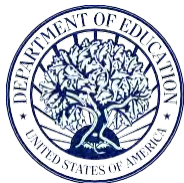


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UNITED STATES DEPARTMENT OF EDUCATION
Office for Civil Rights

January 15, 2021

Part 2: Questions and Answers
Regarding the Department's Title IX Regulations

The Department of Education's (Department) Office for Civil Rights (OCR), through its Outreach, Prevention, Education and Non-discrimination (OPEN) Center, issues the following technical assistance document to support institutions with meeting their obligations under the Title IX regulations. This is Part 2.

The Department announced new Title IX regulations on May 6, 2020. The new regulations were [published in the *Federal Register*](#) on May 19, 2020 at 85 Fed. Reg. 30026 (codified in 34 C.F.R. Part 106), and became effective on August 14, 2020. Many of the questions in this document are derived from questions posed to the OPEN Center via e-mail. This document supplements the [Question and Answer document](#) issued by the OPEN Center on September 4, 2020. OCR may periodically release additional Question and Answer documents addressing the Title IX regulations. All references and citations are to the official version of the Title IX regulations as published in the Federal Register [here](#).

Other than the statutory and regulatory requirements included in the document, the contents of this guidance do not have the force and effect of law and are not meant to bind the public. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

Role of the Title IX Coordinator

Question 1: Do the Title IX regulations specify who can and cannot serve as a recipient's Title IX Coordinator?

Answer 1: The Title IX regulations state in 34 C.F.R. § 106.8(a): "Each recipient must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities under this part, which employee must be referred to as the 'Title IX Coordinator.'" Thus, the restriction placed on a recipient's choice of a Title IX Coordinator is that the person must be the recipient's "employee." Additionally, under 34 C.F.R. § 106.45(b)(1)(iii), the Title IX Coordinator must serve without bias or conflicts of interest, and receive the training specified in that provision. The same requirements apply at all educational levels (e.g., elementary and secondary schools, and postsecondary institutions). As explained below in response to Question 2, the Title IX Coordinator cannot serve as

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the decision-maker who makes the determination regarding responsibility. *See* 34 C.F.R. § 106.45(b)(7)(i).

Question 2: Can a Title IX Coordinator also serve as an investigator?

Answer 2: Yes. The Title IX regulations state in 34 C.F.R. § 106.45(b)(7)(i) that the decision-maker “cannot be the same person(s) as the Title IX Coordinator or the investigator(s).” Similarly, the regulations state in 34 C.F.R. § 106.45(b)(8)(iii)(B) that a decision-maker for an appeal is “not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator.” Neither of these provisions prevents a Title IX Coordinator from also serving as an investigator (though, as stated above, not as a decision-maker). Indeed, at page 30370 of the Preamble to the regulations, the Department notes: “The . . . final regulations leave significant flexibility to recipients, including whether the Title IX Coordinator can also serve as the investigator, whether to use a panel of decision-makers or a single decision-maker, and whether to use the recipient’s own employees or outsource investigative and adjudicative functions to professionals outside the recipient’s employ.”

Question 3: Can a Title IX Coordinator serve as a non-decision-making procedural facilitator during the live hearing?

Answer 3: Yes. The Title IX regulations do not preclude a Title IX Coordinator from serving as a hearing officer whose function is to control the order and decorum of the hearing, so long as that role as a hearing officer is distinct from the “decision-maker” whose role is to, among other obligations, objectively evaluate all relevant evidence, apply the standard of evidence to reach a determination regarding responsibility, issue the written determination, and (during any live hearing with cross-examination) determine whether a question is relevant (and explain any decision to exclude a question as not relevant) before a party or witness answers a question.

Whether or not serving as a hearing officer, the Title IX Coordinator (like the decision-maker and other Title IX personnel) must not have a conflict of interest or bias for or against complainants or respondents generally or against an individual complainant or respondent. 34 C.F.R. § 106.45(b)(1)(iii).

