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What we will cover today

High level view of all of the changes to Title IX as published in the 2020 Amendments, as revised in 2022 to reflect changes made in light of the *Victim Rights Law Center et al v. Cardona* case (decided July 28, 2021).

This presentation is based on the Department of Education, Office for Civil Rights publication entitled:

“Questions and Answers on the Title IX Regulations on Sexual Harassment (July 2021) (Updated June 28, 2022)”

The document asks and answers 67 questions organized in 17 sections, most of which apply to all “recipients,” with only a few exceptions.



Questions and Answers on the Title IX Regulations on Sexual Harassment (July 2021) (Updated June 28, 2022)



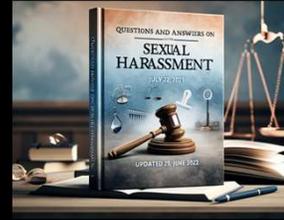
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What we will cover today

Following the Q&A document, this presentation is organized in sections covering the following topics:

General Obligations	Removal of Respondents
Definitions of Sexual Harassment	Presumption of No Responsibility
Where Sexual Harassment Occurs	Time Frames
When Sexual Harassment Occurs	Live Hearings and Cross Examination
Notice of Sexual Harassment	Standard of Proof
Response to Sexual Harassment	Informal Resolution
Formal Complaints	Retaliation and Amnesty
Situations in Which a Party or Witness May be Unable to Participate	Forms of Discrimination Other Than Sexual Harassment
Supportive Measures and Temporary	



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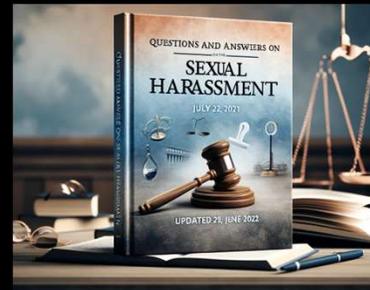
Some Terms Used

"Complainant" as an individual who is alleged to be the victim of conduct that could constitute sexual harassment.

"Respondent" is someone alleged to have been involved in an incident of prohibited conduct under Title IX

"Recipients" are all public and private elementary and secondary schools, school districts, colleges, and universities (hereinafter "schools") receiving any Federal funds.

"Decision Maker" is effectively the judge of Title IX cases: They preside over hearings and issue the verdict in the form of written determinations. Decision-Makers monitor the questioning and cross-examination process and identify irrelevant questions.



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General Obligations



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Historical Overview

Title IX regulations were first established by the Department of Education in 1975.

Subsequent reissuances and amendments occurred in 1980, 2006, and 2020, reflecting evolving legal and societal standards.



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Historical Overview

Pre-2020 Context:

Prior to the 2020 amendments, Title IX regulations focused on preventing discrimination in educational programs receiving federal financial aid.

Specific guidelines on handling sexual harassment were not included; instead, the Office for Civil Rights (OCR) provided interpretive guidance documents to schools.



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What Did the 2020 Amendments Change

2020 Amendments:

Introduced significant changes by specifying legally binding procedures that schools must follow upon receiving notice of alleged sexual harassment.

These amendments marked a pivotal shift towards more concrete and actionable requirements under Title IX in addressing sexual harassment



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What Did the 2020 Amendments Change

Implications for Educational Institutions:

Schools are now required to adhere to a standardized process for dealing with allegations of sexual harassment.

The 2020 amendments emphasize the importance of a clear, legal framework for protecting students and staff from sexual harassment within educational settings.



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Flexibility Beyond the 2020 Title IX Amendments

The 2020 Title IX amendments establish a foundational framework for responding to sexual harassment reports within educational institutions.

Schools have the autonomy to implement measures that exceed the stipulated minimum requirements of the 2020 amendments.

Any additional steps taken must not conflict with the provisions of Title IX or the specific requirements of the 2020 amendments.



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Flexibility Beyond the 2020 Title IX Amendments

Schools are free to adopt practices that support survivors of sexual harassment effectively.

Schools may also adopt best practices for standards of competence for conducting impratiral grievance processes and for other obligations under the Amendments.



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Prevention of Sexual Harassment

2020 Amendments Focus

The 2020 Amendments focus on schools' responsibilities in responding to incidents of sexual harassment.

The amendments detail the required actions schools must take upon receiving reports of sexual harassment.

The Office for Civil Rights (OCR) specifically encourages schools to proactively work towards preventing sexual harassment.



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Prevention of Sexual Harassment

Role of Educational Communities:

The Department of Education recognizes the unique needs, values, and environments of different educational institutions.

Schools are encouraged to develop and implement prevention strategies that are most effective for their specific context.



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Differences in Requirements: K-12 vs. Postsecondary

The 2020 amendments apply broadly to both K-12 (elementary and secondary schools) and postsecondary educational institutions but with two key differences.



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Differences in Requirements: K-12 vs. Postsecondary

Notice Requirements:

K-12 Schools: Must respond whenever an employee has notice of potential sexual harassment.

Postsecondary Schools: The notice requirements for employees are more limited in comparison. (More details later in the presentation)



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Differences in Requirements: K-12 vs. Postsecondary

Live Hearings and Cross-Examination:

Postsecondary Schools Only: Required to conduct a live hearing with opportunities for cross-examination by the parties' advisors of choice.

K-12 Schools: This requirement does not apply to K-12 schools.



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Definition of Sexual Harassment

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Definition of Sexual Harassment

2020 Amendments Definition:

Sexual harassment includes unwelcome sexual conduct, sexual assault, dating violence, domestic violence, and stalking.

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Definition of Sexual Harassment

Sexual harassment is conduct on the basis of sex as described in three different categories:

Quid Pro Quo Harassment:
An employee conditions provision of an aid, benefit, or service on participation in unwelcome sexual conduct.

Severe, Pervasive, and Objectively Offensive Conduct:
Conduct so severe, pervasive, and objectively offensive that it denies equal access to the educational program or activity.

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Definition of Sexual Harassment

Inclusion of Acts Under Federal Laws:
Sexual assault, dating violence, domestic violence, and stalking as defined in federal laws (Clery Act and VAWA).

Sexual Assault (Clery Act): Any unwanted sexual act, forced or not, as recognized by the FBI's crime reporting system. This includes acts like rape and fondling done without the other person's agreement, even if they cannot consent.

