated their rights under Title IX, even if OCR has previously provided assurance to the school of a religious exemption under Title IX. After receiving the complaint, OCR would first evaluate whether the allegation is appropriate for investigation. If yes, and if the school has previously asserted a religious exemption, then OCR would determine whether the exemption applies to the alleged discrimination. If the exemption applies, OCR would dismiss the complaint. If the alleged discrimination does not fall within the school's religious exemption from Title IX, then OCR would proceed with the investigation, following OCR's Case Processing Manual.[225]

[1] You can read the 2020 amendments, entitled "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," at 85 Fed. Reg. 30,026 (May 19, 2020), https://www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf. The amendments begin on page 30,572. The Federal Register notice also includes a preamble, at pages 30,026-30,570, that clarifies OCR's interpretation of Title IX and the Title IX regulations. As discussed above, please note that the preamble itself does not have the force and effect of law.
[2] 85 Fed. Reg. at 30,063.
[3] *Id.*
[4] *Id.*
[5] 20 U.S.C. § 1092(f)(6)(A)(v).
[6] NIBRS User Manual at 40 (April 15, 2021), https://www.fbi.gov/file-repository/ucr/ucr-2019-1-nibrs-user-manua-093020.pdf/view.
[7] 34 U.S.C. § 12291(a)(10).
[8] *Id.* § 12291(a)(8).
[9] *Id*. § 12291(a)(30).
[10] 34 C.F.R. § 106.30 (definition of sexual harassment). *See also* 85 Fed. Reg. at 30,202.
[11] 85 Fed. Reg. at 30,174.
[12] *Id.*
[13] *Id*. at 30,199.
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] 34 C.F.R. § 106.31.
[18] 85 Fed. Reg. at 30,170. *See also* 34 C.F.R. § 106.30(a) (definition of sexual harassment).
[19] 85 Fed. Reg. at 30,170.
[20] *Id.*
[21] *Id.* at 30,169.
[22] *Id.*
[23] *Id.* at 30,170.
[24] *Id*.
[25] *Id.*
[26] 34 C.F.R. § 106.44(a). *See also* 85 Fed. Reg. at 30,196-98.
[27] 85 Fed. Reg. at 30,093. *See also* 34 C.F.R. § 106.45(b)(1)(iii).
[28] 34 C.F.R. § 106.8(d).
[29] 85 Fed. Reg. at 30,201.
[30] *Id*. at 30,197.
[31] *Id.* at 30,199 n.875.
[32] *Id.* at 30,200 n.877.
[33] *Id.* at 30,200.
[34] *Id.* at 30,202.
[35] *Id.*
[36] *Id.* at 30,203.
[37] *Id.* at 30,202.
[38] *Id.*
[39] U.S. Department of Education, Office for Civil Rights, Letter from Acting Assistant Secretary for Civil Rights, Kimberly M. Richey, Withdrawing Certain OCR Documents (Aug. 26, 2020), https://www2.ed.gov/policy/gen/guid/fr-200826-letter.pdf. Guidance documents previously issued by the Department that have since been withdrawn are available at https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/respolicy.html. Note that these

guidance documents, even prior to their withdrawal, do not have the force and effect of law, and are not meant to bind the public or regulated entities in any way.
[40] 34 C.F.R. §§ 106.30(a) (definition of actual knowledge), 106.44(a).
[41] 85 Fed. Reg. at 30,109, 30,115.
[42] 34 C.F.R. § 106.30(a) (definition of actual knowledge).
[43] 85 Fed. Reg. at 30,115-16, 30,120.
[44] *Id.* at 30,115.
[45] 34 C.F.R. § 106.30(a) (definition of actual knowledge); 85 Fed. Reg. at 30,043.
[46] 85 Fed. Reg. at 30,043.
[47] *Id.*
[48] *Id.*
[49] 34 C.F.R. §§ 106.8(a), 106.30(a) (definition of actual knowledge).
[50] 85 Fed. Reg. at 30,093.
[51] 34 C.F.R. § 106.30(a)
[52] 85 Fed. Reg. at 30,116.
[53] *Id*. at 30,192.
[54] *Id*. *See also* 34 C.F.R. § 106.30(a) (definition of complainant).
[55] 85 Fed. Reg. at 30,192.
[56] *Id.* at 30,107, 30,115, 30,523.
[57] *Id.* at 30,107.
[58] *Id*. at 30,523.
[59] *Id.* at 30,107.
[60] *Id.* at 30,115, 30,523.
[61] *Id.* at 30,107.
[62] *Id.*
[63] 34 C.F.R. § 106.44(a).
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] 34 C.F.R. § 106.45(b)(1)(i), (b)(7)(ii)(E); 85 Fed. Reg. at 30,274.
[68] 85 Fed. Reg. at 30,274.
[69] 34 C.F.R. § 106.45(b)(1)(i).
[70] *Id.*
[71] *Id*.
[72] *Id.* § 106.45(b)(1)(vi).
[73] 85 Fed. Reg. at 30,275.
[74] 34 C.F.R. § 106.30(a) (definition of formal complaint).
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.* § 106.6(g); 85 Fed. Reg. at 30,453.
[79] *Id.* § 106.30(a) (definition of formal complaint).
[80] *Id.*
[81] *Id.*
[82] 85 Fed. Reg. at 30,138, 30,198 n.869, 30,219.
[83] 34 C.F.R. § 106.30(a) (definition of formal complaint).
[84] *Id.*
[85] 34 C.F.R. §§ 106.30(a) (definition of formal complaint), 106.44(a).
[86] 85 Fed. Reg. at 30,089.
[87] 34 C.F.R. § 106.45(b)(3)(i). *See also* 85 Fed. Reg. at 30,199.

[88] 34 C.F.R. § 106.44(a).
[89] *Id.*
[90] *Id.* § 106.45(b)(3)(ii). *See also* 85 Fed. Reg. at 30,290.
[91] 85 Fed. Reg. at 30,290.
[92] *Id.*
[93] *Id.* at 30,187.
[94] *See* 34 C.F.R. § 106.45(b)(1)(v).
[95] 85 Fed. Reg. at 30,348. *See also* 34 C.F.R. § 106.45(b)(1)(v).
[96] 34 C.F.R. § 106.45(b)(1)(v).
[97] 34 C.F.R. § 106.45(b)(6)(i). *See also* 85 Fed. Reg. at 30,348.
[98] 34 C.F.R. § 106.44(a).
[99] *Id.*
[100] *Id.* § 106.30(a) (definition of supportive measures). *See also* 34 C.F.R. § 106.44(a).
[101] 34 C.F.R. § 106.30(a) (definition of supportive measures).
[102] *Id.*
[103] 85 Fed. Reg. at 30,182.
[104] *Id.* at 30,401.
[105] *Id.* at 30,182.
[106] 34 C.F.R. § 106.44(c).
[107] *Id.*
[108] *Id.* (referencing the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, and the Americans with Disabilities Act).
[109] *Id.* § 106.44(d).
[110] *Id.* (referencing Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act).
[111] *Id.* § 106.45(b)(1)(iv).
[112] 85 Fed. Reg. at 30,259.
[113] *Id.*
[114] 34 C.F.R. § 106.45(b)(1)(v).
[115] 85 Fed. Reg. at 30,269.
[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] 34 C.F.R. § 106.45(b)(1)(v).
[123] *Id.*
[124] *Id.* § 106.45(b)(6)(i).
[125] *Id.*
[126] *Id.* § 106.45(b)(6)(ii).
[127] *Id.* § 106.45(b)(6)(i).
[128] *Id.*
[129] *Id.*
[130] *Id.* § 106.45(b)(6)(ii).
[131] *Id*.
[132] 85 Fed. Reg. at 30,361.
[133] 34 C.F.R. § 106.6(g).
[134] 85 Fed. Reg. at 30,453.
[135] *Id.* at 30,122.
[136] 34 C.F.R. § 106.45(b)(6)(1).

[137] *Id.* § 106.45(b)(5)(iv).
[138] 85 Fed. Reg. at 30,297.
[139] 34 C.F.R. § 106.45(b)(6)(i).
[140] *Id*. §§ 106.44(a), 106.71. *See also* 85 Fed. Reg. at 30,324.
[141] 85 Fed. Reg. at 30,360. These rules would be in addition to any rules required under 34 C.F.R. § 106.45.
[142] *Id*. at 30,360.
[143] *Id.* at 30,361.
[144] *Id.* at 30,331.
[145] *Id.* at 30,340.
[146] *Id.* at 30,319. *See also* 34 C.F.R. § 106.45(b)(5)(iv).
[147] 85 Fed. Reg. at 30,319, 30,324, 30,331, 30,361.
[148] *Id.* at 30,320, 30,324, 30,342.
[149] *Id.*
[150] 34 C.F.R. § 106.45(b)(6)(i).
[151] *Id. See also* 85 Fed. Reg. at 30,324, 30,355-56.
[152] 34 C.F.R. § 106.45(b)(6)(i).
[153] 85 Fed. Reg. at 30,362.
[154] 34 C.F.R. § 106.45(b)(6)(ii).
[155] *Id*.
[156] 85 Fed. Reg. at 30,361.
[157] 34 C.F.R. § 106.45(b)(6)(i).
[158] *Id.*
[159] 85 Fed. Reg. at 30,354 n.1355.
[160] *Id.*
[161] *Id.* at 30,353.
[162] *Id.*
[163] 34 C.F.R. § 106.45(b)(5)(i). *See also* 85 Fed. Reg. at 30,361, 30,294.
[164] 34 C.F.R. § 106.45(b)(1)(x).
[165] 85 Fed. Reg. at 30,286.
[166] *Id.* at 30,323.
[167] *Id.* at 30,323-24.
[168] *Id.*
[169] *Id.* at 30,323.
[170] *Id.*
[171] 34 C.F.R. § 106.45(b)(6)(i).
[172] 85 Fed. Reg. at 30,348.
[173] *Id.*
[174] 34 C.F.R. § 106.45(b)(6)(i).
[175] 85 Fed. Reg. at 30,349.
[176] 34 C.F.R. § 106.45(b)(6)(i). *See also* 85 Fed. Reg. at 30,328, 30,345, 30,349, 30,361.
[177] 85 Fed. Reg. at 30,328, 30,345, 30,349, 30,361.
[178] *Id*. at 30,328, 30,345, 30,349, 30,361.
[179] *Id.* at 30,349.
[180] *Id.*
[181] *See, e.g.*, *id.* at 30,142 n.625 (acknowledging that speech, when not protected under the U.S. Constitution, may constitute actionable harassment under 34 C.F.R. § 106.30 even when speech is part of the misconduct at issue). *See also id.* at 30,349.
[182] 85 Fed. Reg. at 30,349.
[183] *Id.*
[184] *Id.*

