

Summary of July 2021 United States Department of Education  
*Questions & Answers on the Title IX Regulations on Sexual Harassment*

On July 20, 2021, the United States Department of Education released *Questions and Answers on the Title IX Regulations on Sexual Harassment and Appendix*.

Unlike the last several Title IX documents released by the Department of Education, this document does not indicate an immediate change in the law or enforcement policies. Instead, the resource explains the Biden Administration’s interpretation of the most significant changes to Title IX enforcement created by the May 2020 regulations, and its commitment to enforcing the law currently in place while it plans for any potential changes to the 2020 Regulations. The Q&A document does not carry the force of law, and serves as an explanatory reference. The first 38 pages contain Q&A and references, the last 17 provide example policies.

The Q&A is divided into 17 sections and provides the following:

**Section 1: General Obligations**

- A school is permitted to take steps in response to reports of sexual harassment that go beyond the minimum steps set out by the 2020 amendments, as long as those do not conflict with Title IX or the 2020 amendments.
- The 2020 regulations do not require schools to engage in prevention, but “[encourage] schools to undertake prevention efforts that best serve the needs, values, and environment of their own educational communities.”

**Section 2: Definitions**

- “Sexual Harassment” means conduct on the basis of sex that satisfies one or more of the following:

2020 Regulation Definition	Notes from 2021 Q&A
A school employee conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct;	“quid pro quo” sexual harassment
Unwelcome conduct, determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school’s education program or activity; or	“incorporates the definition of sexual harassment set out by the Supreme Court in a case about when a school may be required to pay financial compensation in a lawsuit for sexual harassment by one student toward another student.”
“Sexual assault” as defined in 20 U.S.C. 1092(f)(6)(A)(v), “dating violence”, as defined in 34 U.S.C. 12291(a)(10), “domestic violence” as defined in 34 U.S.C. 12291(a)(8), or “stalking” as defined in 34 U.S.C. 12291(a)(30).	“refers to definitions in the Clery Act (requires colleges and universities that participate in the federal student financial programs to provide current and prospective students and employees, the public, and the Department with crime statistics and information about campus crime

	<p>prevention programs and policies) and [VAWA] (federal law administered by the U.S. Department of Justice and Health and Human Services that supports comprehensive responses to domestic violence, sexual violence, dating violence, and stalking).”</p>
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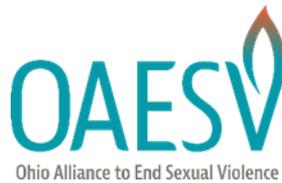
- “Consent”: The 2020 regulations do not require a specific definition of consent.
- “Effectively denies a person’s right to equal access to its education program or activity”
  - The person was denied equal access compared to a similarly situated person who is not suffering the alleged sexual harassment: considerations including skipping class to avoid harasser, decline in GPA, difficulty concentrating during class. However, concrete injury or loss of educational value need not happen before report.
- Notes:
  - A school may respond to events that do not meet the definitions listed above under other misconduct policies, as “Title IX is not the exclusive remedy for sexual misconduct or traumatic events that affect students.”
    - Thus: schools can but do not have to address reported sexual misconduct that occurs outside of a school’s education program or activity; occurs outside of the US or causes harm in the school environment that does not fit within the definition set out above.
- “Put simply, Title IX’s sexual harassment regulation need not replace a school’s more expansive code of conduct and does not prohibit a school from enforcing that code to address misconduct that does not constitute sexual harassment under the 2020 amendments.” **BUT “OCR may investigate complaints that a school’s code of conduct treated students unfairly.**

### Section 3: Where Sexual Harassment Occurs

- Schools are required to respond to sexual harassment that occurs in “buildings or other locations part of the school’s operations, including remote learning platforms”; off-campus settings if school exercised substantial control over respondent and the context in which the alleged sexual harassment occurred (like a field trip); and off campus buildings owned or controlled by a student organization officially recognized by a post-secondary school, such as a building owned by a recognized Greek organization.
- Note: The 2020 amendments allow but do not require schools to provide supportive measures to students experiencing sexual violence outside of those locations. Further, the school can respond to sexual harassment taking place outside of these locations as part of its broader conduct policy.
- Electronic Sexual Harassment: The “2020 amendments ‘does not create a distinction between sexual harassment occurring in person versus online.’” The 2020 Rule does focus on technology owned or operated by the school, but allows for fact-specific analysis.