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Definition of Sexual Harassment

Inclusion of Acts Under Federal Laws:

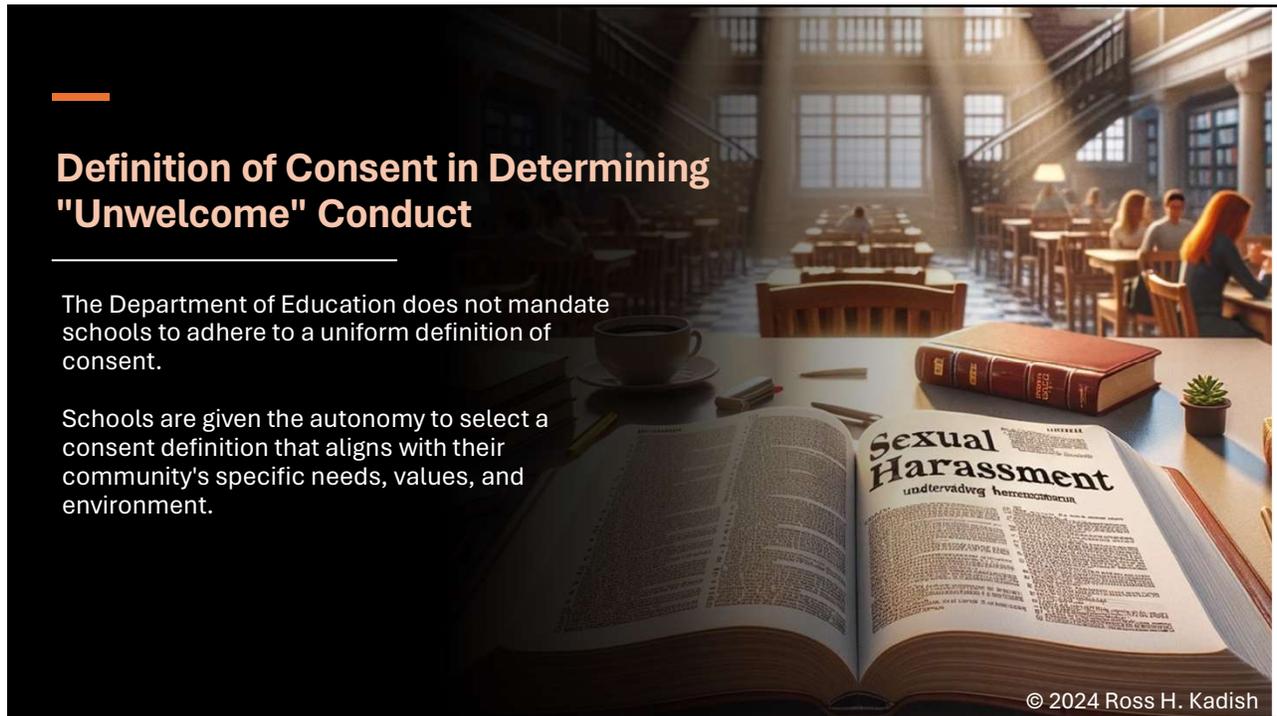
Dating Violence (VAWA): Violence in a romantic or intimate relationship, determined by relationship length, type, and interaction frequency.

Domestic Violence (VAWA): Crimes of violence by a close partner or family member.

Stalking (VAWA): Conduct causing fear for safety or substantial emotional distress, including cyberstalking.

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Definition of Consent in Determining "Unwelcome" Conduct

The Department of Education does not mandate schools to adhere to a uniform definition of consent.

Schools are given the autonomy to select a consent definition that aligns with their community's specific needs, values, and environment.

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Responding to Sexual Misconduct Beyond Title IX's Scope

Title IX's Role and Scope:

Title IX does not the exclusive remedy for all forms of sexual misconduct or trauma affecting students.

Schools have the discretion to respond to sexual misconduct not covered by the Title IX grievance process.

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Responding to Sexual Misconduct Beyond Title IX's Scope

Situations Beyond Title IX Coverage (Examples):

- Incidents that occur outside a school's education program or activity.
- Events taking place outside the United States.
- Situations causing harm in the school environment that do not meet the defined criteria of sexual harassment.

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Responding to Sexual Misconduct Beyond Title IX's Scope

School's Authority and Measures:

Schools can address misconduct (sexual or otherwise) beyond the scope of Title IX.

Title IX regulations do not limit schools from enforcing broader codes of conduct to manage such misconduct.

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Determining Denial of Equal Access under 2020 Amendments

Assessment Criteria:

To assess if sexual harassment denies equal access to education, consider if a reasonable person in the complainant's situation would feel denied equal access compared to others not suffering the same alleged harassment..

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Determining Denial of Equal Access under 2020 Amendments

Indicators of Denied Access (Examples):

- Avoiding classes to escape harassment.
- A drop in grade point average.
- Difficulty concentrating in class.

Reporting Thresholds:

- No need for the complainant to have suffered loss of education before reporting harassment.
- Denial of equal access does not imply total denial of educational opportunities.

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Determining Denial of Equal Access under 2020 Amendments

No Need for Concrete Injury:

- Proof of effective denial of access doesn't require concrete injury, or reaching a breaking point.
- Examples: There is no need to have dropped out, failed a class, or shown specific trauma symptoms.

School's Response:

- Schools should not dismiss complaints based on the perceived level of trauma.
- Schools should inclusion of these and other examples in policies and training can clarify the concept for students and employees

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Where Sexual Harassment Occurs



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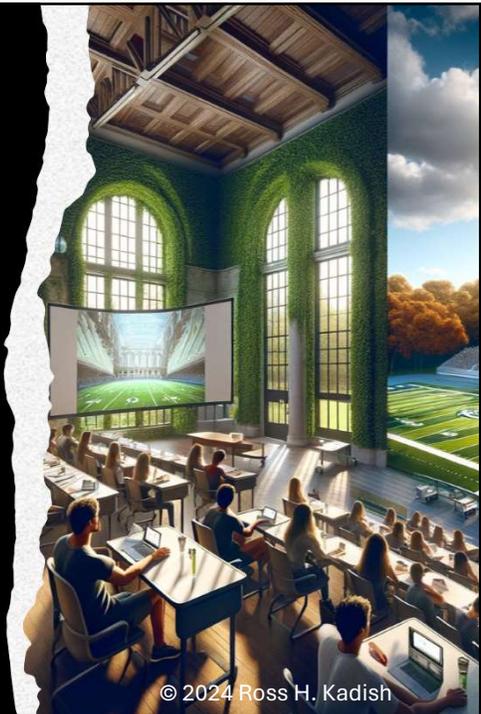
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Scope of Settings Covered by the 2020 Amendments

Applicable Settings:

The 2020 amendments address sexual harassment within U.S.-based education programs and activities, including in the following settings:

- Buildings, remote learning environments, and other locations that are part of the school's operations.
- Off-campus settings where the school has substantial control over the respondent and context in which the alleged harassment occurred.
- Buildings owned or controlled by officially recognized student organizations, such as fraternities or sororities.