[185] 34 C.F.R. § 106.45(b)(6)(i). *See also* 85 Fed. Reg. at 30,349 n.1341.
[186] 34 C.F.R. § 106.45(b)(1)(vii).
[187] 85 Fed. Reg. at 30,386 n.1472, 30,388 n.1480.
[188] *Id.* at 30,386 n.1473.
[189] 34 C.F.R. § 106.45(b)(1)(vii). *See also* 85 Fed. Reg. at 30,378.
[190] 85 Fed. Reg. at 30,378.
[191] *Id*.
[192] 34 C.F.R. § 106.45(b)(9).
[193] *Id.* § 106.45(b)(9)(iii).
[194] 85 Fed. Reg. at 30,401.
[195] *Id.* at 30,403.
[196] *Id.* at 30,361.
[197] 34 C.F.R. § 106.45(b)(9).
[198] 85 Fed. Reg. at 30,406.
[199] 34 C.F.R. § 106.45(b)(9).
[200] 34 C.F.R. § 106.45(b)(1)(iii).
[201] 85 Fed. Reg. at 30,401, 30,403.
[202] 34 C.F.R. § 106.71(a).
[203] *Id.*
[204] *Id.*
[205] 85 Fed. Reg. at 30,536.
[206] *Id.*
[207] *Id.*
[208] *Id.*
[209] *Id.*
[210] 34 C.F.R. § 106.45(b)(1)(i).
[211] *Id.* § 106.71(b)(2). *See also* 85 Fed. Reg. at 30,537.
[212] 34 C.F.R. § 106.71(b)(2).
[213] *Id*.
[214] *Id.* §§ 106.8(c), 106.45. *See also* 85 Fed. Reg. at 30,095, 30,129, 30,471, 30,473.
[215] 34 C.F.R. §§ 106.8(c), 106.45. *See also 85* Fed. Reg. at 30,095, 30,129, 30,461, 30,473.
[216] 34 C.F.R. §§ 106.8(a)-(c).
[217] U.S. Department of Education, Office for Civil Rights, *Revised Sexual Harassment Guidance: Sexual Harassment of Students by School Employees, Other Students, or Third Parties* at 19-20 (Jan. 19, 2001), https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf. This guidance was rescinded in 2020 but remains accessible on the Department's website for historical reference.
[218] *Id.* at 20.
[219] 20 U.S.C. § 1681(a)(3); 34 C.F.R. § 106.12.
[220] 34 C.F.R. § 106.12(b).
[221] *Id.*
[222] *Id.* § 106.12(a).
[223] *Id.*
[224] *Id.* § 106.12(b).
[225] U.S. Department of Education, Office for Civil Rights Case Processing Manual (Aug. 26, 2020), https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf.

Appendix to
Questions and Answers on the Title IX Regulations on Sexual Harassment (July 2021)

This Appendix accompanies Questions and Answers on the Title IX Regulations on Sexual Harassment (July 2021) from the U.S. Department of Education's Office for Civil Rights. This Appendix responds to schools' requests for examples of Title IX procedures that may be adaptable to their own circumstances and helpful in implementing the 2020 amendments to the Department's Title IX regulations.[1] Schools that receive federal funds are obligated to implement these regulations, with some limited exceptions described in the statute and regulations.

The Appendix includes examples for elementary and secondary schools and postsecondary schools. It is not comprehensive but addresses many areas in which questions arise.

Important notes:

- Schools may use the example policy language in this Appendix to guide the creation of their own policies but are not required to do so. The Department does not endorse these provisions in particular, nor does it prefer or support these examples as compared with others that schools may use.
- Other than any statutory and regulatory requirements included below, the contents of this Appendix do not have the force and effect of law and are not meant to bind the public. This Appendix is intended only to provide clarity to the public regarding how OCR interprets existing requirements under the law or agency policies.
- Adoption of one or more of the examples from this Appendix alone does not demonstrate compliance with Title IX. If OCR investigates a discrimination complaint, OCR will make a fact-specific determination regarding whether a school's Title IX policies and procedures, and their implementation, complies with the law.
- The example policy language does not address policies or procedures that may be required to comply with Title VII of the Civil Rights Act of 1964, which prohibits sex discrimination in employment. As the 2020 amendments state: "Nothing in [these regulations] may be read in derogation of any individual's rights under title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq*. or any regulations promulgated thereunder." 34 C.F.R. § 106.6(f).

Please also note that this Appendix focuses on procedures for addressing reports and complaints of sexual harassment, including sexual violence, because the regulations themselves focus on procedures.

[1] The Department issued the regulations to implement Title IX of the Education Amendments Act of 1972. The Department's current Title IX regulations are in 34 C.F.R. Part 106, which is available at https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=f12a46d66326f0c23de5edac094d253d&mc=true&n=pt34.1.106&r=PART&ty=HTML.

The examples are excerpted from the policies at a variety of schools across the United States, and OCR has edited them for readability and consistency.

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Many of the sections below include multiple examples to illustrate choices that different schools have made about communicating their procedures to students and their communities. The 2020 amendments do not necessarily require the approaches in the examples here and, again, the Department does not endorse these provisions in particular, nor does it prefer or support these examples as compared with others that schools may use.

The 2020 amendments impose some different requirements for elementary and secondary schools, as compared to postsecondary schools. In light of this, we have noted where examples track requirements for elementary and secondary schools, postsecondary schools, or both. For more information on these differences, please see the Title IX Q&A.

I. Receiving and Responding to Reports of Sexual Harassment

Example Policies Used by Elementary and Secondary Schools and Postsecondary Schools

- Example Policy 1: When a complaint or report of sexual harassment is made under this school's policy, the Title IX Coordinator (or designee) will: (1) confidentially contact the complainant to offer supportive measures, consider the complainant's wishes with respect to supportive measures, and inform them of the availability of supportive measures with or without filing a formal complaint; (2) explain the process for how to file a formal complaint; (3) inform the complainant that any report made in good faith will not result in discipline; and (4) respect the complainant's wishes with respect to whether to investigate unless the Title IX Coordinator determines it is necessary to pursue the complaint in light of a health or safety concern for the community.
- Example Policy 2: 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.

Example Policy Used by Elementary and Secondary Schools

- Example Policy 1: The district must respond whenever any District employee has been put on actual notice of any sexual harassment or allegations of sexual harassment as

defined in this district's policy. This mandatory obligation is in addition to the child abuse mandatory reporting obligation under state law.

II. Supportive Measures

Example Policies Used by Elementary and Secondary Schools and Postsecondary Schools

- Example Policy 1: Supportive measures are short-term measures that are designed to restore or preserve access to the school's education program or activity. Examples of supportive measures include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures.
- Example Policy 2: 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. Supportive measures are available to the complainant, respondent, and as appropriate, witnesses or other impacted individuals. The Title IX Coordinator will maintain consistent contact with the parties to ensure that safety and emotional and physical well-being are being addressed. 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.
- Example Policy 3: Supportive measures are provided based on an individualized assessment of the needs of the individual. They may include, but are not limited to: facilitating access to medical and counseling services, assistance in arranging the rescheduling of exams and assignments, academic support services, assistance in requesting long-term academic accommodations if the individual qualifies as an individual with a disability, allowing either a complainant or respondent to drop a class in which both parties are enrolled, a mutual "no contact order," and any other reasonably supportive measure that does not unreasonably burden the other party's access to education and that serves the goals of this policy.
- Example Policy 4: The school will make available supportive measures with or without the filing of a formal complaint. 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 counseling, extensions of deadlines or course-related adjustments, restrictions on contact between parties (must be applied equally to both parties), leaves of absence, and increased security and monitoring of certain areas of the school.

III. Investigations

Example Policies Used by Elementary and Secondary Schools and Postsecondary Schools

- Example Policy 1: Once a formal Title IX complaint is filed, an investigator will be assigned and the parties will be treated equitably, including in the provision of supportive measures and remedies. They will receive notice of the specifics of the allegations as known, and as any arise during the investigation. The investigator will be unbiased and free from conflicts of interest and will objectively review the complaint, any evidence, and any information from witnesses, expert witnesses, and the parties. If the investigator conducts interviews, the parties will be provided time to prepare and will receive notice of the time/date/location/participants/purpose for the interviews.
- Example Policy 2: Upon receipt of a formal Title IX complaint, the Title IX Coordinator will appoint an Investigator to investigate the allegations subject to the formal grievance process. The investigation may include, among other things, interviewing the complainant, the respondent, and any witnesses; reviewing law enforcement investigation documents if applicable; reviewing relevant student or employment files (preserving confidentiality wherever necessary); and gathering and examining other relevant documents, social media, and evidence.

Example Policies Used by Elementary and Secondary Schools

- Example Policy 1: The Investigator will attempt to collect all relevant information and evidence. While the Investigator will have the burden of gathering evidence, it is crucial that the parties present evidence and identify witnesses to the Investigator so that they may be considered during the investigation. While all evidence gathered during the investigative process and obtained through the exchange of written questions will be considered, the decision-maker may in their discretion grant lesser weight to last-minute information or evidence introduced through the exchange of written questions that was not previously presented for investigation by the Investigator.
- Example Policy 2: The decision-maker will facilitate a written question and answer period between the parties. Each party may submit their written questions for the other party and witnesses to the decision-maker for review. The questions must be relevant to the case. The decision-maker will determine if the questions submitted are relevant and will then forward the relevant questions to the other party or witnesses for a response. The decision-maker can then review all the responses, determine what is relevant or not

relevant, and issue a decision as to whether the Respondent is responsible for the alleged sexual harassment.

IV. The Role of the Advisor

Example Policies Used by Postsecondary Schools[2]

- Example Policy 1: The role of the advisor is narrow in scope: the advisor may attend any interview or meeting connected with the grievance process that the party whom they are advising is invited to attend, but the advisor may not actively participate in interviews and may not serve as a proxy for the party. The advisor may attend the hearing and may conduct cross-examination of the other party and any witnesses at the hearing; otherwise, the advisor may not actively participate in the hearing.
- Example Policy 2: During meetings and hearings, the advisor may talk quietly with the student or pass notes in a non-disruptive manner. The advisor may not intervene in meetings with the school. In addition, while advisors may provide guidance and assistance throughout the process, all written submissions must be authored by the student.
- Example Policy 3: The advisor may provide advice and consultation to the parties or parties' witnesses outside of the conduct of the live hearing to assist parties in handling the formal resolution process.

V. The Live Hearing Process

Example Policies Used by Postsecondary Schools[3]

A. Before the hearing

- Example Policy 1: In order to promote a fair and expeditious hearing, the parties and their advisors will attend a pre-hearing conference with the decision-maker. The pre-hearing conference assures that the parties and their advisors understand the hearing process and allows for significant issues to be addressed in advance of the hearing.