Question 4: Assuming that the Title IX Coordinator is free of any conflict of interest or bias, is the Title IX Coordinator permitted to serve as an Informal Resolution Facilitator?

Answer 4: 34 C.F.R. § 106.45(b)(9) of the Title IX regulations permits informal resolutions as long as both parties voluntarily consent to attempt an informal resolution process. The Department recognizes the importance of giving recipients flexibility and discretion to satisfy their Title IX obligations in a manner consistent with their unique values and the needs of their educational communities, while respecting the wishes of the parties to the formal complaint. *See* Preamble at 30371-30372. The regulations do not preclude the Title IX Coordinator from serving as the person designated by a recipient to facilitate an informal resolution process. *See* Preamble at 30558.

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Question 5: If a complainant reports or discloses information that puts a recipient on notice of alleged sexual assault, should the Title IX Coordinator sign a formal complaint?

Answer 5: The Title IX regulations direct recipients to respond promptly to each instance of notice of sexual harassment (or allegations of sexual harassment) in the recipient’s education program or activity, against a person in the United States, by taking specific, required actions such as:

- offering supportive measures to the complainant;
- promptly contacting the complainant to discuss the availability of supportive measures as defined in § 106.30;
- considering the complainant’s wishes with respect to supportive measures;
- informing the complainant of the availability of supportive measures with or without the filing of a formal complaint; and
- if a formal complaint is filed, following a grievance process that complies with § 106.45.

See 34 C.F.R. §§ 106.44(a), 106.44(b)(1). These obligations must be met in order for a recipient’s response to comply with Title IX.

Additionally, the deliberate indifference standard for judging a recipient’s response may require the school to take actions that are not specifically listed as mandatory response obligations. For example, depending on the specific facts of a situation, it may be “clearly unreasonable in light of the known circumstances” for a Title IX Coordinator not to sign a formal complaint even after having discussed the complainant’s wishes and understanding that the complainant does not wish to file a formal complaint. The Department understands that deciding how to exercise discretion in each factual circumstance may be challenging, but the purpose is to give recipients flexibility to respond appropriately to each situation, so that the regulations neither automatically override the wishes of a complainant, nor restrict a recipient from investigating when specific circumstances dictate that an investigation is warranted.

In the Preamble to the regulations at 30134-30135, the Department explains:

While it is true that school administrators other than the Title IX Coordinator may have significant interests in ensuring that the recipient investigate potential violations of school policy, for reasons explained above, the decision to initiate a grievance process in situations where the complainant does not want an investigation or where the complainant intends not to participate should be made thoughtfully and intentionally, taking into account the circumstances of the situation including the reasons why the complainant wants or does not want the recipient to investigate. The Title IX Coordinator is trained with special responsibilities that involve interacting with complainants, making the Title IX Coordinator the appropriate person to decide to initiate a grievance process on behalf of the recipient. Other school administrators may report sexual harassment incidents to the Title IX Coordinator, and may express to the Title IX Coordinator reasons why the administrator believes that an

investigation is warranted, but the decision to initiate a grievance process is one that the Title IX Coordinator must make.

...

In order to ensure that a recipient has discretion to investigate and adjudicate allegations of sexual harassment even without the participation of a complainant, in situations where a grievance process is warranted, the final regulations leave that decision in the discretion of the recipient's Title IX Coordinator. However, deciding that allegations warrant an investigation does not necessarily show bias or prejudice of the facts for or against the complainant or respondent. The definition of conduct that could constitute sexual harassment, and the conditions necessitating a recipient's response to sexual harassment allegations, are sufficiently clear that a Title IX Coordinator may determine that a fair, impartial investigation is objectively warranted as part of a recipient's non-deliberately indifferent response, without prejudging whether alleged facts are true or not. Even where the Title IX Coordinator is also the investigator, the Title IX Coordinator must be trained to serve impartially, and the Title IX Coordinator does not lose impartiality solely due to signing a formal complaint on the recipient's behalf.