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Scope of Settings Covered by the 2020 Amendments

Guidance and Training:

- Schools must train Title IX personnel to accurately identify situations requiring a Title IX response accurately.
- OCR encourages the inclusion of examples from each setting in school policies, staff training, and communications to students.



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Scope of Settings Covered by the 2020 Amendments

Limitations and Supportive Measures:

- Sexual harassment taking place outside the United States fall outside the 2020 amendments' scope.
 - May still offer supportive measures.
- Any harassment within educational settings must be addressed, even if related to incidents outside the educational setting.



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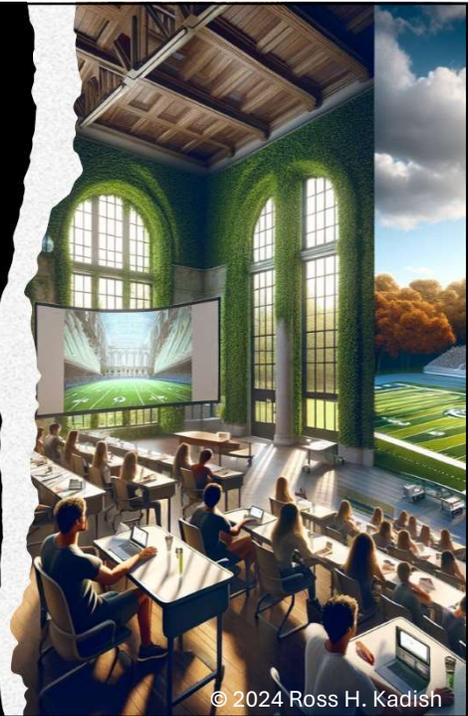
Determining Substantial Control in Off-Campus Settings

Fact-Specific Determination:

- Schools need to make a detailed, case-by-case analysis to decide if they have substantial control over the respondent and the context of off-campus sexual harassment incidents.

Response Obligation:

- If a school determines it has substantial control over the context of an incident, it must respond to notices of sexual harassment or allegations that occurred in those settings.



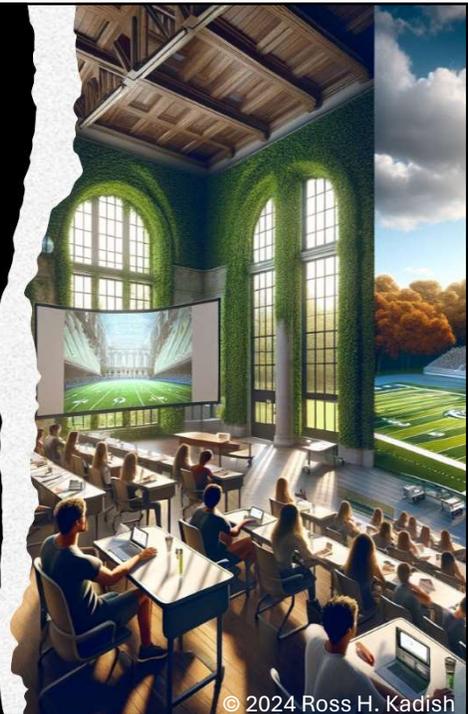
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Determining Substantial Control in Off-Campus Settings

Factors to Consider:

- Factors applied by Federal courts, like if the school funded, promoted, or sponsored the event or circumstance where the harassment occurred.
- No single factor conclusively determines substantial control.



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Determining Substantial Control in Off-Campus Settings

Examples for Consideration (When a school must respond):

- When a harassment incident between two students occurs in an off-campus apartment or house when the school exercised substantial control over the situation
- Incidents occurring in contexts related to school-sponsored activities, such as field trips or athletic team travels, where the school may exercise control over the setting.
- Situations where a school employee, like a teacher, visits a student's home for ostensibly educational purposes but engages in or attempts to instigate sexual activity.



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Applying the 2020 Amendments to Online Sexual Harassment

Scope of School Operations:

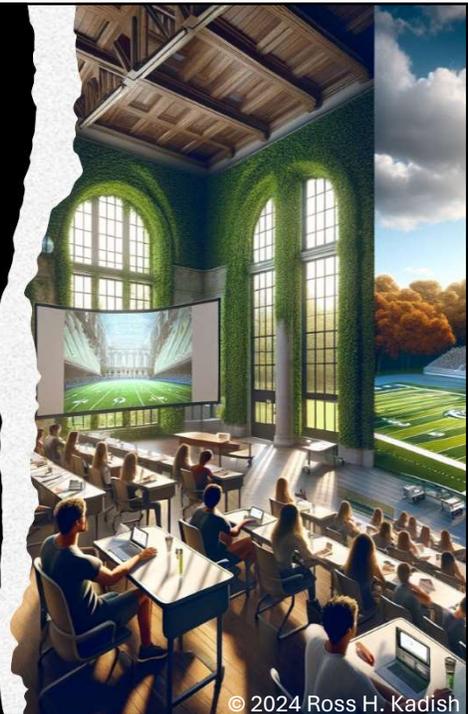
Includes computer and internet networks, digital platforms, and computer hardware or software owned, operated by, or used in the operations of the school.

Analysis of Online Harassment:

The factual circumstances of online harassment must be examined to determine if it took place within an education program or activity of the school.

In-Person vs. Online Harassment:

The 2020 amendments do not differentiate between sexual harassment occurring in person and online. Both are subject to the same scrutiny and response requirements under Title IX.



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Addressing Online Harassment via Personal Devices

Context of Harassment:

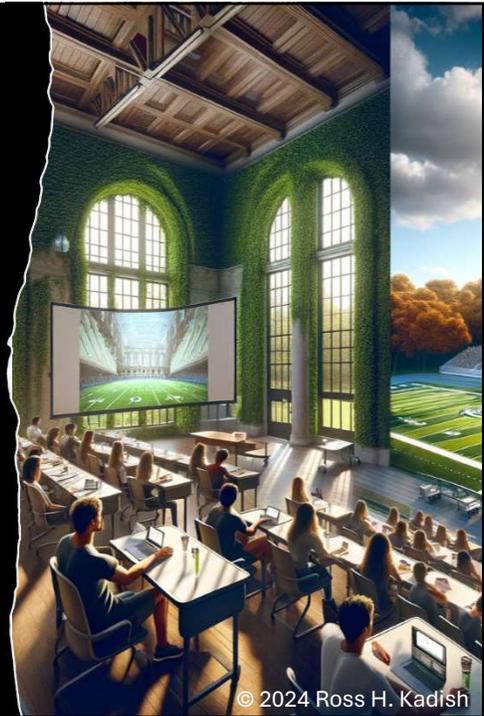
A student using a personal electronic device to engage in online sexual harassment during class time is considered a scenario where the school may have substantial control.