[2] While elementary and secondary schools may choose to permit parties to have an advisor, the 2020 amendments only require an advisor at the postsecondary school level due to the cross-examination requirement. See the Question 41 in the Q&A for more information.

[3] While elementary and secondary schools may choose to use a live hearing, the 2020 amendments only require a live hearing with cross-examination at the postsecondary school level. See Section XII in the Q&A for more information.

B. Hearing Format

- Example Policy 1: While the hearing is not intended to be a repeat of the investigation, the parties will be provided with an equal opportunity for their advisors to conduct cross-examination of the other party and of relevant witnesses. A typical hearing may include: brief opening remarks by the decision-maker; questions posed by the decision-maker to one or both of the parties; cross-examination by either party's advisor of the other party and relevant witnesses; and questions posed by the decision-maker to any relevant witnesses.
- Example Policy 2: The parties and witnesses will address only the decision-maker, and not each other. Only the decision-maker and the parties' advisors may question witnesses and parties.
- Example Policy 3: When it is an individual's turn to appear before the decision-maker, that person will appear separately before the panel and may bring notes for their reference. The decision-maker may ask any individual for a copy of or to inspect their notes. The complainant and respondent may be accompanied by or may otherwise be in contact with their advisor at all times. If the hearing is conducted wholly or partially through video conference, an administrator will ensure that each party has the opportunity to appear before or speak directly to the hearing panel and to appropriately participate in the questioning process.
- Example Policy 4: At the request of either party, the decision-maker will allow the parties and/or witnesses to be visually separated during the hearing. This may include, but is not limited to, the use of videoconference and/or any other appropriate technology. To assess credibility, the decision-maker must have sufficient access to the complainant, respondent, and any witnesses presenting information; if the decision-maker is sighted, then the decision-maker must be able to see them.
- Example Policy 5: Parties will be able to see and hear (or, if deaf or hard of hearing, to access through auxiliary aids or services) all questioning and testimony at the hearing, if they choose to. Witnesses (other than the parties) will attend the hearing only for their own testimony.
- Example Policy 6: The school will ensure that students with disabilities have an equal opportunity to participate in, and benefit from the school's Title IX grievance process, consistent with the requirements of Section 504 of the Rehabilitation Act of 1973. The school will also ensure that English learner students can participate meaningfully and equally in the school's Title IX grievance process, as required by Title VI of the Civil Rights Act of 1964 and the Equal Educational Opportunities Act of 1974.

C. Evidence

- Example Policy 1: The hearing is an opportunity for the parties to address the decision-maker. The parties may address any information in the investigative report, submit supplemental statements in response to the investigative report or, at the time of any sanction, provide verbal impact and mitigation statements. The school will make all evidence gathered available to the parties at the hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination. In reaching a determination, the decision-maker will meet with the complainant, respondent, investigator, and any relevant witnesses, but the decision-maker may not conduct their own investigation.
- Example Policy 2: The parties will have the opportunity to present the evidence they submitted, subject to any exclusions determined by the decision-maker. Generally, the parties may not introduce evidence, including witness testimony, at the hearing that they did not identify during the pre-hearing process. However, the decision-maker has discretion to accept or exclude additional evidence presented at the hearing. In addition, the parties are expected not to spend time on undisputed facts or evidence that would be duplicative.
- Example Policy 3: Courtroom rules of evidence and procedure will not apply. The decision-maker will generally consider, that is rely on, all evidence that they determine to be relevant and reliable. Throughout the hearing, the decision-maker will: (1) Exclude evidence including witness testimony that is, for example, irrelevant in light of the policy violation(s) charged, relevant only to issues not in dispute, or unduly repetitive, and will require rephrasing of questions that violate the rules of conduct; (2) Decide any procedural issues for the hearing; and/or (3) Make any other determinations necessary to promote an orderly, productive, and fair hearing that complies with the rules of conduct.

D. Confidentiality

- Example Policy 1: All live hearings will be closed to the public and witnesses will be present only during their testimony. For live hearings that use technology, the decision-maker shall ensure that appropriate protections are in place to maintain confidentiality.
- Example Policy 2: The hearing is a closed proceeding and is not open to the public. All participants involved in a hearing are expected to respect the seriousness of the matter and the privacy of the individuals involved. The school's expectation of privacy during the hearing process should not be understood to limit any legal rights of the parties during or after the resolution. The school may not, by federal law, prohibit the

complainant from disclosing the final outcome of a formal complaint process (after any appeals are concluded). All other conditions for disclosure of hearing records and outcomes are governed by the school's obligations under the Family Educational Rights and Privacy Act (FERPA), any other applicable privacy laws, and professional ethical standards.

E. Decision-makers asking questions of the parties or witnesses

- Example Policy 1: The decision-maker may question the parties and witnesses, but they may refuse to respond.

VI. Behavior During the Live Hearing/Rules of Decorum

Example Policies Used by Postsecondary Schools

- Example Policy 1: The school will require all parties, advisors, and witnesses to maintain appropriate decorum throughout the live hearing. Participants at the live hearing are expected to abide by the decision-maker's directions and determinations, maintain civility, and avoid emotional outbursts and raised voices. Repeated violations of appropriate decorum will result in a break in the live hearing, the length of which will be determined by the decision-maker. The decision-maker reserves the right to appoint a different advisor to conduct cross-examination on behalf of a party after an advisor's repeated violations of appropriate decorum or other rules related to the conduct of the live hearing.
- Example Policy 2: The hearing will be conducted in a respectful manner that promotes fairness and accurate factfinding and that complies with the rules of conduct.
- Example Policy 3: The school (including any official acting on behalf of the school such as an investigator or a decision-maker) has the right at all times to determine what constitutes appropriate behavior on the part of an advisor and to take appropriate steps to ensure compliance with this policy.
- Example Policy 4: Parties and advisors may take no action at the hearing that a reasonable person would see as intended to intimidate that person (whether party, witness, or official) into not participating in the process or meaningfully modifying their participation in the process.

VII. Protecting the Well-Being of the Parties During the Live Hearing/Investigation

Example Policies Used by Postsecondary Schools

- Example Policy 1: Each participating individual will have access to a private room for the duration of the hearing if the hearing is in person and may choose to participate in the proceedings via video conference.
- Example Policy 2: The decision-maker will discuss measures available to protect the well-being of parties and witnesses at the hearing. These may include, for example, use of lived names and pronouns during the hearing, including names appearing on a screen; a party's right to have their support person available to them at all times during the hearing (in addition to their advisor); and a hearing participant's ability to request a break during the hearing, except when a question is pending.

Example Policy Used by Elementary and Secondary Schools

- Example Policy 1: To the greatest extent possible, and subject to Title IX, the school will make reasonable accommodations in an investigation to avoid potential re-traumatization of a child and to avoid any potential interference with an investigation by the Department of Child and Family Services or a law enforcement agency.
- Example Policy 2: The school will ensure that students with disabilities have an equal opportunity to participate in, and benefit from the school's Title IX grievance process, consistent with the requirements of Section 504 of the Rehabilitation Act of 1973. The school will also ensure that English learner students can participate meaningfully and equally in the school's Title IX grievance process, as required by Title VI of the Civil Rights Act of 1964 and the Equal Educational Opportunities Act of 1974.

VIII. The Cross-Examination Process

Example Policies Used by Postsecondary Schools

A. Explaining Cross-Examination

- Example Policy 1: The parties' advisors will have the opportunity to cross examine the other party (and witnesses, if any). Such cross-examination must be conducted directly, orally, and in real time by the party's advisor and never by a party personally.
- Example Policy 2: Each party's advisor may pose relevant questions to the opposing party and witnesses (including the Investigative Team).
- Example Policy 3: Each party will prepare their questions, including any follow-up questions, for the other party and witnesses, and will provide them to their advisor. The advisor will ask the questions as the party has provided them, and may not ask questions that the advisor themselves have developed without their party.

- Example Policy 4: The role of the advisor at the live hearing is to conduct cross-examination on behalf of a party. The advisor is not to represent a party, but only to relay the party's cross-examination questions that the party wishes to have asked of the other party and witnesses. Advisors may not raise objections or make statements or arguments during the live hearing.

B. Relevant questions only/Decision-maker reviews all questions

- Example Policy 1: Only relevant questions may be asked of a party or witness. Before a complainant, respondent, or witness responds to a question, the decision-maker will first determine whether the question is relevant and explain any decision to exclude a question as not relevant.
- Example Policy 2: When a party's advisor is asking questions of the other party or a witness, the decision-maker will determine whether each question is relevant before the party or witness answers it, will exclude any that are not relevant or unduly repetitive, and will require rephrasing of any questions that violate the rules of conduct. If the decision-maker determines that a question should be excluded as not relevant, they will explain their reasoning.
- Example Policy 3: Only relevant cross-examination questions and follow-up questions, including those that challenge credibility, may be asked. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker first must determine whether the question is relevant or cumulative and must explain any decision to exclude a question that is not relevant or is cumulative.

IX. Restrictions on Considering a Complainant's or Respondent's Sexual History

Example Policies Used by Elementary and Secondary Schools and Postsecondary Schools

- Example Policy 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.

- Example Policy 2: An individual's character or reputation with respect to other sexual activity is not relevant and will not be considered as evidence. Similarly, an individual's prior or subsequent sexual activity is typically not relevant and will only be considered as evidence under limited circumstances. For example, prior sexual history may be relevant to explain the presence of a physical injury or to help resolve other questions raised in the investigation. It may also be relevant to show that someone other than the respondent committed the conduct alleged by the complainant. The investigator will determine the relevance of this information, and both parties will be informed in writing if evidence of prior sexual history is deemed relevant.
- Example Policy 3: Where 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.

X. Situations in Which a Party or Witness Does Not Participate in a Live Hearing or in Cross-examination

Example Policies Used by Postsecondary Schools

- Example Policy 1: If the complainant, the respondent, or a witness informs the school that they will not attend the hearing (or will attend but refuse to be cross-examined), the school's Title IX Coordinator may determine that the hearing may still proceed. The decision-maker may not, however: (a) rely on any statement or information provided by that non-participating individual in reaching a determination regarding responsibility; or (b) draw any adverse inference in reaching a determination regarding responsibility based solely on the individual's absence from the hearing (or their refusal to be cross-examined).
- Example Policy 2: Neither the complainant nor the respondent is required to participate in the resolution process outlined in these procedures. The school will not draw any adverse inferences from a complainant's or respondent's decision not to participate or

to remain silent during the process. An investigator or decision-maker, in the investigation or the hearing respectively, will reach findings and conclusions based on the information available.