Role of the Investigator

Question 6: Can the investigator testify, either voluntarily or in response to a question from a party or from the decision-maker, about the investigator's report or recommendations, at a Title IX grievance process hearing?

Answer 6: Yes. In the Preamble to the Title IX regulations at 30314, the Department contemplates that an investigator might be a witness:

The Department further notes that § 106.45(b)(6)(i) already contemplates parties' equal right to cross-examine any witness, which could include an investigator, and § 106.45(b)(1)(ii) grants parties equal opportunity to present witnesses including fact and expert witnesses, which may include investigators.

Note, however, that in the context of a hearing held by a postsecondary institution or on behalf of a postsecondary institution by a consortium or other third party, an investigator may not testify as to statements made by others, including the complainant or respondent, if the individual who made a statement does not submit to cross-examination. 34 C.F.R. § 106.45(b)(6)(i).

Question 7: May the investigator make recommendations in the investigative report?

Answer 7: The Title IX regulations do not require or prohibit an investigator from making a recommendation with respect to a determination regarding responsibility. The Preamble to the regulations at 30308 states: "The Department does not wish to prohibit the investigator from

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including recommended findings or conclusions in the investigative report. However, the decision-maker is under an independent obligation to objectively evaluate relevant evidence, and thus cannot simply defer to recommendations made by the investigator in the investigative report.”

Role of the Decision-maker

Question 8: Do the Title IX regulations specify who can and cannot serve as a recipient’s decision-maker?

Answer 8: At page 30370 of the Preamble to the Title IX regulations, the Department states: “The Department notes that the final regulations leave significant flexibility to recipients, including whether the Title IX Coordinator can also serve as the investigator, whether to use a panel of decision-makers or a single decision-maker, and whether to use the recipient’s own employees or outsource investigative and adjudicative functions to professionals outside the recipient’s employ.” Thus, a decision-maker may be the recipient’s employee or, at the recipient’s discretion, may be a non-employee such as a consultant or contractor. The decision-maker, however, “cannot be the same person(s) as the Title IX Coordinator or the investigator(s).” 34 C.F.R. § 106.45(b)(7).

At 30251-30252 of the Preamble to the regulations, the Department states:

The final regulations leave recipients flexibility to use their own employees, or to outsource Title IX investigation and adjudication functions, and the Department encourages recipients to pursue alternatives to the inherent difficulties that arise when a recipient’s own employees are expected to perform these functions free from conflicts of interest and bias. The Department notes that several commenters favorably described regional center models that could involve recipients coordinating with each other to outsource Title IX grievance proceedings to experts free from potential conflicts of interest stemming from affiliation with the recipient. The Department declines to require recipients to use outside, unaffiliated Title IX personnel because the Department does not conclude that such prescription is necessary to effectuate the purposes of the final regulations; although recipients may face challenges with respect to ensuring that personnel serve free from conflicts of interest and bias, recipients can comply with the final regulations by using the recipient’s own employees.

Training

Question 9: If a recipient uses non-employee contractors or consultants to provide the training required for Title IX personnel (described in 34 C.F.R. § 106.45(b)(1)(iii)) such that the recipient does not own or control the training materials, is the recipient required to post the training materials on its website?

Answer 9: Yes. Under 34 C.F.R. § 106.45(b)(10)(i)(D), the training materials referred to in 34 C.F.R. § 106.45(b)(1)(iii) must be made publicly available on a recipient’s website, or, if the recipient does

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not have a website, such materials must be made available upon request for inspection by members of the public.

In the Preamble to the Title IX regulations, the Department acknowledges that a recipient may hire outside consultants to provide training for the recipient's Title IX personnel, and that the materials may be owned by the outside consultant and not by the recipient itself. In such a circumstance, the Department notes, a recipient would need to secure permission from the consultant to publish the training materials, or alternatively, the recipient could create its own training materials over which the recipient has ownership and control. (Preamble at 30412.) OCR provided additional technical assistance regarding the requirement to post training materials in an OCR Blog post available [here](#).