Determining Control:

Similar to in-person harassment, the school must analyze the factual circumstances of the online harassment to determine if it occurred under conditions where the school had substantial control over both the respondent and the context.

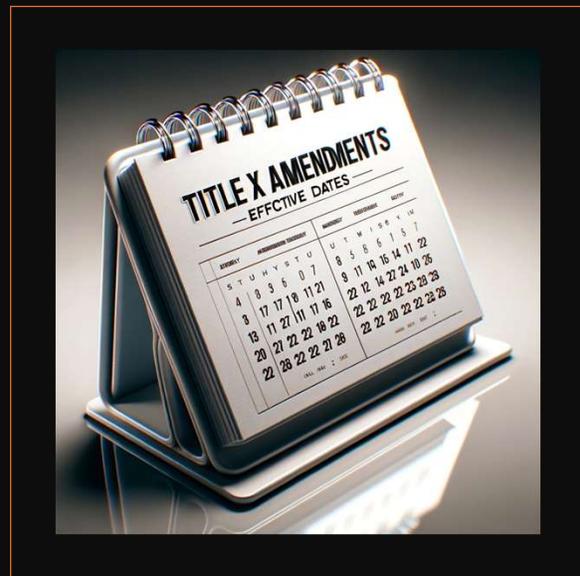
Substantial Control Criteria:

The concept of "substantial control" involves evaluating the school's authority and influence over the setting and the individuals involved, even if the harassment utilizes personal devices during class activities.



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When Harassment Occurred



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Evaluating Pre-2020 Amendments Sexual Harassment Allegations

Effective Date and Retroactivity:

The 2020 amendments became effective on August 14, 2020, and do not have retroactive application.

Incidents of alleged sexual harassment occurring before this date must be assessed under the Title IX regulations and guidance that w

Response to Incidents Prior to August 14, 2020:

The 2020 amendments do not apply to conduct that happened before their effective date, regardless of when a complaint is filed.

Schools are required to follow the Title IX statute and previous regulations for incidents occurring before August 14, 2020.



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Evaluating Pre-2020 Amendments Sexual Harassment Allegations

Guidance for Historical Allegations:

Prior to August 2020, Title IX regulations did not specifically address sexual harassment.

Since publication of the regulations in 2001, OCR issued guidance documents in 2011, 2014, and 2017 to help schools interpret Title IX regulations. These have all since been rescinded.

These rescinded documents remain available on OCR's website for historical reference, aiding schools in responding to allegations from before the 2020 amendments.



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Notice of Sexual Harassment



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Notification Requirements for Sexual Harassment Allegations

Elementary and Secondary Schools:

Any school employee's awareness of sexual harassment triggers a response requirement.

Postsecondary Institutions:

Response is required when notice of alleged sexual harassment is received by the Title IX Coordinator or any official with authority to implement corrective measures.

Determining who has authority to implement corrective measures is fact specific and based on the specific context of the institution

Schools have discretion to designate certain employees explicitly for this role.



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Accepting Reports of Sexual Harassment from Unaffiliated Individuals

Open Reporting Policy:

Schools are allowed to receive reports of sexual harassment from anyone, regardless of their association with the school.

There is no prerequisite for the reporter to be involved or trying to be involved in a school program or activity.



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Response to Allegations Known Only by the Alleged Harasser

Not required to Respond:

Under the 2020 amendments, a school is not required to respond to sexual harassment allegations if the only person with knowledge is the alleged harasser themselves.

Rationale:

The school is considered not to have notice of the harassment under Title IX in such circumstances.

This is because the school cannot be expected to take appropriate action if the only individual aware of the allegations is the respondent (alleged harasser).



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School's Response Obligation to Alleged Sexual Harassment

Obligation to Respond:

Schools at all levels must respond to allegations that could potentially meet the definition of sexual harassment.

This response is required even if there is uncertainty about whether the alleged harassment actually occurred.

Definition of Actual Knowledge:

Actual knowledge is defined as awareness of conduct that might be sexual harassment.

A complainant is someone purported to be "the victim of conduct that could constitute sexual harassment".

Response to Allegations:

The school must act promptly and appropriately upon receiving allegations that, if true, could be sexual harassment,



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Discretion in Who Must Report Sexual Harassment for Postsecondary Schools

Empowerment of Officials:

Postsecondary schools can designate numerous officials with the authority to take corrective action, such as coaches and athletic trainers.

Mandatory Reporting:

Post-secondary schools may decide which employees are required to report sexual harassment.

Certain employees, like mental health providers, may be allowed to keep disclosures confidential.

Institutional Policies:

Post-secondary schools can create policies that require various staff members, including professors and all employees, to report sexual harassment to the Title IX Coordinator.



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Discretion in Reporting Sexual Harassment for Postsecondary Schools

Responsibility for Response:

A postsecondary institution is accountable for responding to sexual harassment only if the Title IX Coordinator or another authorized official with authority to institute corrective action actually receives notice.

A post-secondary school will not be held accountable to respond when a mandatory reporter has notice unless that mandatory reporter is, or has actually reported to the the Title IX Coordinator or other official with authority to institute corrective action

Publicizing Officials with Authority:

Post-secondary schools may publicize a list of officials with authority to institute corrective measures.

OCR encourages this practice to help students and others understand which reports will necessitate a school response.



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Response to Sexual Harassment



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School Response to Sexual Harassment Allegations

Mandatory Response:

Schools must respond promptly and appropriately to actual knowledge of sexual harassment, ensuring the response is not deliberately indifferent.

Deliberate Indifference:

A school's response is deemed deliberately indifferent only if it is "clearly unreasonable in light of the known circumstances."

Title IX Coordinator's Role:

Must immediately reach out to the complainant to discuss available supportive measures regardless whether formal complaint filed.

Explain the process for filing a formal complaint.



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School Response to Sexual Harassment Allegations

Formal Complaint Response to Respondent

If a formal complaint arises (whether filed by the complainant or the Title IX coordinator), the school must:

Provide supportive measures to the respondent.

Adhere to the grievance process outlined in the 2020 amendments.