- Example Policy 3: If a party does not submit to cross-examination, the decision-maker cannot rely on any prior statements made by that party in reaching a determination regarding responsibility, but may reach a determination regarding responsibility based on evidence that does not constitute a statement by that party. The decision-maker may also consider evidence created by the party where the evidence itself constituted the alleged prohibited conduct. Such evidence may include, by way of example but not limitation, text messages, e-mails, social media postings, audio or video recordings, or other documents or digital media created and sent by a party as a form of alleged sexual harassment, or as part of an alleged course of conduct that constitutes stalking. The decision-maker cannot draw an inference about the responsibility for a policy violation based solely on a party's absence from the hearing or refusal to answer cross-examination or other questions.
- Example Policy 4: A statement is a person's intent to make factual assertions, including evidence that contains a person's statement(s). Party or witness statements, police reports, Sexual Assault Nurse Examiner (SANE) reports, medical reports, and other records may not be relied upon in making a final determination after the completion of a live hearing to the extent that they contain statements of a party or witness who has not submitted to cross-examination. However, the decision-maker cannot draw any inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or their refusal to answer cross-examination questions.

XI. Presumptions about Complainants, Respondents, and Witnesses

Example Policies Used by Elementary and Secondary Schools and Postsecondary Schools

- Example Policy 1: The school presumes that reports 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.
- Example Policy 2: All formal sexual misconduct complaints are assumed to be made in good faith. However, if the evidence establishes that the formal complaint was intentionally falsely made, corrective/disciplinary action may be taken, up to and including suspension, expulsion, or termination. This does not include allegations

that are made in good faith but are ultimately shown to be erroneous or do not result in a policy violation determination.

- Example Policy 3: The respondent is presumed to be not responsible for the alleged conduct until a determination regarding responsibility is made by the decision-maker.
- Example Policy 4: An individual's status as a respondent will not be considered a negative factor during consideration of the grievance. 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.

XII. Determination Regarding Responsibility

Example Policies Used by Elementary and Secondary Schools and Postsecondary Schools

- Example Policy 1: The school will review the evidence provided by all parties and will make a final determination of responsibility after the investigation. The decision-maker will not be the Title IX Coordinator, the investigator, or any other individual who may have a conflict of interest. The final determination will be provided to the parties at the same time, with appeal rights provided. It will explain if any policies were violated, the steps and methods taken to investigate, the findings of the investigation, conclusions about the findings, the ultimate determination and the reasons for it, any disciplinary sanctions that will be imposed on the respondent, and any remedies available to the complainant to restore or preserve equal access.
- Example Policy 2: The decision-maker will issue a written determination following the review of evidence. The written determination will include: (1) identification of allegations potentially constituting sexual harassment as defined in 34 C.F.R. § 106.30; (2) a description of the procedural steps taken from the receipt of the complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, and methods used to gather evidence; (3) findings of fact supporting the determination, conclusions regarding the application of this formal grievance process to the facts; (4) a statement of, and rationale for, the result as to each allegation, including any determination regarding responsibility, any disciplinary sanctions the decision-maker imposed on the respondent that directly relate to the complainant, and whether remedies designed to restore or preserve equal access to the school's education program or activity will be provided to the complainant; and (5) procedures and permissible bases for the parties to appeal the determination. The written determination will be provided to the parties simultaneously. 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.

XIII. Sanctions and Remedies

Example Policies Used by Elementary and Secondary Schools and Postsecondary Schools

- Example Policy 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].
- Example Policy 2: When a respondent is found responsible for the prohibited behavior as alleged, sanctions are based on the severity and circumstances of the behavior. Disciplinary actions or consequences can range from a conference with the respondent and a school official through suspension or expulsion. When a respondent is found responsible for the prohibited behavior as alleged, remedies must 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.
- Example Policy 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.
- Example Policy 4: The role of the Title IX Coordinator following the receipt of the written determination from the decision-maker is to facilitate the imposition of sanctions, if any, the provision of remedies, if any, and to otherwise complete the formal resolution process. The appropriate school official, after consultation with the Title IX Coordinator, will determine the sanctions imposed and remedies provided, if any. The Title IX Coordinator must provide written notice to the parties simultaneously. 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.
- Example Policy 5: 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, and take into account any special circumstances regarding the student. The IEP team will consider the parents' views and any preference for the reassignment location along with any location proposed by school staff at the meeting. 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. Accordingly, the IEP team will consider the views of all members, including the parents, at the meeting.

XIV. Appeals

Example Policies Used by Elementary and Secondary Schools and Postsecondary Schools

- Example Policy 1: Each party may appeal (1) the dismissal of a formal complaint or any included allegations and/or (2) a determination regarding responsibility. To appeal, a party must submit their written appeal within five business days of being notified of the decision, including the grounds for the appeal. The grounds for appeal are as follows: Procedural irregularity that affected the outcome of the matter (i.e., a failure to follow the institution's own procedures); New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against an individual party, or for or against complainants or respondents in general, that affected the outcome of the matter. The submission of an appeal stays any sanctions for the pendency of an appeal. Supportive measures and remote learning opportunities remain available during the pendency of the appeal. If a party appeals, the school will as soon as practicable notify the other party in writing of the appeal; however the time for appeal shall be offered equitably to all parties and shall not be extended for any party solely because the other party filed an appeal. Appeals will be decided by an individual, who will be free of conflict of interest and bias, and will not serve as investigator, Title IX Coordinator, or decision-maker in the same matter.
- Example Policy 2: Appeals are available after a complaint dismissal or after a final determination is made. Appeals can be made due to procedural irregularities in the

investigation affecting the outcome, new evidence becoming available, or due to bias or a conflict of interest by Title IX personnel that may have affected the outcome. Appeal requests must be made within 30 days of the school's final determination and include the rationale for the appeal. Parties will be given an opportunity to submit a written statement in support of or against the final determination. A new decision-maker will issue the final decision at the same time to each party.

- Example Policy 3: The complainant and respondent have an equal opportunity to appeal the policy violation determination and any sanctions. The school administers the appeal process, but is not a party and does not advocate for or against any appeal. A party may appeal only on the following grounds and the appeal should identify the reason(s) why the party is appealing: (1) there was a procedural error in the hearing process that materially affected the outcome; procedural error refers to alleged deviations from school policy, and not challenges to policies or procedures themselves; (2) there is new evidence that was not reasonably available at the time of the hearing and that could have affected the outcome; (3) the decision-maker had a conflict of interest or bias that affected the outcome; (4) the determination regarding the policy violation was unreasonable based on the evidence before the decision-maker; this ground is available only to a party who participated in the hearing; and (5) the sanctions were disproportionate to the hearing officer's findings. The appeal must be submitted within 10 business days following the issuance of the notice of determination. The appeal must identify the ground(s) for appeal and contain specific arguments supporting each ground for appeal. The school will notify the other party of the appeal, and that other party will have an opportunity to submit a written statement in response to the appeal, within three business days. The school will also inform the parties that they have an opportunity to meet with the appeal officer separately to discuss the proportionality of the sanction. The appeal officer, who will not be the same person as the Title IX Coordinator, investigator, or decision-maker, will decide the appeal considering the evidence presented at the hearing, the investigation file, and the appeal statements of both parties. In disproportionate sanction appeals, they may also consider any input the parties provided during the meeting. The appeal officer will summarize their decision in a written report that will be sent to the complainant and respondent within 10 business days of receiving the appeal.

XV. Informal Resolution

Example Policies Used by Elementary and Secondary Schools and Postsecondary Schools

- Example Policy 1: Informal resolution is available only after a formal complaint has been filed, prior to a determination of responsibility, and if the complainant and respondent voluntarily consent to the process in writing. Informal resolution is not available in cases in which an employee is alleged to have sexually harassed a student. Informal resolution

may involve agreement to pursue individual or community remedies, including targeted or broad-based educational programming or training; supported direct conversation or interaction with the respondent; mediation; indirect action by the Title IX Coordinator; and other forms of resolution that can be tailored to the needs of the parties. With the voluntary consent of the parties, informal resolution may be used to agree upon disciplinary sanctions. Disciplinary action will only be imposed against a respondent where there is a sufficient factual foundation and both the complainant and the respondent have agreed to forego the additional procedures set forth in this school's policy and accept an agreed upon sanction. Any person who facilitates an informal resolution will be trained and free from conflicts of interest or bias for or against either party.

- Example Policy 2: The informal resolution process is only available where the complainant has filed a formal sexual harassment complaint that involves parties of the same status (e.g., student-student or employee-employee) and the parties voluntarily request in writing to resolve the formal complaint through the informal resolution process. Within five workdays of receiving a written request to start the informal resolution process, the school will appoint an official to facilitate an effective and appropriate resolution. The Title IX Coordinator may serve as the facilitator. Within five workdays of such appointment, the parties may identify to the Title IX Coordinator in writing any potential conflict of interest or bias posed by such facilitator to the matter. The Title IX Coordinator will consider the information and appoint another facilitator if a material conflict of interest or bias exists. The facilitator will request a written statement from the parties to be submitted within 10 workdays. Each party may request that witnesses are interviewed, but the school shall not conduct a full investigation as part of the informal resolution process. The facilitator will hold a meeting(s) with the parties and coordinate the informal resolution measures. Each party may have one advisor of their choice during the meeting, but the advisor may not speak on the party's behalf. The informal resolution process should be completed within 30 workdays in most cases, unless good cause exists to extend the time. The parties will be notified in writing and given the reason for the delay and an estimated time of completion. Any resolution of a formal complaint through the informal resolution process must address the concerns of the complainant and the responsibility of the school to address alleged violations of its policy, while also respecting the due process rights of the respondent. Informal resolution process remedies include mandatory training, reflective writing assignment, counseling, written counseling memorandum by an employee's supervisor, suspension, termination, or expulsion, or other methods designed to restore or preserve equal access to the school's education programs or activities. At the conclusion of meetings, interviews, and the receipt of statements, the facilitator will write an informal resolution report and provide the parties with the informal resolution report simultaneously. At any time prior to resolving a formal complaint through the informal resolution process,

either party may withdraw in writing from the informal resolution process and resume or begin the formal resolution process.

- Example Policy 3: The Title IX Coordinator will determine whether it is appropriate to offer the parties informal resolution in lieu of a formal investigation of the complaint. In the event that the Title IX Coordinator determines that informal resolution is appropriate, the parties will be provided written notice disclosing: the allegations, the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared. Both parties must provide voluntary, written consent to the informal resolution process.

XVI. Addressing Conduct That the School Deems to be Sexual Harassment but Does Not Meet the Definition of Sexual Harassment Under the Title IX Regulations

Example Policies Used by Elementary and Secondary Schools and Postsecondary Schools

- Example Policy 1: It is important to note that conduct that does not meet the criteria under Title IX may violate other federal or state laws or school policies regarding student misconduct or may be inappropriate and require an immediate response in the form of supportive measures and remedies to prevent its recurrence and address its effects.