Question 10: If a recipient participates in a consortium or delegates investigative or adjudicative functions to a regional center, does it still need to post its training materials?

Answer 10: Yes. Notably, the Title IX regulations do permit schools to delegate certain functions to a regional center, or to join a consortium of schools in order to implement the regulations. In these instances, recipients are permitted to publish written grievance procedures that satisfy the regulations, as well as their training materials, by way of hosting these documents on a shared website, so long as they are publicly available under the terms of 34 C.F.R. § 106.45(b)(10)(i)(D).

For more information about consortia or regional centers, please see this OCR [webinar](#).

Question 11: Can the Department recommend any specific Title IX Coordinator and investigator training?

Answer 11: As stated in the Preamble to the Title IX regulations at 30257:

[T]he Department encourages recipients to pursue training from sources that rely on qualified, experienced professionals likely to result in best practices for effective, impartial investigations. The Department does not certify, endorse, or otherwise approve or disapprove of particular organizations (whether for profit or non-profit) or individuals that provide Title IX-related training and consulting services to recipients. Whether or not a recipient has complied with § 106.45(b)(1)(iii) is not determined by the source of the training materials or training presentations utilized by a recipient.

Investigative Reports

Question 12: Do the Title IX regulations require the recipient to provide a copy of the investigative report to the decision-maker? If so, at what point in the process should this transmission occur?

Answer 12: The Title IX regulations require the recipient to send a copy of the investigative report to the parties and their advisors (if any) at least ten days prior to the date of a hearing (if a hearing is required or otherwise provided) or other time of determination regarding responsibility, but do not prescribe how or when the investigative report should be given to the decision-maker. Because the

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purpose of this requirement, found at 34 C.F.R. § 106.45(b)(5)(vii), is to ensure that the parties are prepared for a hearing or, if no hearing is required or otherwise provided, that the parties have the opportunity to have their views of the evidence considered by the decision-maker, the decision-maker will need to have the investigative report and the parties’ responses to same, prior to reaching a determination regarding responsibility, but the timing and manner of transmitting the investigative report to the decision-maker is within the recipient’s discretion. *See* Preamble at 30309.

Time Frames

Question 13: Where the Title IX regulations refer to specific time frames, how are “days” calculated?

Answer 13: The time frames referred to in the Title IX regulations (such as the 10-day time period in 34 C.F.R. § 106.45(b)(5)(vi)) may be measured by calendar days, business days, school days, or any other reasonable method that works best with the school’s administrative operations. In the Preamble to the regulations, at 30188, for example, the Department states: “The Department appreciates the commenter’s request for clarification as to how to calculate ‘days’ with respect to various time frames referenced in the proposed regulations and appreciates the opportunity to clarify that because the Department does not require a specific method for calculating ‘days,’ recipients retain the flexibility to adopt the method that works best for the recipient’s operations; for example, a recipient could use calendar days, school days, or business days, or a method the recipient already uses in other aspects of its operations.” *See also* Preamble at 30098 FN 464; 30306; 30311; and 30433.

Sending Written Determinations

Question 14: The Title IX regulations require that the written determination regarding responsibility be provided to the parties simultaneously. Can the Department clarify what “simultaneous” means in this provision?

Answer 14: The Title IX regulations, at 34 C.F.R. § 106.45(b)(7)(iii), state: “The recipient must provide the written determination to the parties simultaneously.” The regulations do not further define “simultaneous,” which should be given its plain and ordinary meaning, e.g., occurring at the same time.

Evidence

Question 15: After the parties have been given the opportunity to respond to the investigative report in compliance with 34 C.F.R. § 106.45(b)(5)(vii), is the final investigative report admitted as evidence for consideration by the decision-maker? If so, are the written comments that the parties made in response to the investigative report also admitted as evidence?