### Section 4: When Harassment Occurred

- The 2020 Regulations do not apply retroactively.



### Section 5: Notice of Sexual Harassment:

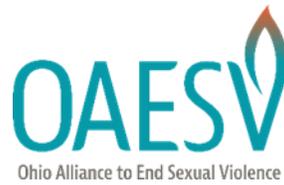
- A K-12 school must respond whenever any school employee has notice of sexual harassment. In post-secondary schools, notice may be more limited in scope, and the institution must respond when notice is received by the Title IX Coordinator or another official who has authority to institute corrective measures on the institution's behalf.
- But where a post-secondary institution includes more employees or volunteers in their reporting policy: "The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment does not qualify an individual as one who has authority to institute corrective measures on behalf of the school." ... and "the Department will not conclude that volunteers and ICs are officials with authority unless the school has granted the volunteers or independent contractors the authority to institute corrective measures on behalf of the school." OCR will not hold a school responsible for an employee failing to adhere to its school's policy if that school's policy is over and above ORC's regulations.

### Section 6: Response

- Upon actual knowledge, a school must respond "promptly in a manner that is not deliberately indifferent."
  - **Deliberate Indifference:** "only if its response to sexual harassment is clearly unreasonable in light of the known circumstances."
  - Coordinator must promptly contact the complainant to discuss availability of supportive measures, regardless of whether formal complaint is filed and to explain the process for filing a formal complaint.
  - If a formal complaint is filed, the school must also offer supportive measures to the respondent and follow the grievance process specified by the 2020 amendments.
- No specific sanctions are required, though the school must describe the range of possible disciplinary sanctions and remedies or a list of the possible sanctions and remedies.

### Section 7: Formal Complaints

- **Formal Complaint:** "a document filed by a complainant alleging sexual harassment against a respondent and requesting that the school investigate the allegation of sexual harassment."
  - Can be a hard copy document or an electronic document submitted via email or an online portal.
  - Must have an electronic or actual signature.
  - This can include an email signed by a student.
- When the complainant is not currently enrolled or participating in school, the school is only required to respond to the formal complaint if the complainant is attempting to participate in an education program or activity when filing the complaint (this can vary if the larger conduct code requires response).
- In some cases, a Title IX Coordinator must file its own complaint even if a complainant does not attend the school and did not file their own complaint. Basis: the school has a Title IX obligation to provide all students, not just the complainant, with an educational environment that does not discriminate based on sex.
- The school is not required to dismiss a complaint if the respondent leaves school.



## **Section 8: Handling Situations in Which a Party or Witness May be Unable to Participate in the Title IX Grievance Process in Person**

- “If a witness or party is temporarily unable to participate due to disability, the school has ‘discretion to apply limited extensions of time frames during the grievance process for good cause, which may include, for example, a temporary postponement of a hearing to accommodate a disability.’” But the school must balance this with fairness, notify all parties, and not delay solely because in-person interviews or hearings are not available.

## **Section 9: Supportive Measures & Temporary Removal of Respondents from Campus**

- Upon receipt of a complaint or notice of sexual harassment, the school must contact the complainant and offer supportive measures “designed to restore or preserve equal access to the [school’s] education program or activity.” The 2020 amendments added that “these include measures designed to protect the safety of all parties or the school’s educational environment.” Examples include counseling, extensions of deadlines, modifications of work or class schedules, campus escort services, mutual no contact directives.
- Supportive measures cannot be more burdensome on one party.
- School must still offer supportive measures during COVID – but this will impact the “facts and circumstances” and may result in remote services.
- A school may remove a respondent from campus during a pending Title IX process if the school determines the respondent is a threat to others. On an emergency basis, after a safety and risk analysis, the school may remove a respondent after providing them with notice and opportunity to challenge the decision immediately following the removal. Notwithstanding, a school must also meet all requirements to students (including respondents) under disability laws.