- Example Policy 2: This school adopts a "two-pronged" approach. All conduct not covered under the current definition of sexual harassment, including sexual misconduct, will be addressed by the principal under the student code of conduct. Title IX procedures will be reserved only for those alleged actions that fall under the Title IX definition of sexual harassment.

- Example Policy 3: The Title IX Coordinator shall investigate the allegations in all formal complaints. The Title IX Coordinator must dismiss the formal complaint if the conduct alleged in the formal complaint would not constitute sexual harassment as defined in this school's policy even if proved, or is outside the 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. The Title IX Coordinator shall forward the formal complaint to an appropriate school official that will determine whether the conduct alleged in the formal complaint violates a separate policy or code of conduct.

- Example Policy 4: In May of 2020, the U.S. Department of Education issued new regulations for colleges and universities that address sexual assault and other sexual misconduct. These regulations cover certain specific forms of sexual misconduct. To comply with these regulations, this school has revised its existing policy for those types of misconduct. In addition, this school maintains its existing Sexual Misconduct Policy for other types of sexual misconduct that are not covered by the new regulations. Both policies are important to creating and supporting a school community that rejects all forms of sexual misconduct.
- Example Policy 5: The Title IX regulations direct the school's response to some, but not all, of the forms of prohibited behavior in this school's Title IX policy. Allegations in a Title IX formal complaint related to behavior that occurs outside of the education program or activity or outside the United States, or behavior that would not meet the definition of Title IX sexual harassment as defined in this school's Title IX policy, must be dismissed. Both the complainant and respondent may appeal the dismissal of any allegations under Title IX. However, in keeping with the school's educational mission and commitment to fostering a learning, living, and working environment free from discrimination, harassment, and retaliation, this school will still move forward with an investigation or formal resolution under the same resolution process for all forms of prohibited behavior under this school's Title IX policy. In this instance, this school is using its Title IX policy as a code of conduct to address behavior that occurred outside of the education program or activity or outside of the United States, even though the behavior falls outside of Title IX jurisdiction under the Department of Education's 2020 amendments.

XVII. Parent and Guardian Rights

Example Policy Used by Elementary and Secondary Schools

- Example Policy 1: Consistent with the applicable laws of the jurisdiction in which the school is located, 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. The student may have an advisor of choice who is a different person from the parent or guardian.

Q A

U.S. Department of Education

Update on Court Ruling about the Department of Education's Title IX Regulations

U.S. Department of Education sent this bulletin at 08/24/2021 04:42 PM EDT

U.S. DEPARTMENT OF EDUCATION

Dear Students, Educators, and other Stakeholders,

I write with an important update regarding the Department of Education's regulations implementing Title IX of the Education Amendments of 1972, as amended in 2020. On July 28, 2021, a federal district court in Massachusetts issued a decision in *Victim Rights Law Center et al. v. Cardona*, No. 1:20-cv-11104, 2021 WL 3185743 (D. Mass. July 28, 2021). This case was brought by several organizations and individuals challenging the 2020 amendments to the Title IX regulations.

The court upheld most of the provisions of the 2020 amendments that the plaintiffs challenged, but it found one part of 34 C.F.R. § 106.45(b)(6)(i) (live hearing requirement for the Title IX grievance process at postsecondary institutions only) to be arbitrary and capricious, vacated that part of the provision, and remanded it to the Department for further consideration. In a subsequent order issued on August 10, 2021, the court clarified that its decision applied nationwide. The court vacated the part of 34 C.F.R. § 106.45(b)(6)(i) that prohibits a decision-maker from relying on statements that are not subject to cross-examination during the hearing: "If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility…." Please note that all other provisions in the 2020 amendments, including all other parts of 34 C.F.R. § 106.45(b)(6)(i), remain in effect. The affected provision at 34 C.F.R. § 106.45(b)(6)(i) is only applicable to postsecondary institutions and does not apply to elementary or secondary schools, which are not required to provide for a live hearing with cross-examination.

In accordance with the court's order, the Department will immediately cease enforcement of the part of § 106.45(b)(6)(i) regarding the prohibition against statements not subject to cross-examination. Postsecondary institutions are no longer subject to this portion of the provision.

In practical terms, a decision-maker at a postsecondary institution may now consider statements made by parties or witnesses that are otherwise permitted under the regulations, even if those parties or witnesses do not participate in cross-examination at the live hearing, in reaching a determination regarding responsibility in a Title IX grievance process.

For example, a decision-maker at a postsecondary institution may now consider statements made by the parties and witnesses during the investigation, emails or text exchanges between the parties leading up to the alleged sexual harassment, and statements about the alleged sexual harassment that satisfy the regulation's relevance rules, regardless of whether the parties or witnesses submit to cross-examination at the live hearing. A decision-maker at a postsecondary institution may also consider police reports, Sexual Assault Nurse Examiner documents, medical reports, and other documents even if those documents contain statements of a party or witness who is not cross-examined at the live hearing.

The Office for Civil Rights is in the process of identifying all documents on our website that discuss this vacated provision and will make updates to those documents as appropriate in the coming weeks. Any statements in an OCR document about the vacated part of § 106.45(b)(6)(i) should not be relied upon.

As OCR announced in an April 6, 2021, letter to students, educators, and other stakeholders, OCR is undertaking a comprehensive review of the Department's existing Title IX regulations, orders, guidance, policies, and other similar agency actions to fulfill the policy set out in President Biden's Executive Order, dated March 8, 2021, on *Guaranteeing an Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity*. This process is ongoing, and OCR anticipates publishing a notice of proposed rulemaking to amend the Department's Title IX regulations.

OCR also recently issued a question-and-answer resource to clarify how OCR interprets schools' obligations under the 2020 amendments and a related appendix, which provides examples of Title IX procedures that schools may find helpful in implementing the 2020 amendments. The resource will be updated to reflect the court's decision in *VRLC v. Cardona*, and we hope it will continue to be a valuable tool to assist schools in carrying out their obligations under Title IX.

You can read our letter here and read our blog post here.

Thank you for your efforts to ensure equal educational opportunities for all of our nation's students.

Sincerely,

Suzanne B. Goldberg

Acting Assistant Secretary for Civil Rights

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NACUA NOTES
National Association of College and University Attorneys September 1, 2021 | Vol. 20 No.1

TOPIC:

Accommodations for Disabilities in the Title IX Grievance Process

AUTHORS:

Janet Elie Faulkner and Phil Catanzano[1]

INTRODUCTION:

For more than a decade, colleges and universities have sought to navigate the frequently shifting terrain that underlies the question of how higher education institutions should address sexual misconduct under Title IX of the Education Amendments of 1972 ("Title IX").[2] Some critics contended that the federal government's recent requirements were too complainant or survivor-focused, imperiling the due process or fair process rights of respondents. Subsequent guidance focused on the parity of process to be afforded to both parties.[3] In 2020, much of that guidance was codified in Title IX's updated implementing regulations, 34 C.F.R. Part 106.

This NACUANOTE focuses on an aspect of these policies that has been largely in the background during the evolution of much of this guidance but was recently discussed in the Preamble to the updated Title IX regulations and in federal guidance issued in July 2021: how institutions should consider and accommodate disabilities in sexual misconduct processes that are founded on concepts of strict parity of process for both parties.

While institutions are developing experience addressing disability accommodations in the Title IX process, practices are not consistent or standardized in the same way as disability-related accommodations in other areas commonly navigated by educational institutions, like in the academic, living, or working contexts.[4] At the same time, institutions could face challenging questions when an individual seeks an accommodation that, on its face, may appear to make the Title IX process unfair. For example, an individual with a disability may receive additional

time to respond to or review a large document. Unlike the academic context, where the faculty member need not be informed of the reason for the accommodation and is only required to know the accommodation to be provided, in the sexual misconduct arena, the obligation to provide a disability accommodation presents differently. Institutions must grapple with what accommodations to provide, if any; how to message that accommodation appropriately to the other participant(s) in the Title IX process; and how to determine when or whether a party's disability should be disclosed in the Title IX process to avoid a perception that the accommodation results in an unfair process. This NACUANOTE will summarize the relevant laws, guidance, and case law before delving into a practical discussion of how institutions can better recognize the challenges at the intersection of disability law and the federal government's requirements for processes involving the adjudication of allegations of sexual misconduct.

DISCUSSION:

I. The Legal Landscape

Higher education institutions are prohibited from discriminating against individuals with disabilities through several federal and state laws. For example, the Americans with Disabilities Act, as amended ("ADA"), broadly covers higher education institutions in various ways. Public institutions are typically bound by Titles I and II of the ADA, and private institutions are typically bound by Title III of the ADA as "public accommodations."[5] Title I of the ADA also applies to public and private institutions, providing protections for applicants for employment or employees with disabilities. Additionally, Section 504 of the Rehabilitation Act ("Section 504") applies to virtually all higher education institutions, insofar as it broadly covers "any program or activity receiving Federal financial assistance."[6] Generally, both federal laws provide that individuals may not be treated differently on the basis of disability, and that institutions must make reasonable modifications of "policies, practices or procedures" to accommodate individuals with disabilities.[7]

A. Title IX Requirements Evolve with Little Attention to Disability Law

While disability-based protections and accommodations are replete throughout the academic, living, dining, extracurricular, and employment contexts of higher education, disability-based accommodations in the post-secondary context were not addressed helpfully in the Title IX regulations on sexual misconduct prior to 2020 or in relevant sub-regulatory guidance prior to 2014.[8] The U.S. Department of Education's Office for Civil Rights ("OCR") began discussing disability in the context of sexual misconduct proceedings explicitly in its 2014 Questions and Answers on Title IX and Sexual Misconduct. OCR explained that institutions must consider disability-based accommodations in the interim measures they provide to individuals who experience sexual misconduct.[9] In responding to a question about "what issues may arise with respect to students with disabilities who experience sexual violence," OCR stated:

> When students with disabilities experience sexual violence, federal civil rights laws other than Title IX may also be relevant to a school's responsibility to investigate and address such incidents. Certain students require additional assistance and support. For example, students with intellectual disabilities may need additional help in learning about sexual violence, including a school's sexual violence education and prevention programs, what constitutes sexual violence and how students can report incidents of sexual violence. In addition, students with disabilities who experience sexual violence may require additional services and supports, including psychological services and counseling

> services. Postsecondary students who need these additional services and supports can seek assistance from the institution's disability resource office.
>
> A student who has not been previously determined to have a disability may, as a result of experiencing sexual violence, develop a mental health-related disability that could cause the student to need special education and related services.
>
> A school must also ensure that any school reporting forms, information, or training about sexual violence be provided in a manner that is accessible to students and employees with disabilities, for example, by providing electronically-accessible versions of paper forms to individuals with print disabilities, or by providing a sign language interpreter to a deaf individual attending a training.[10]

