

January 15, 2021

Part 2: 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 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 periodically releases additional Question and Answer documents addressing 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

the decisionmaker 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 decisionmaker

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
-

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 not 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

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.”

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

In the

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 decisionmaker, the decisionmaker will need to have the investigative report and the parties' responses to same, including a determination regarding responsibility, but the timing and manner of transmitting the investigative report to the decisionmaker 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 timeframes 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 reference-4 (e)-an "T c16 (eci)-16aayv-3nap (e) dan

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 decisionmaker must consider and the decisionmaker 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 decisionmaker may not, however, consider evidence that the regulations preclude the decisionmaker 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 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)(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)(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 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



\$ ) HGHUDO FRXUW RUGHU YDFDWHG WKH IROORZLQJ ODQJXDJH LQ & ) 5 †  
H[DPLQDWLRQ DW WKH OLYH KHDULQJ WKH GHFLVLRQ PDNHU V PXVW QRW UH  
GHWHUPLQDWLRQ UHJDUGLQJ UHVSRVLELOLW\ ' 9LFWLP 5LJKWV /DZ &HQWHU H  
ODVV -XO\ DSSHVW&LWQGLQJ 'HSDUWPHQW ZLOO QR ORQJHU HQIRUFH W  
VWDWHPHQWV LQ WKLV GRFXPHQW PD\ QRW EH UHOLHG XSRQ 6HH XSGDWHG 4X  
7LWOH ,; 5HJXODWLRQV RQ 6H[XDO +DUDVPHQW

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 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, graduation) on a respondent’s account while a formal complaint process is pending, 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, 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 § 106.45(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

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 an informal resolution process?