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Remedies and Sanctions for Sexual Harassment Findings

School's Discretion on Remedies and Sanctions:

Schools are not mandated by the 2020 amendments to impose specific remedies or sanctions following a finding of responsibility for sexual harassment.

Schools have the autonomy to determine disciplinary and remedial actions they deem suitable for their educational environment.

Objective of Remedies:

Remedies must aim to restore or preserve the complainant's equal access to the school's educational programs or activities.

Remedies can include, modify, or expand upon the supportive measures previously provided, and they can be disciplinary or punitive towards the respondent.



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Remedies and Sanctions for Sexual Harassment Findings

Disclosure of Possible Disciplinary Actions:

Schools must disclose the range or list of possible disciplinary sanctions and remedies.

The requirement for disclosure is meant to guide, not to limit the school's flexibility in addressing specific cases.



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Formal Complaints



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Understanding a "Formal Complaint" in the 2020 Amendments

Definition of a Formal Complaint:

A document filed by a complainant alleging sexual harassment against a respondent, and requesting the school to investigate.

Format and Signature Requirement:

Can be submitted as a hard copy or electronic document (via email or online portal).

Must include the complainant's physical or digital signature, or clearly indicate the complainant is the filer.



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Understanding a "Formal Complaint" in the 2020 Amendments

Submission Process:

A formal complaint can be filed with the school's Title IX Coordinator in person, by mail, or email, among other methods designated by the school.

A parent or guardian may file on behalf of the individual if legally authorized.

Title IX Coordinator's Role:

The Title IX Coordinator may also file a formal complaint, triggering the investigation process.



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Eligibility to File a Formal Complaint of Sexual Harassment- Not Currently Enrolled or Attending

Acceptance of Formal Complaints:

Schools must accept formal complaints of sexual harassment from complainants who are not currently enrolled or attending but are attempting to participate in the school's education program or activity.

Current and Attempted Participation:

Both individuals currently participating in or attempting to participate in the school's programs may file formal complaints.

"Attempting to participate" includes those intending to re-enroll, apply to new programs, engage in alumni activities, or are on leave but plan to return, or have applied for admission.

Complainant's Status:

The critical factor is the complainant's status at the time of filing the complaint, not their future intentions or actions concerning enrollment or participation.



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Title IX Coordinator's Authority to File a Formal Complaint

Coordinator's Initiative:

The Title IX Coordinator has the authority to file a formal complaint, even if the complainant is not currently participating in or attempting to participate in the school's education program or activity.

Title IX Obligation:

The school may be in violation of Title IX if the Coordinator does not file a complaint in certain situations.

Circumstances for Coordinator Action:

The Coordinator may need to file a complaint even without the complainant's desire to file or participate in the grievance process. Failing to do so may be considered to be deliberately indifferent.



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School Response to Sexual Harassment Outside Title IX

School's Discretionary Response:

Schools can address reports of sexual harassment, or other misconduct, through their own student-conduct processes, even if the complainant is not participating or attempting to participate in the school's education program or activity.

Use of School Conduct Process:

This approach applies to situations not covered by the 2020 amendments, such as when the complainant is disconnected from the school's educational programs.



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Responding to Allegations Involving Former Students

Obligation to Respond:

A school is required to address reports of sexual harassment when it has “actual knowledge” even if the accused individual (respondent) has left the school and does not plan to return.

Title IX Coordinator’s Responsibilities:

The Title IX Coordinator must discuss available supportive measures with the complainant, irrespective of whether a formal complaint is filed.

Must also consider the complainant's preferences regarding the implementation of supportive measures.



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Handling Formal Complaints Against Former School Members

Discretion in Dismissal:

A school has discretion to dismiss formal complaints when a respondent is no longer enrolled or employed by the institution.

Discretion to dismiss may be informed by the specific facts and circumstances of each case.

Considerations for Proceeding:

Ongoing risk posed by the respondent to the school community.

Benefits of determining responsibility for the complainant, even if disciplinary sanctions cannot be applied.

The necessity of understanding the harassment's extent, employee awareness and inaction, patterns of harassment, and the experiences of multiple complainants.



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Handling Formal Complaints Against Former School Members

Grievance Process Benefits:

Continuing with the grievance process allows the school to:

- Identify the harassment scope.
- Assess employee responses or failures to respond.
- Detect patterns of harassment.
- Determine appropriate remedial actions.



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Using Trauma-Informed Approaches in Responding to Sexual Harassment

Trauma-Informed Approaches:

A trauma-informed approach to responding to sexual harassment recognizes the complex impact trauma can have on survivors, including their emotional, psychological, and physical well-being.

This approach integrates knowledge about trauma into all aspects of response to harassment, ensuring that the process is sensitive to the survivor's experiences and promotes safety, empowerment, and healing.

2020 Amendments Guidance:

The 2020 amendments do not restrict the use of trauma-informed practices, as long as they align with specific regulatory requirements.



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Handling Situations in Which a Party or Witness May be Unable to Participate in the Title IX Grievance Process in Person



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Title IX Grievance Process Continuity During COVID-19

Obligation to Proceed:

Schools are required to maintain their Title IX grievance processes and cannot suspend investigations or proceedings due to the COVID-19 pandemic.

No Policy Suspension:

Instituting a policy that puts Title IX processes on hold because of COVID-19 is not permissible.

Guidance on COVID-19 and Title IX:

The OCR has provided additional guidance on how schools can fulfill their Title IX obligations while navigating the challenges posed by the COVID-19 pandemic.



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Accommodating Disabilities in Title IX Grievance Processes

Extension for Disabilities:

Schools have discretion to grant time extensions during the grievance process, for good cause, including to accommodate disabilities.

Balancing Interests:

Decisions on delays or extensions must consider the need for promptness, fairness, and accurate outcomes.



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Accommodating Disabilities in Title IX Grievance Processes

Notification Requirements:

Schools must inform all parties about the reasons for any delay, the estimated duration, and provide updates on the investigation.

Use of Technology:

In-person interviews or hearings must not be delayed solely because they cannot be done in-person.

Schools should utilize technology to conduct necessary activities remotely, ensuring timeliness, equity, and compliance with the law.



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Virtual Participation in Title IX Grievance Processes

Technology Use Approved:

The 2020 amendments authorize schools to use technology for virtual appearances by participants, including witnesses, during live hearings in the Title IX grievance process.

Requirements for Virtual Hearings:

The technology utilized must ensure that all participants can see and hear each other clearly.

Schools must provide appropriate accommodations for participants with disabilities.