While this was a helpful start, the call of the question focused only upon the resources to be provided to individuals who *experience* sexual misconduct. It did not discuss the protections that should be afforded for either party – accuser or accused – or witnesses with disabilities who take part in an institutional sexual misconduct process. Similarly, while OCR's 2017 Dear Colleague Letter and associated Questions and Answers document withdrew both the 2011 and 2014 guidance documents and sought to correct what was described as the "deprivation of rights for many students," including "accused students denied fair process" and accusers "denied an adequate resolution of their complaints," it did not mention disability protections at all.[11]

On August 14, 2020, the updated Title IX regulations became effective and began to address disability issues in a much more substantive way than prior guidance. While most institutions were focused on the significant changes required in adjudicating sexual misconduct through the introduction of new jurisdictional and definitional changes, conducting live hearings in certain situations, and implementing other systemic procedural changes, the regulations also began discussing disability accommodations more directly. For example, the regulations discuss time delays in Title IX processes and state that the updated processes must allow for temporary delays for good cause, which may include "the need for language assistance or accommodation of disabilities."[12] Further, the regulations discussing emergency removal state that a respondent can be removed from campus on an emergency basis after the institution undertakes "an individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal."[13] When executing this regulatory change in 2020, the Department stated that while "[n]othing in this subpart precludes a recipient from placing a non-student employee respondent on administrative leave during the pendency of a grievance process…[t]his provision may not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act."[14]

The Department also discussed disability issues in the Preamble to the 2020 regulations. Specifically, Directed Question 5 highlighted that several commenters to the proposed regulations had shared that students with "invisible disabilities," such as attention-deficit/hyperactivity disorder, autism, and various anxiety disorders, did not adequately receive disability-related resources, accommodations, and supports "specific to their unique needs" during Title IX proceedings.[15] Other commenters stated that there was inadequate coordination between Title IX offices and disability services offices when an individual with an

invisible disability becomes involved in a Title IX proceeding, as either a complainant or a respondent.[16] The Department acknowledged these concerns, noting that educational institutions "must comply with obligations under disability laws with respect to students, employees, or participants in a Title IX reporting or grievance process situation, regardless of the recipient's internal organizational structure."[17] A college must fulfill its disability obligations in its usual manner, but also within the 2020 Title IX grievance framework, even if the 2020 Title IX framework is incompatible with other existing college processes. The Department noted that if requests for disability accommodations overlap with supportive measures or remedies required under Title IX, the institution's Title IX Coordinator is responsible for the effective implementation of such supportive measures (pursuant to 34 C.F.R. §106.30) and remedies (pursuant to 34 C.F.R. §106.45(b)(7)(iv)). They also may need to coordinate multiple offices within the institution to adequately satisfy these requirements, typically including accessibility offices and human resources offices.[18]

While the Department's comments acknowledge the need to address disability-related issues, implementation has often proven more challenging than meets the eye when executed in practice. At the post-secondary level, for example, both the ADA and Section 504 place the responsibility on the individual with a disability to provide notice of that disability and to request accommodations in a timely manner.[19] There is no requirement in the Title IX regulations for when, or even whether, an individual must request such accommodations. Moreover, the accommodation process typically includes the collection and review of relevant medical or psychological documentation submitted by the individual's health care provider(s) before the institution engages with the individual in an interactive process to determine appropriate accommodations. If the student or employee did not have a previous diagnosis of a disability, this also could encompass a range of evaluations. These inconsistencies present several ambiguities for institutions to resolve, including:

- Should institutions pause Title IX proceedings while a party – complainant or respondent – compiles relevant disability-related documentation for review?
- If one individual in the process has a disability that requires an accommodation, such as additional time to review documents and draft responses, should the other party automatically receive that same additional time for the sake of parity of process? Does that now create further unfairness for the individual with the disability?
- How should disability be considered, if at all, in the context of whether an individual is found responsible for violating an institution's rules, and/or whether the presentation of a disability mitigates the appropriate sanction to be assigned?[20]

College and university administrators charged with addressing these questions have the overarching need to balance a request for an accommodation to enable an individual with a disability to participate in the process with making the process fair to all. One of the first and potentially most effective ways for colleges and universities to coordinate these compliance requirements is to state explicitly which offices have the authority to evaluate and administer requests for disability accommodations. Requests for accommodations in the sexual misconduct grievance process may be handled in the same manner as requests for accommodations arise in other contexts. Accessibility services offices and/or human resources offices for employees commonly have the expertise to collect and evaluate medical information and suggest potential accommodations, consistent with past practice. As with any request for disability accommodation, representatives from those offices can collaborate with other relevant offices – here, the Title IX coordinator and/or hearing officer – to consider whether an accommodation is reasonable within the context of a Title IX grievance process.

B. Relevant Case Law

While the government's Title IX guidance has not always focused on disability, the case law itself is often nuanced and focused on more prominent legal questions raised by the parties. Notably, disability-related court rulings are limited, because claims have typically been pled as Title IX violations, not as Americans with Disabilities Act (ADA) or Section 504 violations. Title IX claims often lead to different analytical questions than would arise in a disability claim. For example, should a request for a disability accommodation be scrutinized in line with an institution's disability accommodation process, the Title IX process, or both? Court decisions have been relatively limited in enforcing protections for individuals with disabilities, with many resolving the matter in unreported decisions. Other courts have dismissed disability claims for technical reasons, such as to highlight that the request for accommodations was not made clearly or appropriately. To date, courts have found consistently that an individual affirmatively must request an accommodation in the Title IX process. Courts have found that an institution is not on constructive notice of an individual's disability when the individual is participating in the Title IX process, even if a party already receives accommodations in other programs at the institution.

Rossley v. Drake University[21] was among the first reported decisions involving a request for disability accommodations in the Title IX process in the post-2011 Dear Colleague Letter era.[22] In that case, the institution charged a student-respondent with sexual misconduct. During the subsequent institutional proceedings, the respondent informed the Dean of Students, the investigators, the hearing officer, and others that he was diagnosed with dyslexia, ADHD, and word-retrieval issues, but did not make requests for accommodations which would enable him to participate in the Title IX process based on his disability.[23] The student was subsequently found responsible for sexual misconduct and expelled. He later brought claims against the University under Title IX, the ADA, and state common law. The federal district court noted in its ruling on a motion for summary judgment that Title III of the ADA states that it is unlawful for "any place of public accommodation" to "fail[ ] to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities."[24] The court focused on two issues in its review of the ADA claim: (1) Did the plaintiff-respondent make a specific request for a disability accommodation to which the University should have responded, and (2) was the University on notice of the disability such that it should have affirmatively provided accommodations in the Title IX process?

For the first question, the court found that, while the respondent apprised investigators, the hearing officer, and others of his disabilities and some of the associated symptoms, neither the respondent nor his advisor in the institutional process requested any accommodations.[25] While the respondent's advisor requested extra time during the disciplinary hearing, the advisor consistently raised the request as "an issue of procedural fairness," and not in connection with the respondent's disabilities.[26] Ultimately, the court determined that no reasonable jury could find that the respondent or his attorney-advisor affirmatively requested any accommodations during the investigation, disciplinary hearing, or appeals hearing.

The court also dismissed the claim that the University was constructively on notice of the respondent's disabilities due to his prior academic accommodations and statements about his ADHD, dyslexia, and word-retrieval issues.[27] The court stated that the respondent's academic accommodations arose in "different contexts than the disciplinary procedures set out in the Code and the Policy."[28] For example, the court highlighted that "'time and a half' during

an exam is not procedurally or substantively comparable to 'time and a half' during a disciplinary procedure involving credibility and factual determinations."[29] Ultimately, the court concluded that the respondent's "requests were specifically directed to his academic pursuits," and he "did not indicate that, due to his disabilities, he would be unable to participate in the investigation or subsequent hearings."[30]

In *Pierre v. University of Dayton*,[31] a student who had been found responsible for sexual misconduct alleged that his institution violated Section 504 and the ADA by failing to provide an accommodation for his disability. He alleged that his disability limited "…his ability to articulate and express himself verbally while under stress and pressure…." However, the respondent did not identify that he had a disability until the appeal process, after he had been found responsible in the school's student conduct process. The federal district court noted that the respondent had been granted ample opportunities to present information at multiple points in the conduct process, and he had been accompanied by an attorney as his advisor throughout the process.[32] While the court conceded that the respondent had requested and qualified for disability-related accommodations in an academic setting, it held that he was obligated to request additional accommodations during the Title IX disciplinary process because "[o]ther departments in the University would not know to ask [him] about accommodations because University policy dictates that [] disability and accommodations are confidential…."[33]

In *Doe v. Devonshire*,[34] a student-respondent alleged that the University violated his due process rights under 42 U.S.C. § 1983 and the Fourteenth Amendment by removing him from University housing after he was accused of engaging in sexual harassment and other forms of sexual misconduct. The respondent had previously been diagnosed with "severe emotional and learning disabilities including generalized anxiety disorder, sensorineural hearing loss, disorder of written expression and ADHD."[35] This respondent based his due process claim partly on the University's failure to proactively provide him with disability accommodations during the conduct process.[36] In denying the student's motion for a preliminary injunction, the district court held that the University provided the respondent with sufficient notice and opportunity to review the charges against him and had provided instructions on how to request disability accommodations.[37] This district court also concluded that the University was not obligated to affirmatively provide disability accommodations in the conduct process. The court stated that the proper question for the student's claim under Section 1983 and the Fourteenth Amendment was whether he was afforded sufficient process, not whether he was offered an ideal process.

In *Doe v. University of Miami*,[38] a complainant in an underlying Title IX matter alleged that the University failed to provide her reasonable disability accommodations. The University claimed that Doe never requested disability accommodations through the University's Office of Disability Services, even though the University's published procedures informed Doe that this was the appropriate office through which to seek such accommodations.[39] Doe claimed that she did not do so because a dean had actively discouraged her from seeking accommodations and purportedly told her that "being raped did not entitle her to any kind of special accommodation."[40] Insensitivity of this alleged statement aside, the federal district court concluded that because the complainant never made "a specific demand for an accommodation," the University did not refuse to accommodate her needs in a way that amounted to disability discrimination.[41] The court continued that, even "liberally construing" the complainant's allegation, she only alleged that the University told her that (1) she must directly request accommodations from professors in the academic context and (2) she had not previously qualified for disability accommodations with the University's Office of Disability Services.[42] Because Doe had never made a specific demand that was denied in the Title IX process, the court dismissed her disability claim.[43]

Viewed collectively, these court decisions, and the authors' collective experience, indicate that institutions have appropriate processes to fulfill their obligations to offer disability related accommodations in their Title IX grievance processes. However, these obligations trigger when an individual requests an accommodation within the Title IX process context. Not only is this the point at which obligations may begin, it often may be the point at which institutions are deemed to be on actual notice of the need for an accommodation. The courts have been clear that a college is not on constructive notice to provide accommodations if an individual already requested or received accommodations elsewhere in the institution. Despite the focus of disability law to provide individualized accommodations to ensure an equitable playing field in most areas of institutional life, there still may exist a sense of uncertainty in providing such accommodations in sexual misconduct proceedings because of the prescriptive language in the updated Title IX regulations requiring parity.