Answer 15: The investigative report must contain a summary of relevant evidence gathered during the investigation of a formal complaint of sexual harassment, and prior to a hearing (if a hearing is required or otherwise provided) or other time of determination regarding responsibility, the recipient

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must send the investigative report to the parties and their advisors of choice (if any) with an opportunity for the parties to respond to the investigative report. 34 C.F.R. § 106.45(b)(5)(vii).

The Title IX regulations do not deem the investigative report itself, or a party’s written response to it, as relevant evidence that a decision-maker must consider, and the decision-maker has an independent obligation to evaluate the relevance of available evidence, including evidence summarized in the investigative report, and to consider all other relevant evidence. The decision-maker may not, however, consider evidence that the regulations preclude the decision-maker from considering. (For instance, the regulations preclude a recipient from using in a Title IX grievance process information protected by a legally recognized privilege, a party’s treatment records, or (as to postsecondary institutions) a party or witness’s statements, unless the party or witness has submitted to cross-examination. 34 C.F.R. §§ 106.45(b)(1)(x), 106.45(b)(5), 106.45(b)(6)(i).)

Question 16: Do Title IX regulations addressing a complainant’s sexual predisposition and prior sexual behavior govern the inclusion of such information in the investigative report?

Answer 16: Yes. The Title IX regulations, at 34 C.F.R. § 106.45(b)(6)(i)-(ii), state that a complainant’s sexual predisposition is “not relevant,” and that a complainant’s prior sexual behavior is “not relevant,” unless the questions or evidence meet one of two limited exceptions. The investigative report required under 34 C.F.R. § 106.45(b)(5)(vii) requires a summary of “relevant” evidence. In the Preamble at 30304, the Department explains: “. . . all evidence summarized in the investigative report under § 106.45(b)(5)(vii) must be ‘relevant’ such that evidence about a complainant’s sexual predisposition would never be included in the investigative report and evidence about a complainant’s prior sexual behavior would only be included if it meets one of the two narrow exceptions stated in § 106.45(b)(6)(i)-(ii) (deeming all questions and evidence about a complainant’s sexual predisposition ‘not relevant,’ and all questions and evidence about a complainant’s prior sexual behavior ‘not relevant’ with two limited exceptions).”

Question 17: The Title IX regulations do not require elementary and secondary schools to hold live hearings, but must an elementary or secondary school allow the parties to cross-examine other parties and witnesses prior to the decision-maker reaching a determination regarding responsibility?

Answer 17: The Title IX regulations, at 34 C.F.R. § 106.45(b)(6), require postsecondary institutions to hold a live hearing with cross-examination conducted by the parties’ advisors, while making hearings optional for elementary and secondary schools (and other recipients that are not postsecondary institutions), so long as the parties have equal opportunity to submit written, relevant questions for the other parties and witnesses to answer before a determination regarding responsibility is reached.

Cross-Examination

Question 18: If a party refuses to participate in cross-examination at the postsecondary level, will the refusal be held against them?

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Answer 18: The Title IX regulations state: “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; provided, however, that *the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party’s or witness’s absence from the live hearing or refusal to answer cross-examination or other questions.*” 34 C.F.R. § 106.45(b)(6)(i) (emphasis added).

Advisors

Question 19: If a postsecondary institution must provide a party with an advisor pursuant to 34 C.F.R. § 106.45(b)(6)(i) (i.e., because the party appeared at the live hearing without an advisor of choice), can the provided advisor be an employee of the institution or must such an advisor be independent of the institution?

Answer 19: The Title IX regulations do not preclude a postsecondary institution from providing an advisor who is an employee of the institution to serve as a party’s advisor for purposes of cross-examination, if the party does not have an advisor.

Question 20: If the respondent does not find a suitable advisor and only wants to be represented by an attorney, does the postsecondary institution have to pay for the party’s attorney?