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Supportive Measures and Temporary Removal of Respondents from Campus



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Supportive Measures Without a Formal Complaint

Requirement for Supportive Measures:

Schools are required to offer supportive measures to complainants of sexual harassment, even if no formal complaint has been filed.

Engagement with Complainant:

The school must proactively contact the complainant to discuss available supportive measures and take into account the complainant's preferences regarding these measures.



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Supportive Measures for Complainants in Title IX Cases

Objective of Supportive Measures:

To restore or preserve equal access to the school's education program or activity for the complainant.

Designed to ensure safety of all parties, maintain a safe educational environment, and deter further sexual harassment.

Consideration of Complainant's Wishes:

Schools must take into account the preferences of the complainant in deciding which supportive measures to implement.

Measures should not unreasonably burden the other party involved.



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Supportive Measures for Complainants in Title IX Cases

Discretion in Providing Support:

Schools have the flexibility to determine appropriate supportive measures based on the unique circumstances of each case.

Examples of Supportive Measures:

Counseling, deadline extensions, course adjustments, modified schedules, campus escort services, contact restrictions, housing or work location changes, leaves of absence, increased security, and similar measures



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Maintaining Supportive Measures During COVID-19

Ongoing Title IX Obligations:

The COVID-19 pandemic does not exempt schools from their responsibilities under Title IX. Schools must continue to provide supportive measures to both complainants and respondents in sexual harassment cases.

Adaptations to Supportive Measures:

Schools may need to adapt supportive measures to the current circumstances, such as offering remote counseling or teletherapy for students who cannot access in-person services due to the pandemic.

In remote learning contexts, measures might include arranging for complainants and respondents not to attend the same online classes to prevent further distress or harassment.



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Emergency Removal of Respondents in Title IX Cases

Provision for Emergency Removal:

Under the 2020 amendments, schools have the authority to remove a respondent from educational programs or activities on an emergency basis if they pose an immediate threat.

Criteria for Removal:

An individualized safety and risk analysis must be conducted to ascertain the immediate threat to physical health or safety of any person based on sexual harassment allegations.

Respondents must be given notice and an opportunity to challenge the removal decision immediately after being removed.



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Emergency Removal of Respondents in Title IX Cases

Compliance with Disability Laws:

Schools must ensure that any actions taken, including emergency removal, comply with federal disability laws.

Administrative Leave for Employees:

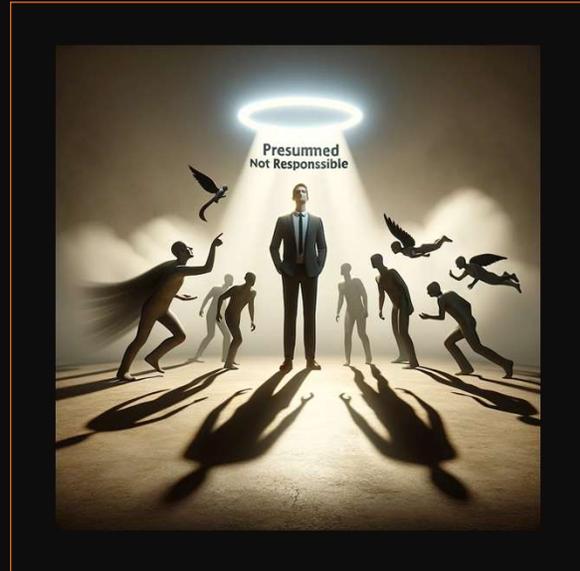
Non-student employee respondents may be placed on administrative leave during the Title IX grievance process in compliance with federal disability laws.



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Presumption of No Responsibility



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Presumption of Non-Responsibility and Complainant Credibility

Presumption of Non-Responsibility:

The 2020 amendments mandate a presumption that the respondent is not responsible for alleged misconduct until a determination is made at the grievance process's conclusion.

Misconceptions Clarified:

This presumption does not imply that the alleged harassment did not occur or that a complainant is lying.

It is a procedural safeguard designed to ensure fairness and impartiality during the investigation.

Impartiality in Investigations:

The presumption ensures that investigators and decision-makers approach each case without preconceived notions about the respondent's guilt or the complainant's truthfulness.



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Time Frames



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Timing of Sexual Harassment Investigations Under the 2020 Amendments

Reasonably Prompt Time Frames:

The 2020 amendments mandate that the grievance process for sexual harassment complaints be completed within reasonably prompt time frames, including the investigation, any appeals, and informal resolution processes.

No Open-Ended Time Frames:

The entire grievance process must be concluded within the specific time frames designated by the school, eliminating indefinite durations for any part of the process.



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Timing of Sexual Harassment Investigations Under the 2020 Amendments

Context of Reasonableness:

The appropriateness of the time frame is assessed in relation to the school's operational context, aiming for a balance between promptness, fairness, and accuracy.

Importance of Prompt Resolution:

A swift conclusion is crucial as the grievance process impacts participants' ability to focus on their education or work. Prompt resolutions also uphold Title IX's nondiscrimination mandate by providing necessary remedies.



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Timing of Sexual Harassment Investigations Under the 2020 Amendments

School's Discretion on Time Frames:

Schools have discretion to set their own timelines based on their unique characteristics and disciplinary experiences. They must adhere to the time frames established in their grievance processes.

Previous 60-Day Guideline:

While a 60-day resolution guideline was previously suggested, schools are not prohibited from adopting it, although it is no longer a requirement.

Allowances for Delays:

Temporary delays or time frame extensions are permissible with good cause, such as the absence of key participants, concurrent law enforcement activities, or the need for accessibility accommodations.



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Live Hearings and Cross-Examination



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Live Hearings Requirement in Title IX Grievance Processes

Requirement for Postsecondary Schools:

Under the 2020 amendments, postsecondary institutions are mandated to conduct live hearings during the Title IX grievance process.

Virtual Hearings Option:

These live hearings can be held virtually, using technology that allows all participants, including the decision-maker and parties, to simultaneously see and hear the party or witness being questioned.



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Understanding Cross-Examination in Title IX Hearings

Definition of Cross-Examination:

During a live hearing, each party's advisor is allowed to ask relevant questions to the other party and any witnesses, including those that challenge credibility. This questioning process is known as cross-examination.

Advisor's Role:

Parties themselves are not permitted to directly conduct cross-examination; it must be done through their advisors.

Requirement for Postsecondary Schools:

If a party does not have an advisor, postsecondary schools are required to provide one for the purpose of conducting cross-examination.



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Advisor Provision in Title IX Live Hearings

Advisor Requirement for Cross-Examination:

Postsecondary schools must provide an advisor for the purpose of conducting cross-examination during live hearings if a party does not have one.