## **Section 10: Presumption of No Responsibility**

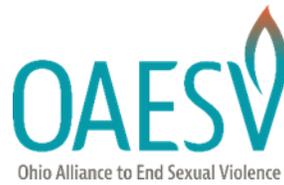
- Does not imply the school need to assume a complainant is lying: presumption is designed to ensure investigators and decision makers serve impartially and do not prejudice. “Schools that have relied on this presumption to decline services to a complainant or to make assumptions about a complainant’s credibility have done so in error.”

## **Section 11: Time Frames**

- The 2020 rules provide no set time frame, but instead require schools to create a “reasonable” time frame, and good cause temporary delays are permitted.

## **Section 12: Live Hearings and Cross Examination**

- Only required in post-secondary schools.
- What is required in K-12 for process?
  - “[K-12 schools] must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.”
  - In addition, the decision-maker “must explain to the party proposing the questions any decision to exclude a question as not relevant.”
  - If a parent or legal guardian has the legal right to act on behalf of a complainant, they can do so in all aspects of a Title IX grievance process.



- What is required in a post-secondary process?
  - The hearing can be virtual if technology enables the decision maker and parties to simultaneously see and hear the party or the witness answering questions.
  - The school need only provide parties with an advisor for the cross-examination portion, and only if those parties request an advisor for that purpose.
  - The school may put Decorum Rules in place – and a school can require a party to use a different advisor if the advisor refuses to comply with the school’s Decorum Rules.
  - Tech can be used instead of live hearings upon party request or school initiative.
  - Questions about prior sexual behavior are not relevant “unless such questions and evidence about the complainant’s prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged.”
  - Absent a party’s consent, no questions may be posed about mental or medical health records.
- Consequences for not participating in a live hearing:
  - If a party or witness does not submit to cross-examination, that individual’s statements cannot be relied upon by the decision maker.
  - “If a party is unable to participate at a hearing ‘due to death or post-investigation disability,’ the school’s decision-makers may not rely on any statements from that individual in their decision-making about whether the respondent has committed sexual harassment in violation of school policy.”
  - Police reports, medical reports, and other documents may not be relied upon to the extent they contain statements of a party or witness who has not submitted to cross-examination.
  - BUT a school can rely on other relevant evidence including photos or videos where a witness or party is not making an assertion of consequential fact.
    - Texts: the texts constituting the alleged harassment even if the respondent does not submit to cross examination. In contrast, evidence leading up to or about the harassment would not qualify for consideration.

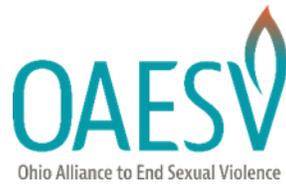
### **Section 13: Standard of Proof**

- Either Preponderance of the Evidence or Clear and Convincing Evidence.
- Must be the same for all conduct code violations, including non-sexual violence/harassment violations (like plagiarism) and faculty offenses.

### **Section 14: Informal Resolution**

- A school is not required to offer Informal Resolution in student/student cases. A school may not offer Informal Resolution to process allegations against a faculty member.
- Schools must obtain the complainant’s voluntary, written consent before engaging in any Informal Resolution process.

### **Section 15: Retaliation and Amnesty**



- Amnesty policies which protect complainants against charges for conduct code violations for facts underlying the sexual assault (like alcohol or COVID gathering violations) are encouraged but not required.
- Schools may not punish a complainant for filing a complaint if the respondent is found not responsible, unless there is a finding of bad faith.

**Section 16: Sex Discrimination Other than Sexual Harassment**

- For instances of sex discrimination not involving sexual harassment, schools must adhere to the 1975 Regulations mandating a prompt and equitable grievance process.

**Section 17: Religious Exemption**

- “Title IX does not apply to an educational institution that is controlled by a religious organization to the extent that application of Title IX would be inconsistent with the religious tenets of the organization.”
- Such organizations may apply for the exemption retroactively.