

## Insights

### OCR Issues Questions and Answers on the Title IX Regulations on Sexual Harassment

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Recently, the U.S. Department of Education's Office of Civil Rights ("OCR") issued new guidance on the 2020 Title IX regulations (the "Regulations") in a question and answer ("Q&A") format. The **Q&A** clarifies and explains how OCR intends the Regulations to be implemented and enforced. It addresses 67 questions that cover a variety of topics ranging from definitions of sexual harassment to how a hearing process should be conducted. OCR also provides sample policies that address many areas of the Regulations.

OCR mentions that it is currently reviewing the Regulations and considering whether revisions should be made. However, the Regulations remain in effect for now and have the force of law; and the regulatory process is a time-consuming one, so no changes should be anticipated prior to sometime in 2022 at the earliest. Although the Q&A discusses almost every area of the Regulations, below is a discussion of key observations:

- Much of the Q&A refers to the preamble of the Regulations, which are described as clarifying OCR's interpretation of the Regulations. This suggests that OCR is likely to apply the broader interpretations and stated intent included in the preamble rather than the plain wording of each portion of the Regulations, allowing schools somewhat greater leeway in implementing them than may previously have been assumed.
- OCR emphasizes that schools are permitted to provide protections above and beyond the requirements of the Regulations. This includes, but is not limited to, regulating overseas conduct, regulating conduct not included in the official definition of sexual harassment, and requiring more individuals to be mandatory reporters.
- There is an emphasis placed on the ability, and perhaps obligation, of a Title IX Coordinator to file a formal complaint even if the complainant is not associated with the school or prefers not to pursue a formal complaint. OCR explains that, in some cases, schools could be found by OCR to be in violation of Title IX if a Title IX Coordinator fails to file a formal complaint, especially in a circumstance where the school has actual knowledge (within the definition of that term in the Regulations) of the alleged sexual harassment even if the complainant does not wish to file a formal complaint.
- Although OCR, in guidance predating the promulgation of the Regulations, had identified 60 days as the suggested period of time in which a school should resolve a sexual harassment complaint, it now explains that only a "reasonable" time frame is required by the Regulations. OCR underscores that it is not in a position to punish a school for not achieving resolution in 60 days, but stresses that a "reasonably prompt" process is required and suggests that "nothing prohibits" a school from adopting a 60-day time frame – thus seemingly encouraging schools to do so.

- The Regulations contain a provision indicating that the decisionmaker is not permitted to consider prior statements of any witness who declines to submit to cross-examination. This is a major reversal of previous guidance, which allowed the report of a person who had interviewed the party or witness to be considered regardless of whether the party or witness testified. In its recent guidance, OCR emphasizes that parties and witnesses are not required to submit to cross-examination and suggests that other evidence (such as video evidence) may be used to overcome the required inability of the decisionmaker to consider prior statements of a witness who does not submit to cross-examination. Further, the Q&A emphasizes that a decisionmaker must consider prior statements made by a witness who submits to cross-examination but thereafter refuses to answer questions posed by the decisionmaker. It further emphasizes that the decisionmaker is permitted to limit questioning to “relevant” matters and may exclude questions in relation to such matters as the complainant’s prior sexual conduct unless material to the specific allegations in the complaint.
- It is evident from the Q&A that schools may structure their live hearings as they wish within the boundaries of what is required by the Regulations (e.g., a live hearing with cross-examination for institutions of higher education), as long as all rules and requirements are applied equally to all parties.

The Q&A is a useful resource for schools in both drafting and implementing their Title IX complaint and hearing procedures. If your school has questions or concerns about your obligations under Title IX please contact **Elizabeth M. Roberson, Deborah J. Daniels**, or another one of our **Education and School Law Professionals** for assistance.

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