Advisor During the Grievance Process:

The parties must have the same opportunities to be accompanied by an advisor of their choice in all parts of the grievance process.

Postsecondary schools are mandated to provide an advisor specifically for cross-examination.

Choosing an Advisor:

Parties may select their advisors, who can be friends, family members, attorneys, or any individual of their choosing. If a party does not choose an advisor, the school must provide one for cross-examination purposes.



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Participation in Title IX Grievance Process and Cross-Examination

Voluntary Participation:

Parties and witnesses are not mandated to participate in the Title IX grievance process or to undergo cross-examination during live hearings at postsecondary institutions.

Supportive Measures:

Schools are required to provide supportive measures to complainants, irrespective of their decision to participate in the grievance process.

Anti-Retaliation Measures:

The 2020 amendments explicitly prohibit retaliation against any individual based on their choice to engage or not engage in the grievance process.



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School's Discretion in Live Hearing Procedures

Flexibility in Hearing Rules:

Schools have discretion to establish their own procedures for conducting live hearings, ensuring these rules are consistently applied to all parties involved.

Examples of Custom Rules:

- Deciding on the admissibility of evidence not previously presented.
- Allowing or limiting opening and closing statements by the parties.
- Establishing a process for objections to relevance of questions and evidence.
- Setting reasonable time limits for the duration of the hearing.
- Determining duplicative questions as irrelevant.



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Rules of Decorum for Live Hearings in Title IX Processes

Adoption of Decorum Rules:

Schools have discretion to establish rules of decorum for live hearings, tailoring these rules to their specific educational environment.

Purpose of Decorum Rules:

To ensure that all participants, including advisors, parties, and witnesses, engage in the hearing process in a respectful, non-abusive manner.



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Rules of Decorum for Live Hearings in Title IX Processes

Examples of Decorum Enforcement:

Prohibiting abusive, intimidating, or disrespectful questioning by advisors.

Allowing schools to require a party to choose a different advisor if their current advisor violates the decorum rules, such as by yelling or acting in an intimidating manner.

Authority to Enforce Decorum:

Schools can enforce these rules even during relevant questioning, e.g., emphasizing that questions must be asked respectfully and without harassment.



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Virtual Participation in Title IX Live Hearings

Virtual Hearing Option::

Under the 2020 amendments, schools discretion to allow any or all parties, witnesses, and other participants to appear virtually during live hearings, ensuring that everyone can simultaneously see and hear each other.

Request for Virtual Hearings:

Parties have the right to request a fully virtual hearing, including for cross-examination purposes, without needing to provide a justification. Schools are required to accommodate such requests.

Flexibility in Hearing Format:

Schools can conduct virtual hearings or have participants in separate locations even without a specific request from any party.



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Limitations on Questioning in Title IX Grievance Process

Relevance Requirement:

Under the 2020 amendments, all questions asked during the grievance process, including live hearings and written exchanges, must be relevant.

Specific Limitations:

Questions about the complainant's sexual history are generally considered not relevant, with certain exceptions.

Schools can exclude duplicative or repetitive questions as not relevant.

Postsecondary School Cross-Examination:

During cross-examination at postsecondary schools, only relevant questions may be asked.

The decision-maker is responsible for determining the relevance of each question before it is answered by a party or witness.



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Relevance of Complainant's Sexual History in Title IX Cases

General Rule on Relevance:

The 2020 amendments specify that questions and evidence about a complainant's sexual predisposition or prior sexual behavior are generally not relevant to the grievance process.

Exceptions:

Questions and evidence are deemed relevant only if they aim to prove that someone other than the respondent committed the alleged conduct.

Or if they relate to specific incidents of prior sexual behavior with the respondent to prove consent.



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Relevance of Complainant's Sexual History in Title IX Cases

Definition of "Prior Sexual Behavior":

Refers to sexual behavior unrelated to the allegations being considered.

The regulations do not typically find questions about sexual behavior following the alleged incident to be relevant.

Consent Definitions:

Relevance of sexual behavior between the complainant and respondent may vary based on a school's specific definition of consent, which can range from requiring verbal expression to understanding consent based on circumstances.



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Cross-Examination and Medical Records in Title IX Cases

Restrictions on Medical Records:

Cross-examination questions cannot seek information from a party's medical, psychological, or similar records without the party's written consent.

Privileged Records:

Questions about records protected by legally recognized privilege, such as attorney-client or doctor-patient privilege, are not allowed unless the privilege is waived by the party.



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Cross-Examination and Medical Records in Title IX Cases

Compliance with Privacy Laws:

Schools and parties involved in the grievance process must adhere to relevant state and federal health care privacy laws, ensuring the protection of sensitive information.

Scope of Protections:

These protections for medical and privileged records apply during both the investigation phase and the live hearing of the Title IX grievance process.



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Protecting Well-being During Cross-Examination

Well-being Measures:

Schools may implement measures aimed at protecting the well-being of parties during the cross-examination process in live hearings.

Breaks During Hearings:

The school can grant breaks to parties during a live hearing to alleviate stress and maintain focus.

Relevance Check Before Answering:

Each cross-examination question must be paused before being answered to allow the decision-maker to assess its relevance. This ensures that only pertinent questions are asked, reducing undue pressure on parties and witnesses.



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Evaluating Answers to Cross-Examination Questions

Flexibility in Answer Formats:

The 2020 amendments specify that answers to cross-examination questions are not required to follow a linear or sequential format, nor must parties recall details with exact specificity.

Impartiality in Decision-Making:

Decision-makers are mandated to undergo training to serve impartially and not to prejudge the facts of the case, aligning with the goal of fair evaluation



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Consideration of Statements without Cross-Examination

Court Decision Impact:

A federal court decision vacated the 2020 amendments' prohibition against decision-makers relying on statements from parties or witnesses who do not undergo cross-examination at postsecondary school hearings.

Inference from Non-Participation:

Despite this change, decision-makers are still prohibited from drawing any inferences about a party's credibility based solely on their choice not to participate in the hearing or undergo cross-examination.



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Effective Date of Court-Ordered Change in Title IX Regulation

Date of Court Decision:

The federal court's decision altering the Title IX regulation was issued on July 28, 2021.

Immediate Effect:

The change took effect immediately.

The court's ruling applies to all Title IX grievance processes started after July 28, 2021, irrespective of when the incident of alleged sexual harassment occurred.



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Consideration of Statements Without Cross-Examination

Permissible Statements:

Decision-makers in postsecondary school Title IX processes may consider statements from parties or witnesses that comply with the regulations, irrespective of cross-examination participation.

