

# Sanghavi Law Office, LLC

## January 2021 Questions and Answers from the U.S. Department of Education, Office for Civil Rights Regarding Title IX Regulations

On January 15, 2021, the U.S. Department of Education, Office for Civil Rights (“OCR”) issued two technical assistance documents in response to inquiries regarding how institutions can meet their obligations under the new Title IX regulations, which became effective on August 14, 2020. The two documents issued - *Part 1: Questions and Answers Regarding the Department’s Final Title IX Regulations* and *Part 2: Questions and Answers Regarding the Department’s Final Title IX Regulations* - supplement the September 4, 2020 technical assistance document issued by OCR, which also addressed the Title IX regulations.

**Below is a summary of the information provided in the Part 1 document (found at <https://www2.ed.gov/about/offices/list/ocr/docs/qa-titleix-part1-20210115.pdf>):**

### **Applicability of Prior OCR Guidance**

- If there is conflict between the new Title IX regulations and OCR’s previously issued guidance documents, the final regulations, and not the guidance documents, control.
- The new Title IX regulations will not be enforced retroactively. For alleged sexual harassment occurring prior to the August 14, 2020 effective date of the new regulations, recipients should refer to the 2001 Revised Sexual Harassment Guidance and the 2017 Q&A on Campus Sexual Misconduct, both of which have been rescinded but are still on the OCR website at <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/respolicy.html>.

### **Definitions**

- Attempted sexual assault is covered under the definition of sexual harassment in the Title IX regulations.

### **Deliberate Indifference**

- Beyond requiring a recipient to promptly respond to actual knowledge of sexual harassment in a manner that is not deliberately indifferent, the Title IX regulations require that a recipient must treat the parties equitably, which means for a respondent that it must follow a grievance process that complies with 34 C.F.R. § 106.45 before imposing disciplinary sanctions, and must not put in place supportive measures that are unreasonably burdensome.

### **Program or Activity**

- A recipient *may* use the procedures in 34 C.F.R. § 106.45 of the Title IX regulations even when the sexual harassment occurs outside of the recipient’s education program or activity and thus does not trigger the recipient’s duties under 34 C.F.R. § 106.44(a).

### **Off-campus Locations**

- A recipient is not required to investigate a formal complaint alleging that sexual harassment occurred against a student engaged in a study abroad program.

### **Parents (Role, Filing Complaints)**

- A recipient may need to notify a parent or guardian of reported sexual harassment, so that the recipient “adequately respects” any underlying legal rights of the parent or guardian to make decisions “on behalf of” a complainant, respondent, or other individual involved in a Title IX matter. The recipient must notify the parent or guardian of the Title IX matter if it would be “clearly unreasonable in light of the known circumstances” for the recipient not to do so.

### **Employees**

- The requirements in the Title IX regulations apply to allegations between employees of a recipient.
- Recipients who are subject to both Title VII and Title IX must comply with both laws, and the Title IX regulations do not lessen an individual’s rights under Title VII.
- The Title IX regulations do not prevent a recipient from using one decision-maker to reach the determination regarding responsibility, and a different decision-maker(s) (e.g., a tenure committee) to determine appropriate disciplinary sanctions (including through a separate process, such as another hearing), so long as the end result is a single written determination that includes any disciplinary sanctions imposed by the recipient against the respondent, pursuant to 34 C.F.R. § 106.45(b)(7).

### **Record-Keeping**

- The Title IX regulations do not specify what happens to the records described in 34 C.F.R. § 106.45(b)(10) after the required seven-year retention period and do not prevent a recipient from keeping records for a longer period of time.

### **FERPA and Confidentiality**

- In considering whether a recipient’s disclosure of the identity of a respondent found responsible for sexual harassment was potentially retaliatory, OCR will examine whether the disclosure was made for a non-retaliatory purpose, or whether it satisfied one of the three exceptions found in 34 C.F.R. § 106.71(a): 1) disclosure was permitted under FERPA; 2) disclosure was required by law; or 3) disclosure was necessary to carry out the purposes of Title IX and its regulations.
- When a formal complaint is signed by a Title IX Coordinator rather than filed by a complainant, the complainant’s identity, if known, must be disclosed in the written notice of allegations. However, if the complainant’s identity is unknown, then the grievance process may proceed even though the written notice of allegations does not include the complainant’s identity.

### **Clery Act**

- The scope of a recipient's program or activity under the Title IX regulations is not co-extensive with Clery Act geography.
- A complainant's request to dismiss, or a postsecondary institution's decision to dismiss, a formal complaint of sexual harassment under Title IX does not affect the postsecondary institution's responsibility under the Clery Act.

### **Elementary and Secondary School Proceedings**

- The provisions in the Title IX regulations regarding a complainant's prior sexual history and sexual predisposition apply at both the elementary and secondary school and postsecondary levels.
- All of the written notifications and opportunities for parties to provide feedback during an investigation of a formal complaint, outlined in 34 C.F.R. § 106.45, are required for elementary and secondary schools, except § 106.45(b)(6) regarding hearings.