Answer 20: No. The postsecondary institution is not required to pay for a party’s attorney. The Title IX regulations state: “If a party does not have an advisor present at the live hearing, *the recipient must provide without fee or charge to that party, an advisor of the recipient’s choice, who may be, but is not required to be, an attorney,* to conduct cross-examination on behalf of that party.” 34 C.F.R. § 106.45(b)(6)(i) (emphasis added).

Sanctions

Question 21: Are recipients allowed to place holds (for example, on a transcript, registration, or graduation) on a respondent’s account while a formal complaint process is pending, or is such action considered an impermissible sanction prior to a final determination regarding responsibility?

Answer 21: The Title IX regulations prohibit a recipient from imposing “any disciplinary sanctions or other actions that are not supportive measures as defined in 34 C.F.R. § 106.30, against a respondent” without following the 34 C.F.R. § 106.45 grievance process. 34 C.F.R. §§106.44(a), 106.45(b)(1)(i). Even a temporary “hold” on a transcript, registration, or graduation will generally be considered to be disciplinary, punitive, and/or unreasonably burdensome, and appropriate supportive measures cannot be disciplinary, punitive, or unreasonably burdensome. In the Preamble to the regulations at, e.g., 30182, the Department stated: “Removal from sports teams (and similar exclusions from school-related activities) also require a fact-specific analysis, but whether the burden is ‘unreasonable’ does not depend on whether the respondent still has access to academic programs; whether a supportive measure meets the § 106.30(a) definition also includes analyzing whether a respondent’s access to the array of educational opportunities and benefits offered by the recipient is unreasonably burdened. Changing a class schedule, for example, may more often be deemed an

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acceptable, reasonable burden than restricting a respondent from participating on a sports team, holding a student government position, participating in an extracurricular activity, and so forth.”

Appeals

Question 22: If a complainant or respondent are no longer students, and are not attempting to participate in the recipient’s education programs or activities, do they still have a right to appeal under the Title IX regulations, or does the withdrawal terminate their right to appeal?

Answer 22: The Title IX regulations grant complainants and respondents equal rights to appeal, and to participate in any filed appeal, pursuant to 34 C.F.R. § 106.45(b)(8). The regulations do not condition those rights on whether a complainant or respondent is enrolled or employed by the recipient, participating in the recipient’s education programs or activities, or otherwise has an affiliation or relationship to the recipient.

Informal Resolution

Question 23: Can a postsecondary institution decide not to go forward with a hearing on a formal complaint of sexual harassment if the complainant and respondent both knowingly and voluntarily waive the right to a hearing?

Answer 23: Yes, but only if the provisions governing informal resolutions are followed. The Title IX regulations provide that under certain conditions, a recipient can facilitate, and the parties may engage in, informal resolution of the formal complaint of sexual harassment. When the recipient and the parties opt to resolve a formal complaint through informal resolution, a hearing is not required (nor is the recipient obligated to continue its investigation into the allegations). To comply with the Title IX regulations concerning informal resolutions, the parties must receive the written notice, voluntarily decide to attempt an informal resolution process, and have the right to withdraw from the informal process and resume the formal grievance process, pursuant to 34 C.F.R. § 106.45(b)(9).

The Department has also created a [website](#) to aid schools, students, and other stakeholders to better understand the new Title IX regulations.

If you have questions for OCR, want additional information or technical assistance, or believe that a school is violating Federal civil rights law, visit OCR’s website at www.ed.gov/ocr, or the Department’s Title IX page at www.ed.gov/titleix. You may contact OCR at (800) 421-3481 (TDD: 800-877-8339), ocr@ed.gov, OCR’s Outreach, Prevention, Education and Non-discrimination (OPEN) Center at OPEN@ed.gov, or e-mail the OPEN Center with additional questions about the Title IX regulations at T9questions@ed.gov. You may also fill out a complaint form online at <https://www2.ed.gov/about/offices/list/ocr/complaintintro.html>.