Institutional tentativeness in crafting accommodations within a Title IX process may, thus, stem from concern about potential liability to the other, non-accommodated party in the Title IX process under an "erroneous outcome" or "selective enforcement" theory. For example, in *Doe v. Case Western Reserve University*,[44] a student alleged that the University violated Title IX, but not the ADA, when it failed to provide him with reasonable accommodations due to alleged gender bias. He claimed that he provided notice that he had mental health and other disabilities at his initial meeting in the Title IX process. The district court dismissed the issue after evidence reflected that a University official discussed accommodations and support services during the initial meeting and at subsequent meetings but the student made no requests.[45] In another case, *Doe v. Quinnipiac University*,[46] a student sought an injunction to halt a Title IX hearing. The court refused to halt the hearing based on a health care provider's letter that speculated that the stress and anxiety the student experienced through participation in what he felt was a biased Title IX process "could set off a downward spiral of anxiety and depression."[47] The plaintiff subsequently sued the University for purportedly violating his rights under Title IX in multiple ways, but he notably did not allege disability-related violations. The tension between the two statutory schemes exists, and institutions still have an obligation to consider requests for accommodations and craft accommodations which also provide fairness.

II. Practical Steps to Evaluate Requests for Disability Accommodations and/or Assist Individuals with Disabilities

Individuals with developmental disabilities[48] and/or some form of mental health disorders[49] attend and are often employed by colleges and universities at higher rates than in previous generations. Given that reality, colleges and universities routinely provide academic, living, and working accommodations to these individuals, as the federal government and the courts have been clear about the requirements to provide reasonable accommodations in these contexts. However, the lack of explicit guidance in the Title IX regulations until recently may have caused institutions to operate more cautiously before providing accommodations for developmental disabilities in a Title IX process, unless the need and/or the student's disabled status is specifically identified. Complicating matters further, while the academic literature makes clear that individuals with disabilities are more likely than their non-disabled counterparts to be subject to sexual misconduct,[50] the conduct of individuals with certain disabilities may exacerbate or be perceived as sexual misconduct, particularly harassment and stalking. For example, observations or perceptions of conduct that could satisfy the definition of stalking or harassment could also be consistent with the lack of self-awareness or failure to process certain social cues that are also associated with certain disabilities.[51]

While this would be a challenging line to walk in any context, both the ADA and Section 504 also clearly state that colleges and universities cannot "regard" an individual as having a disability and treat them differently as a result.[52] Thus, in the absence of a request for a disability-related accommodation, Title IX coordinators, investigators, hearing officers, and others who take part in the Title IX process could create significant risk for the institution if they assume (correctly or incorrectly) that an individual who has not requested an accommodation needs one because of a perceived disability. Similarly, providing a "stock" list of potential accommodations is inconsistent with the expectation that, in the disability context, there will be an individualized assessment of each person's medical or psychological conditions, the way those conditions present, and an individualized analysis of proposed accommodations through an interactive process. Individualized assessments are particularly necessary for cognitive or mental health disabilities, where individuals' development, skills, and prognosis may vary widely based on a medical condition, training received, and medication.

In the face of competing dilemmas and challenges, the following is a non-exhaustive list of considerations for colleges and universities seeking to adequately satisfy the directives of Title IX, along with the parameters of the ADA and Section 504.

- **Focus on giving students consistent and targeted information about your ADA processes: Title IX policies and related gender-based misconduct policies should clearly direct all parties and witnesses to the institution's disability accommodation process(es).** Start by specifically identifying the office where an individual must submit a request for a disability accommodation. Choose the office that has the authority and capability to receive and evaluate information about an individual's disability. This may be the accessibility services office for students. For faculty and staff, it could be this same office, or human resources. Provide this information in sexual misconduct training and educational materials. If the institution provides party "rights" or witness "rights" documents during a Title IX process, the opportunity to request and receive reasonable accommodations should be included in those materials, too. Make clear that such requests should be made as early as possible to avoid delaying the process, but also set expectations that such requests may delay the Title IX process in certain situations.[53]

- **Title IX policies and the individuals executing these policies should establish formal relationships with individuals with expertise in the institutional disability accommodation process.** Sexual misconduct policies and procedures are coordinated and executed by the institution's Title IX coordinator. Similarly, in the disability context, the Section 504 coordinator, ADA coordinator, Human Resources staff, or other appropriate individuals are charged with providing disability-related accommodations. These two roles should remain separate for good reason: individuals providing accommodations should not weigh the severity of the allegations in determining what accommodations are appropriate, while at the same time, Title IX coordinators do not have a need to know a party's diagnosis and should not provide advantages to an individual with a disability unless there is a confirmation of a disability and a formal accommodation in place. Similarly, while Title IX coordinators generally are not qualified to evaluate medical documentation, the Title IX coordinators may play an important and appropriate role in the interactive process for determining whether potential accommodations are reasonable in the context of an investigation and adjudication process. Both roles are separately and collectively critical, but they should be designed thoughtfully to avoid conflict or undue delay. The distinction in roles may need to be messaged carefully to the community to avoid a perception that individuals involved in

disciplinary processes are given preferential treatment over individuals seeking academic accommodations.

- **Train issue spotters and choreograph appropriate steps.** While there are few, if any, situations in which an investigator, hearing officer, or other Title IX official should be involved in the accommodation process, a party may unknowingly raise a request for a disability-related accommodation for the first time in the context of an investigation or a hearing. In that situation, institutions should make sure that the Title IX role players are on the lookout for such requests and that they anticipate the steps to take if an investigator and/or hearing officer receives medical documentation and/or a request for accommodation. If using external investigators, this also may require additional consideration about how medical or psychological evaluations or other medical documents are maintained and to whom they are provided within the institution. While it should go without saying, unless the materials have independent inculpatory or exculpatory value, they should generally not be shared with the other party or witnesses, or included as an attachment to a Title IX investigatory report, unless the individual expressly has given permission for information to be considered and shared. While this sounds complicated, this practice is parallel to how a teaching faculty member is informed about sharing materials related to academic accommodations with appropriate institutional staff and not, for example, sharing such materials with other students in the class. Additionally, colleges should consider carefully how to separate medical documentation of disability diagnoses from Title IX case management systems, which often capture and maintain emails, notes, and other records related to Title IX processes.

- **Develop messages to discuss delays and communicate accommodations as appropriate.** While certain forms of accommodation may not need to be shared with the other party in a Title IX matter, others may be unavoidable. For example, given the requirement of a live hearing and the right of parties and their advisors to observe testimony in real time, an individual's receipt of an accommodation in this process may be obvious. Institutions are not required to modify the Title IX grievance process to provide disability accommodations if those modifications constitute fundamental alterations of the grievance process. That said, certain forms of accommodation will raise questions if not clearly explained and in the absence of a policy which justifies the fact that the parties may not be provided the exact same timelines, for example.

- **Without limiting the menu of potential accommodations, think through the common forms of accommodation and how they may impact the Title IX process in advance to expedite any similar requests.** While the range of reasonable accommodations should be individualized to the disability and the way it presents, there are common accommodations in both academic and other contexts, including extra time for review and response to a complaint, an investigation report, or in a hearing process; provision of materials and evidence in an alternative form to accommodate disabilities; and availability of a note taker or interpreters for deaf or hearing-impaired students.[54] Given that these are relatively common accommodation requests, how will the institutional policy/process acclimate to such accommodations? If simultaneous communications are required, how will different timelines for one party be expressed to the other? Each potential accommodation may raise a handful of specific questions within the institutional process. Such decisions are made far more effectively when considered thoughtfully, by the right people, and in advance. Because the disability accommodation process is necessarily an interactive and individualized one, any menu

of typical accommodation options needs to be open to modification based on the circumstances of the party requesting them.

- **Allow for flexibility in the Title IX process to accommodate disability needs.** Given the rise in Title IX litigation, many Title IX coordinators are reticent to diverge from the institution's policy and procedures. Thus, if the policy allows one advisor to accompany a party in a Title IX process, some institutions implement that concept literally and will not budge from the rule. Requests for assistance from a support person are among the more commonly-requested accommodations for disabilities. Individuals should not be forced to decide between an advisor (who may be an attorney) and a support person who assists in reading materials to an individual with a disability. Institutions should also consider whether an individual, such as an advisor provided by the school, is qualified to provide an accommodation and not just assign them the role because it is convenient. Ultimately, institutions should seek to be as fair as possible in the process, while also exercising flexibility to accommodate the needs of individuals with disabilities.

- **Use appropriate language for each effort taken by the institution.** In the disability-law context, accommodations may be referred to as modifications and may also include access to auxiliary aids. These accommodations are separate from the supportive measures provided to a complainant or respondent as required under Title IX. While these measures may feel practically similar, the legal basis for them is different, and institutions should document that distinction, as appropriate.

- **Encourage regular meetings between faculty and staff who work with individuals with disabilities and individuals involved in the Title IX process.** These meetings could serve as resource roundups where respective offices can share developments in the disability services area and sexual misconduct processes, thereby cross-pollinating knowledge. Such conversations also could take place generally and focus on policies and resources, without ever having to disclose the identities of individuals.

- **Seek to better understand the potential challenges related to disabilities on your campus.** For example, include disability as a demographic factor in campus climate surveys about sexual misconduct. Assess how disability issues may impact individuals –complainants or respondents – as well as witnesses or others who may be involved in such matters.

- **Consider developing education and training about sexuality, healthy sexual practices, and healthy relationships for students with developmental and/or cognitive disabilities to supplement training about the Title IX process.** As mentioned above, some disabilities can exacerbate conduct, real or perceived, that may fall within an institution's definition of prohibited conduct. Providing appropriate training for individuals with these disabilities may be helpful. However, keep in mind that individuals with disabilities should not be required to attend separate or additional training requirements solely on the basis of their disability and how their disability *could* present in extremely limited circumstances. If such a situation becomes apparent short of a Title IX process, though, appropriate training may be invaluable if conducted by carefully selected individuals. This can be achieved if, for example, an individual reports another individual's potentially stalking behavior. If the aggrieved individual does not wish to file a formal complaint, and the school is aware that the student has a disability

that presents consistent with the underlying perception, the institution may be able to require or otherwise suggest such training to avoid future miscommunications.

