

Department of Education Encourages Schools to Exercise Discretion Beyond 2020 Title IX Requirements

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The U.S. Department of Education’s Office for Civil Rights (OCR) has released its [Questions and Answers on the Title IX Regulations on Sexual Harassment \(July 2021\) and Appendix](#) with sample policies (Q & A), which represents the most extensive discussion to date by OCR under Biden-Harris Administration of the 2020 Title IX amendments enacted by the previous administration.

The Q & A includes new clarifications and information previously provided by OCR after implementation of the 2020 amendments.

According to OCR, the Q & A aims to assist schools, students, and others by highlighting areas in which schools may have discretion in their procedures for responding to reports of sexual harassment. The Q & A emphasizes that the 2020 amendments “set out the minimum steps that a school must take in response to notice of alleged sexual harassment,” and that “[a] school may take additional actions so long as those actions do not conflict with Title IX or the 2020 amendments.”

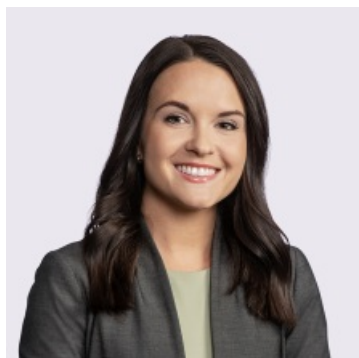
For example, the Q & A encourages or suggests schools:

- Undertake prevention efforts that best serve the needs, values, and environment of their own educational communities.
- Develop and enforce their codes of conduct as an additional tool for ensuring safe and supportive educational environments for all students. (OCR notes that, while it does not enforce codes of conduct, it may investigate complaints that a school’s code of conduct treated students differently based on sex, including sexual orientation or gender identity.)
- Include examples of their on-campus and off-campus programs and activities in their policies, staff training, and student-oriented communications.
- Offer supportive measures to a complainant who reports sexual harassment that occurred outside the school’s education program or activity.
- Determine their own reasonably prompt timeframes for concluding the grievance process for formal complaints, which align with those they have committed to in their grievance processes. (OCR notes nothing in the 2020 amendment prohibits schools from adopting the 60-day time period included in its guidance no longer in place.)
- Implement rules on how the live hearing is conducted and on rules of decorum, so long as those rules apply equally to all parties.
- Exercise discretion to make fact-specific determinations about whether to offer informal resolution in response to a complaint, and to adopt the informal resolution process that best serves the needs of its community.
- For postsecondary institutions, publicize a list of officials with the authority to

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institute corrective measures on a school's behalf to assist students and others in understanding which reports will require a school to respond.

The Q & A also explains that, while a respondent may not be presumed responsible, a school "should never assume a complainant ... is lying" or that alleged conduct did not occur.

The Q & A explicitly states that the preamble to the 2020 amendments clarifies OCR's interpretation of Title IX and the regulations, but "the preamble itself does not have the force and effect of law." The Q & A stresses, "As always, OCR's enforcement of Title IX stems from Title IX and its implementing regulations, not this or other guidance documents."

OCR also notes that the Q & A is guided by President Joe Biden's ['Executive Order on Guaranteeing an Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity'](#) and ["Executive Order on Preventing and Combatting Discrimination on the Basis of Gender Identity or Sexual Orientation."](#) OCR discusses the Q & A in its [blogpost](#).

This Q&A comes after OCR conducted a virtual [public hearing](#) on Title IX in June 2021. Over five days, more than 280 students, educators, and other members of the public spoke to OCR on a variety of issues related to Title IX. The 2020 amendments remain in effect while OCR's comprehensive review of Title IX and its implementing regulations is ongoing.

The Jackson Lewis Higher Education Team is well-versed in Title IX issues and continues to analyze ongoing developments in this area. Please contact a Jackson Lewis attorney with any questions regarding the Q & A and other Title IX developments. More information regarding Jackson Lewis' [Title IX Video Training Series](#) can be found [here](#).

(Summer law clerk Felicia Kalkman contributed to this article.)

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