

UNITED STATES DEPARTMENT OF EDUCATION
Office for Civil Rights

January 15, 2021

Part 1: Questions and Answers
Regarding the Department's Title IX Regulations

The Department of Education (Department) Office for Civil Rights (OCR), through its Outreach, Prevention, Education and Non-discrimination (OPEN) Center, issues the following technical

for that proposition. Additionally, at 30068, the Department acknowledges that guidance documents

With respect to a respondent's claim that a recipient's grievance process was inequitable, the recipient's legal obligation is to comply with 34 C.F.R. §§ 106.44, 106.45 and conduct a grievance process. Where a recipient's supportive measures unreasonably burden a respondent, those supportive measures would not meet the definition of a "supportive measure" as per 34 C.F.R. § 106.30. The recipient must follow the grievance process specified in 34 C.F.R. § 106.45 before taking an action that is not a supportive measure, unless the emergency removal provision in 34 C.F.R. § 106.44(c) or administrative leave provision in 34 C.F.R. § 106.44(d) apply.

Program or Activity

Question 4: May a recipient use the procedures outlined in 34 C.F.R. § 106.45 of the Title IX regulation even in cases where an incident of sexual harassment occurs outside of the recipient's education program or activity and thus does not trigger the recipient's Title IX obligations? (he)4 (h2 (e)4 (m)-2)2SL

that affects that parent or guardian's student, the school must notify the parent or guardian of the Title IX matter.

Employees

Question 7: Do the requirements in the Title IX regulations apply to allegations between employees of a recipient?

Answer 7: Yes. The Title IX regulations, 34 C.F.R. § 106.30(a) define "complainant" and "respondent" respectively as "an individual who is alleged to be the victim" and "an individual who has been reported to be the perpetrator." A person may be a complainant or respondent, regardless of whether the person is a student, employee, or otherwise affiliated with the university.

Similarly, the regulations require a university to respond promptly when the university has actual knowledge of sexual harassment in the university's education program or activity against a person in the United States, and that response must treat the complainant and respondent equitably by offering supportive measures to the complainant and refraining from imposing disciplinary sanctions on the respondent without following a grievance process that complies with 34 C.F.R. § 106.45. (34 C.F.R. § 106.44(a)). Thus, the regulations cover sexual harassment allegations in cases where the complainant and respondent are both employees.

At 30439 of the Preamble to the regulations, the Department explains:

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determination regarding esp

FERPA and Confidentiality

Question 10: The Title IX regulations make the release of a respondent's identity confidential unless the FERPA exceptions apply. FERPA permits but does not require the consensual disclosure of records by postsecondary educational institutions in connection with disciplinary proceedings concerning crimes of violence or forcible sex offenses. Crimes of violence and forcible sex offenses do not include all forms of sexual harassment as defined in 34 C.F.R. § 106.30(d). Does that mean that recipients cannot reveal the identity of a respondent found responsible for sexual harassment, including in response to a reference check, because it would be retaliatory to release confidential information, assuming there is no state law requiring this information to be revealed?

Answer 10: In the Preamble to the regulations at 3042627 (emphasis added), the Department addresses the intersection of FERPA and the regulations' requirement in 34 C.F.R. § 106.45(b)(5)(vi).

The Title IX regulations at 34 C.F.R. § 106.71(a), state the general rule that a recipient must keep confidential the identity of any person who has reported sexual harassment, or who has been reported to be a perpetrator of sexual harassment. The purpose of this provision is to prevent the school from retaliating against anyone. This duty of confidentiality has three exceptions in 34 C.F.R. § 106.71(a): if disclosure is permitted under FERPA, disclosure is required by law, or if disclosure is necessary to carry out the purposes of Title IX and its regulations, including to conduct a grievance process.

A recipient's disclosure of the identity of a respondent cannot be made with a retaliatory purpose without violating 34 C.F.R. § 106.71. If the disclosure is made by a recipient without falling into one of the three exceptions listed in 34 C.F.R. § 106.71, OCR may view the disclosure as potentially retaliatory, and examine the facts and circumstances to determine whether the disclosure either (i) satisfied one of the three exceptions (for example, the disclosure was necessary to carry out the purposes of the Title IX regulations), or (ii) was made for a non-retaliatory purpose.

Question 11: How can a recipient address a complainant's request for confidentiality, including in instances where a Title IX Coordinator signs the formal complaint initiating an investigation into a complainant's sexual harassment allegations?

Answer 11: The Title IX regulations balance a complainant's desire for confidentiality (in terms of, for instance, the complainant's identity not being disclosed to the respondent) with a school's discretion to pursue an investigation where factual circumstances warrant an investigation even though the complainant does not desire to file a formal complaint or participate in a grievance process. In the Preamble to the regulations at 30133-30134, the Department discusses these issues at length, including the following (footnotes omitted here):

A complainant (or third party) who desires to report sexual harassment without disclosing the complainant's identity to anyone may do so, but the recipient will be unable to provide supportive measures in response to that report without knowing the complainant's identity.

supportive measures for the complainant (e.g., where contact order is appropriate

Answer 14: Yes. The Title IX regulations state that with or without a hearing, questions and evidence about the complainant's sexual predisposition ~~are~~ never relevant, and questions and evidence about a complainant's prior sexual behavior are not relevant unless such questions and evidence are offered to (1) prove that someone other than the respondent committed the conduct alleged by the complainant, or (2) if 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. 34 C.F.R. 106.45(b)(6)(i)-(ii). The same requirements apply at all educational level