- **Train community stakeholders about how disability may present and exacerbate allegations or instances of sexual misconduct.** There have been far too many heartbreaking responses (of law enforcement and others) to behavior that was perceived to be threatening but actually was a natural extension of an individual's disability. In virtually all of these situations, better training for these actors could have avoided subjecting a person with a disability to arrest or prosecution. Similar tactics can be used on campus. For example, include training about working with individuals with disabilities as a term in memoranda of understanding with outside resources such as police departments, emergency medical services, and resource organizations. (Some municipal police departments now receive training for working with individuals with other impairments, such as dementia. Ask if departments have access to parallel training for individuals with developmental disabilities.) Ensure that options for transport for medical or police / court services are available for individuals with disabilities. While ambulances may be used to transport individuals with physical disabilities, travel via ambulance may cause additional trauma. This also holds true for individuals who may receive physical injuries during an alleged encounter.

CONCLUSION:

While each of the situations that may arise in the disability context should be considered on their facts and individualized to the situation, there are some basic legal requirements that institutions should consider consistently. Namely, requests for accommodations for disabilities must be considered in the Title IX context as with any other academic program. An individual must demonstrate that he or she meets the eligibility requirements to receive potential accommodations. As with accommodations in other contexts, potential accommodations must be considered using the interactive process. At the same time, when accommodations are deemed appropriate, the institutions should take care to avoid providing an accommodation which appears to provide a preferential advantage over the other party. Finally, while addressing these issues will always be challenging in practice, institutions can take certain measures in their policies and practices to educate their community and best support all individuals involved in a Title IX process.

END NOTES:

[1] Janet Elie Faulkner is the founding attorney of Faulkner Legal, a law practice focusing on employment, education, and disability law. She previously served as in-house counsel to two higher education institutions in Boston for almost fifteen years. Her firm's website is https://www.faulknerlegal.com. Phil Catanzano is also in private practice, where he counsels higher education institutions in regard to developing policies and defending against reviews triggered by the U.S. Department of Education or U.S. Department of Justice. He previously worked for the U.S. Department of Education's Office for Civil Rights for almost a decade.

[2] *See generally* U.S. Dep.'t of Educ. Office for Civil Rights, "Dear Colleague Letter: Sexual Violence" (April 4, 2011) [hereinafter 2011 DCL]; U.S. Dep.'t of Educ. Office for Civil Rights, "Questions and Answers on Title IX and Sexual Violence" (April 29, 2014) [hereinafter 2014 Q&A]. Both documents were rescinded during the Trump Administration.

[3] *See generally* U.S. Dep.'t of Educ. Office for Civil Rights, "Dear Colleague Letter and Questions and Answers on Campus Sexual Misconduct" (Sept. 22, 2017) [hereinafter 2017 Dear Colleague and Q&A].

[4] *See, e.g.*, 34 C.F.R. §§ 104.11-12 (Section 504 regulations highlighting non-discrimination and accommodation obligations in employment); 34 C.F.R. Subpart C and §§ 104.41-47 (discussing, among other issues, non-discrimination requirements in post-secondary education that include academic accommodations and housing accommodations); *see also* 29 C.F.R. Part 1630 (regulations to implement the equal employment provisions of the Americans with Disabilities Act).

[5] *See* 42 U.S.C. § 12182; *see*, *e.g.*, *McInerney v. Rensselaer Polytechnic Institute*, 505 F.3d 135, 128 (2nd Cir. 2007).

[6] *See* 29 U.S.C.A. § 794(a) (West Supp.1997).

[7] *See generally* 42 U.S.C. § 12182(b)(2) (defining "discrimination" under the ADA); *see also* 34 C.F.R. §§ 104.43-104.44 (implementing Section 504); 28 C.F.R. § 36.103 (stating that the ADA "shall not be construed to apply a lesser standard than the standard to be applied" under Section 504).

[8] *See generally* 34 C.F.R. Part 106. The primary OCR guidance documents only mention disability sparingly outside of the consent context. *See* 2011 DCL at 8, n. 22 (noting that "if an alleged perpetrator is an elementary or secondary student with a disability, schools must follow the procedural safeguards in the Individuals with Disabilities Education Act … as well as the requirements of Section 504 of the Rehabilitation Act of 1973 … when conducting the investigation and hearing"); *see, e.g.*, U.S. Dep't. of Educ., "Revised Sexual Harassment: Harassment of Students by School Employees, Other Students, or Third Parties", at 8 (Jan. 19, 2001) (discussing that an individual may be "legally or practically unable to consent to the sexual conduct" based on "certain types of disabilities [that] could affect a student's ability to do so"). Curiously, while the 2011 Dear Colleague letter references disability protections, it does so seemingly with specific reference to elementary and secondary schools, not post-secondary education.

[9] *See* 2014 Q&A, *supra* note 2.

[10] *Id.* at 6–7.

[11] *See* 2017 Dear Colleague and Q&A, *supra* note 3.

[12] 34 C.F.R. § 106.45(b)(1)(v).

[13] 34 C.F.R. 106.44(c).

[14] 34 C.F.R. 106.44(d).

[15] 85 Federal Register 30493-94 (2020).

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *See* U.S. Dep.'t of Educ., "Students with Disabilities Preparing for Post-Secondary Education" (2011) (stating that students do not need to disclose a disability in their post-secondary institution, "[b]ut if [they] want the school to provide an academic adjustment, [they] must identify [themselves] as having a disability"); *see*, *e.g.*, *Kortyna v. Lafayette College,* 47 F. Supp. 3d 225 (E.D. Pa. 2014) and 2017 WL 1134129 (E.D. Pa. 2017) (other citations omitted)*(*discussed *infra*.n.47).

[20] *See supra* note 7. With this type of challenge, and as pointed out below, individuals with disabilities still have an obligation to comply with an institution's policies and/or codes of conduct.

[21] 342 F. Supp. 3d 904, 911–12 (S.D. Iowa 2018); *aff'd*, 979 F.3d 1184, 1197 (8th Cir. 2020), *cert. den.*, 2021 WL 1072363 (March 22, 2021).

[22]*Id. Rossley* is a highly fact-specific matter which was the subject of multiple interim procedural rulings in the court system. The student's parent served as their attorney-advisor. That parent also had been a member of the University's board of trustees.

[23] *Id.* at 936–37.

[24] *Id.* at 935–36 (*citing* 42 U.S.C. § 12182(b)(2)(A)(ii)).

[25] *See id.* at 936–37.

[26] *Id.* at 937.

[27] *Id.* at 937-38.

[28] *Id.* at 938.

[29] *Id.*

[30] *Id.*

[31] 2017 WL 1134510, at *4 (S.D. Ohio 2017).

[32] *Id.* at *10.

[33] *Id.*

[34] 181 F. Supp. 3d 146, 148–49 (D. Mass. 2016).

[35] *Id.* at 148.

[36] *Id.* at 153.

[37] *Id.*

[38] 446 F. Supp. 3d 1000 (S.D. Fla. 2000).

[39] *See id.* at 1004–05.

[40] *Id.* at 1005, 1009.

[41] *Id.*

[42] *Id.*

[43] *Id.* at 1010–11.

[44] 2019 WL 1982266, at *7-8 (N.D. Ohio 2019), *aff'd,* 809 Fed. Appx. 276 at *6 (6th Cir. 2020).

[45] *Id.* at *7–8 (alleging breach of contract and Title IX violations, but not claims under the ADA or Section 504).

[46] 2017 WL 1206002, at *5 (D. Conn. 2017)

[47] *Id.* The plaintiff requested a preliminary injunction to stop the University from holding a Title IX hearing because he wanted hearing officers to receive medical information about his disabilities but did not want this information shared with the complainant. *See* 2017 WL 1206002, at *3-4 (D. Conn.). The plaintiff, a student accused of intimate partner violence, notified investigators that his "disabilities, including ADHD, [] affected his ability to process information." 404 F. Supp. 3d 643, 650 (D. Conn. 2019). The University provided an array of related accommodations during the hearing. For example, all questions and information about a particular incident would be presented together for the respondent, and he was given time to process questions before responding, as well as the ability to take frequent breaks. *Id.* at 652. *See also Kortyna v. Lafayette College*, 47 F. Supp. 3d 225 (E.D. Pa. 2014) and 2017 WL 1134129 (E.D. Pa. 2017) (*other citations omitted)*, where a faculty member was diagnosed with mental health conditions *after* the charges of sexual harassment arose. The faculty member unsuccessfully sought permission for a lawyer to speak on his behalf in the Title IX process as an accommodation for his mental health conditions and was denied, and subsequently claimed he was terminated because of his disability. *Id.* at 242; 2017 WL 1134129 at *13. The district court dismissed the faculty member's claims, finding the College dismissed the faculty member for his conduct toward the students, which included retaliation after they reported his sexual harassment.

[48]The Centers for Disease Control ("CDC") defines "developmental disabilities" as " a group of conditions due to an impairment in physical, learning, language, or behavior areas…[that] may impact day-to-day functioning, and usually last throughout a person's lifetime." The CDC includes the following conditions as developmental disabilities: attention-deficit/ hyperactivity disorder (ADHD), autism spectrum disorder, cerebral palsy, hearing loss, intellectual disability, learning disability, and vision impairment, and other developmental delays. CDC, "Developmental Disabilities" (last accessed Aug. 31, 2021). The term "developmental disabilities" will be used in this NACUANOTE to cover this range of disabilities, including "cognitive disabilities."

[49] The terms "mental illness," and/or "psychological disability" sometimes are used instead of "mental health disorder." The American Psychiatric Association (APA) describes "mental illnesses" as "…health conditions involving changes in emotion, thinking or behavior (or a combination of these). Mental illnesses are associated with distress and/or problems functioning in social, work or family activities." APA, "What is Mental Illness" (last accessed Aug. 31, 2021). The National Institutes of Health's National Institute of Mental Health presents a list of "Mental Disorders and Related Topics" at https://www.nimh.nih.gov/health/topics/index.shtml (last accessed Aug. 31, 2021).

[50] *See* National Council on Disability, "Not on the Radar: Sexual Assault of College Students with Disabilities", at 11. (Jan. 30, 2018).

[51] The federal government has opined that disabilities do not excuse prohibited conduct from sanctions. *See University of Michigan*, OCR Docket No. 15-99-2142, p. 5 (June 7, 2000) (In a case in which a respondent claimed that several violations of the institution's sexual misconduct policy resulted from his subsequently-diagnosed bipolar disorder, OCR stated that the institution's focus should be on whether a student committed conduct that violated a code of conduct, not on a student's disability. OCR explained that the University "is permitted to discipline a student for misconduct, even if that conduct stemmed from the student's disability, if the conduct violates an essential conduct code.").

[52]*See generally* 42 U.S.C. § 12012(3)(A) (defining disability under the ADA to include individuals being regarded as having such an impairment); 34 C.F.R. § 104.3 (Section 504's definition also makes clear that individuals "regarded as" having a disability are protected under the non-discrimination mandates of the law).