Examples of Considerable Statements:

Statements made during the investigation phase.

Emails or text exchanges between the parties related to the alleged incident.

Statements that meet the regulation's criteria for relevance regarding the alleged sexual harassment.

Official documents such as police reports, Sexual Assault Nurse Examiner documents, medical reports, etc., that are relevant under the regulation's guidelines.

Relevance and Admissibility:

The key criterion for the admissibility of such statements and documents is their relevance to the allegations, as defined by the Title IX regulations.



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Requirement to Consider Statements Without Cross-Examination

Objective Evaluation Mandate:

The 2020 amendments mandate an objective evaluation of all relevant evidence in Title IX grievance processes at postsecondary schools.

Impact of Court Decision:

Postsecondary schools cannot maintain a prohibition on considering statements by parties or witnesses who do not undergo cross-examination at live hearings if such statements meet the relevance criteria.

Relevance Criteria Compliance:

Statements that comply with the regulation's relevance rules must be considered in the grievance process for cases initiated after July 28, 2021.



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Reliance on Statements When Questions Are Unanswered

Cross-Examination vs. Decision-Maker Questions:

The preamble differentiates between cross-examination conducted by a party's advisor and questions directly posed the decision-maker.

Use of Statements in Decision-Making:

If a party or witness participates in cross-examination but does not respond to questions from the decision-maker, their statements can still be considered by the decision-maker in the final assessment.

Prohibition on Drawing Inferences:

Decision-makers are prohibited from inferring anything about a party's credibility based on their refusal to answer questions posed by the decision-maker.



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Standard of Proof



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Standards of Proof in Title IX Grievance Process

Choice of Standard of Proof:

The 2020 amendments require schools to specify in their grievance process which standard of evidence will be used to determine responsibility: preponderance-of-the-evidence or clear-and-convincing-evidence.

Preponderance-of-the-Evidence Standard:

This standard requires the decision-maker to conclude that the alleged facts are "more likely than not" true, essentially meaning there is a greater than 50% chance that the allegations are accurate.

Clear-and-Convincing-Evidence Standard:

Under this stricter standard, the decision-maker must find it "highly probable" or reasonably certain that the allegations are true, indicating a higher degree of certainty than the preponderance standard.



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Uniform Standard of Proof in Title IX Cases

Uniformity Requirement:

Schools must apply the same standard of proof for all formal complaints of sexual harassment, whether the complaints involve students, employees, or faculty members.

Collective Bargaining Agreements:

If a collective bargaining agreement mandates using the clear-and-convincing evidence standard for employee-related sexual harassment investigations, the same standard must be applied to student-related cases under the 2020 amendments.



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Informal Resolution



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Informal Resolution Process for Sexual Harassment Complaints

Option for Informal Resolution:

Schools may offer an informal resolution process, such as restorative justice or mediation, to resolve sexual harassment complaints, although it is not mandatory.

Restrictions on Informal Resolution:

Informal resolution processes are not allowed for complaints alleging sexual harassment by an employee against a student.

Flexibility in Process Design:

The term "informal process" is intentionally left undefined, providing schools with the flexibility to develop a process that best meets their community's needs.



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Informal Resolution Process for Sexual Harassment Complaints

Mediation Practices:

Direct interaction between the parties is not a requirement for mediation.

Mediations can be conducted with parties in separate rooms, with a mediator facilitating the discussions.

Voluntary Participation:

Participation in the informal resolution process must be entirely voluntary for both parties, and they should not feel pressured to engage.

Discretionary Use by Schools:

Schools have the discretion to decide on a case-by-case basis whether an informal resolution is appropriate for a particular complaint.



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Requirements for Informal Resolution Process under Title IX

Voluntary Written Consent:

Schools must obtain voluntary, written consent from both the complainant and the respondent before initiating any informal resolution process, such as mediation or restorative justice.

Freedom to Choose Resolution Mechanism:

With consent, parties can select an informal resolution approach that best addresses their needs, promoting flexibility and autonomy in the process.

Option to Withdraw:

Parties retain the right to withdraw from the informal resolution process at any time before reaching an agreement, allowing them to return to the formal grievance process.



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Requirements for Informal Resolution Process under Title IX

Impartiality and Training Requirements:

Individuals facilitating informal resolutions must be free from bias or conflicts of interest and trained to serve impartially, ensuring fairness and objectivity throughout the process.

Use of Trauma-Informed Techniques:

Schools may incorporate trauma-informed techniques in the informal resolution process to support sensitive handling of the situation.



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Retaliation and Amnesty



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Prohibition of Retaliation Under the 2020 Amendments

Retaliation Defined:

Retaliation under the 2020 amendments is characterized as intimidation, threats, coercion, or discrimination.

Prohibition of Retaliation:

The 2020 amendments explicitly prohibit any form of retaliation related to reports or complaints of sex discrimination or sexual harassment, safeguarding the rights and privileges secured by Title IX.



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Disciplinary Actions for Policy Violations During Sexual Harassment Incidents

Retaliation and Collateral Conduct:

Charging individuals for code of conduct violations unrelated to sex discrimination or sexual harassment, stemming from the same incident, is prohibited if intended to interfere with Title IX rights, qualifying as retaliation.

Exception for Zero-Tolerance Policies:

A school may impose discipline if it follows a zero-tolerance policy that applies the same punishment for specific violations, regardless of the context, as this does not aim to interfere with Title IX rights and is not considered retaliation.



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Amnesty Policies to Encourage Reporting of Sexual Harassment

Support for Amnesty Policies:

The Department recognizes the value of amnesty policies in encouraging students to report sexual harassment by providing protection from certain code of conduct violations related to the incident.

Policy Design:

Amnesty policies typically ensure that students reporting sexual misconduct, whether as victims or witnesses, are not penalized for related violations, such as underage drinking at the event where the incident occurred.

Discretion of Schools:

Schools have the freedom to implement amnesty policies and may define retaliation more broadly than outlined in the 2020 amendments to further protect those involved in reporting.



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Consequences for Filing Unsubstantiated Complaints

Protection Against Punishment:

Under the 2020 amendments, a finding that the respondent is not responsible for the alleged sexual harassment does not automatically imply that the complainant filed the complaint in bad faith.

Retaliation Concerns:

Penalizing a complainant solely based on the outcome of the grievance process may be considered retaliation, which is prohibited under the amendments.

Discretion of Schools:

If there is evidence that a complainant made a materially false statement in bad faith during the Title IX grievance process, the school may take action for a code-of-conduct violation without it being considered retaliation.



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