**Below is a summary of the information provided in the Part 2 document (found at <https://www2.ed.gov/about/offices/list/ocr/docs/qa-titleix-part2-20210115.pdf>).**

### **Role of the Title IX Coordinator**

- The Title IX regulations do not specify who can and cannot serve as a recipient's Title IX Coordinator other than that the person must be the recipient's "employee," must serve without bias or conflicts of interest, and must receive the specified training.
- The Title IX Coordinator may serve as an investigator but cannot serve as the decision-maker in a Title IX process.
- A Title IX Coordinator may serve as a non-decision-making procedural facilitator during the live hearing at a postsecondary institution, but may not make decisions about relevance.
- If free of any conflict of interest or bias, the Title IX Coordinator may serve as an informal resolution facilitator.
- If a complainant reports or discloses information that puts a recipient on notice of alleged sexual harassment, the Title IX Coordinator should respond promptly by taking specific, required actions such as informing the complainant of the availability of supportive measures, with or without a formal complaint, and considering the complainant's wishes with respect to such supportive measures. Where the complainant does not want an investigation or intends not to participate, the Title IX Coordinator should take into account the circumstances of the situation, including the reasons why the complainant wants or does not want the recipient to investigate. 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. The regulations are intended to give recipients flexibility to respond appropriately to each situation, neither automatically overriding the wishes of a complainant, nor restricting an investigation when specific circumstances dictate that an investigation is warranted.

### **Role of the Investigator and Decision-maker**

- The investigator may 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. However, in a hearing held by a postsecondary institution, an investigator may not testify as to statements made by others, including the complainant or respondent, if the individual who made the statement does not submit to cross-examination. 34 C.F.R. § 106.45(b)(6)(i).
- The investigative report may include recommendations with respect to a determination regarding responsibility. However, the decision-maker must objectively evaluate relevant evidence, and cannot simply defer to the investigator's recommendations.
- The Title IX regulations leave significant flexibility in allowing the decision-maker to be the recipient's employee, or a non-employee such as a consultant or contractor.

### **Training**

- If a recipient that uses non-employee contractors or consultants to provide its required Title IX training, it is still required to post the training materials on its website.
- If a recipient participates in a consortium or delegates investigative or adjudicative functions to a regional center, the recipient may publish its written grievance procedures, as well as its training materials, 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).
- No specific Title IX Coordinator or investigator training is recommended, but recipients are encouraged to pursue training from sources that rely on qualified, experienced professionals likely to result in best practices for effective, impartial investigations.

### **Investigative Reports**

- The Title IX regulations require a recipient to provide a copy of the investigative report and the parties' responses to the decision-maker, but do not prescribe how or when.

### **Time Frames**

- Where the Title IX regulations refer to specific time frames, "days" may be measured by calendar days, business days, school days, or any other reasonable method that works best with the school's administrative operations.

### **Sending Written Determinations**

- The requirement that the written determination regarding responsibility be provided to the parties simultaneously should be given its plain and ordinary meaning, e.g., occurring at the same time.

### **Evidence**

- The Title IX regulations do not deem the investigative report itself, or a party's written response to it, as relevant evidence that a decision-maker must consider. The decision-maker has an independent obligation to evaluate the relevance of available evidence, including evidence summarized in the investigative report, and to consider all other relevant evidence.
- The Title IX regulations state that a complainant's sexual predisposition and prior sexual behavior are "not relevant," and, thus, such evidence would never be included in the

investigative report unless it met one of two limited exceptions stated in § 106.45(b)(6)(i)-(ii).

- While elementary and secondary schools are not required to hold live hearings, the Title IX regulations require that they provide the parties with an equal opportunity to submit written, relevant questions for the other parties and witnesses to answer before a determination regarding responsibility is reached.

#### **Cross-Examination**

- If a party or witness refuses to participate in cross-examination at a live hearing at the postsecondary level, the decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility. However, the decision-maker cannot draw an inference about responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer questions.

#### **Advisors**

- A postsecondary institution may provide a party with an employee of the institution to serve as a party's advisor for purposes of cross-examination during a live-hearing, if the party does not have an advisor.
- If a party does not have an advisor present at the live hearing, the postsecondary 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.

#### **Sanctions**

- A temporary hold on a respondent's account (for example, on a transcript, registration, or graduation) while a formal complaint process is pending will generally be considered impermissibly disciplinary, punitive, and/or unreasonably burdensome.

#### **Appeals**

- A complainant or a respondent who is no longer a student, and is not attempting to participate in the recipient's education programs or activities, is nonetheless afforded an equal right to appeal under the Title IX regulations.

#### **Informal Resolution**

- A postsecondary institution may decide not to go forward with a hearing on a formal complaint of sexual harassment, and a recipient is not obligated to continue its investigation into the allegations, if, in accordance with the provisions governing informal resolutions, the parties: 1) receive the written notice; 2) voluntarily decide to attempt an informal resolution process; and 3) have the right to withdraw from the informal process and resume the formal grievance process.