



# Questions and Answers on the Title IX Regulations on Sexual Harassment (July 2021)



UNITED STATES  
DEPARTMENT  
OF EDUCATION

Office for Civil Rights

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**Questions and Answers on the Title IX Regulations  
on Sexual Harassment and Appendix (July 2021)  
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## **Questions and Answers on the Title IX Regulations on Sexual Harassment (July 2021)**

Ensuring equal access to education for all students—from pre-K through elementary and secondary schools and postsecondary institutions—is at the heart of the mission of the U.S. Department of Education’s Office for Civil Rights. This includes protecting rights of students and others to an educational environment free from discrimination based on sex, including discrimination in the form of sexual harassment and discrimination based on sexual orientation or gender identity, as guaranteed by Title IX of the Education Amendments of 1972.

This question-and-answer resource describes OCR’s interpretation of schools’ responsibilities under Title IX, and the Department’s current implementing regulations related to sexual harassment, as enforced by OCR. The focus here is on questions related to the most recent amendments to the regulations in 2020 (the 2020 amendments).<sup>1</sup> The Department is undertaking a comprehensive review of its current Title IX regulations as amended in 2020, following President Biden’s [Executive Order on Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity](#). While this review is ongoing and until any new regulations go into effect, the 2020 amendments remain in effect.

This Q&A does not address policies or procedures under Title VII of the Civil Rights Act of 1964, which prohibits sex discrimination in employment. As the 2020 amendments state: “Nothing in [these regulations] may be read in derogation of any individual’s rights under title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* or any regulations promulgated thereunder.” [34 C.F.R. § 106.6\(f\)](#).

For additional information about Title IX, please also see [OCR’s Title IX and Sex Discrimination Webpage](#) and [OCR’s Sex Discrimination FAQ Webpage](#). You can find the Department’s Title IX regulations, including the 2020 amendments, at [34 C.F.R. Part 106](#).

This Q&A has 17 sections and provides information on a variety of topics covered by the 2020 amendments, including the definition of sexual harassment, how a school can obtain notice of sexual harassment, a school’s response to allegations of sexual harassment, and how a school must process formal complaints of sexual harassment, including live hearings and cross-examination.

- [Preamble](#) references: Please note that where appropriate, this Q&A refers to the preamble to the 2020 amendments, which clarifies OCR’s interpretation of Title IX and the regulations. You can find citations to specific preamble sections in the endnotes of this Q&A. The preamble itself does not have the force and effect of law.

- Q&A Appendix: OCR provides an appendix to accompany this Q&A, with examples of policy provisions from various schools. These examples may be helpful as schools continue their work to implement the requirements of the 2020 amendments.

**Who can file a discrimination complaint – and how to file:** Anyone can file a complaint with OCR, including students, parents and guardians, community members, and others who experience or observe discrimination in education programs or activities. To file a complaint, please use this [online form](#). For more information, see [How to File a Discrimination Complaint with the Office for Civil Rights](#) and this short video on [How to File a Complaint with the Office for Civil Rights](#).

**Additional questions?** Please note that this Q&A addresses many important issues but is not comprehensive. We recognize that you might have additional questions and invite you to send them to OCR at [ocr@ed.gov](mailto:ocr@ed.gov).

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**A mini-glossary for this Q&A:**

This Q&A is geared towards recipients of federal financial assistance that are educational institutions and uses the term “schools” to refer to all such recipients, including school districts, colleges, and universities. It also includes several terms that are commonly used in Title IX grievance processes for formal complaints of sexual harassment. Here is information about what those terms mean in this document:

|              |   |
|--------------|---|
| Allegation:  | An assertion that someone has engaged in sexual harassment.   |
| Complainant: | The person who has experienced the alleged sexual harassment. This person is considered a complainant regardless of whether they choose to file a formal complaint of sexual harassment under Title IX. |

|                             |   |
|-----------------------------|---|
| Respondent:                 | The person accused of the alleged sexual harassment.  |
| Reporter:                   | The person who reports sexual harassment to the school. This may be the complainant but may also be someone else (also known as a “third party” reporter).  |
| Title IX grievance process: | This is the formal name used in the Title IX regulations for a school’s process for addressing formal complaints of sexual harassment under Title IX.   |
| Actual knowledge:           | When a school receives notice of alleged misconduct that meets the definition of “sexual harassment” under the Title IX regulations, as described below, the school has “actual knowledge” and must respond appropriately. Additional information regarding how schools receive notice and have “actual knowledge” is discussed in Question 14. |

**I. General Obligations**

**Question 1: What did the 2020 amendments change about the Department’s Title IX regulations?**

Answer 1: The Department’s Title IX regulations were first issued in 1975, reissued in 1980, and then amended after that, including in 2006 and 2020. Prior to 2020, the regulations set out requirements under Title IX for educational programs and activities that receive federal financial aid, but they did not include specific requirements related to sexual harassment. Instead, OCR had several guidance documents in place to assist schools in understanding how OCR interpreted the Department’s Title IX regulations. The 2020 amendments added specific, legally binding steps that schools must take in response to notice of alleged sexual harassment.

**Question 2: Is a school permitted to take steps in response to reports of sexual harassment that go beyond those set out in the 2020 amendments?**

Answer 2: Yes. The 2020 amendments set out the minimum steps that a school must take in response to notice of alleged sexual harassment. A school may take additional actions so long as those actions do not conflict with Title IX or the 2020 amendments. The preamble provides this additional guidance:

A school “remain[s] free to adopt best practices for supporting survivors and standards of competence for conducting impartial grievance processes, while meeting obligations imposed under the [2020 amendments].”<sup>2</sup>

**Question 3: What does the Department expect from schools regarding prevention of sexual harassment?**

Answer 3: The 2020 amendments focus on “setting forth requirements for [schools’] responses to sexual harassment.”<sup>3</sup> However, the preamble also says that “the Department agrees with commenters that educators, experts, students, and employees should also endeavor to *prevent* sexual harassment from occurring in the first place.”<sup>4</sup> OCR encourages schools to undertake prevention efforts that best serve the needs, values, and environment of their own educational communities.

**Question 4: Are there any differences in the 2020 amendments’ requirements for elementary and secondary schools and postsecondary schools?**

Answer 4: Yes. Although the 2020 amendments have many of the same requirements for elementary and secondary and postsecondary schools, there are two requirements that differ – notice and live hearings.

- Notice: Any time an elementary or secondary school employee has notice that sexual harassment might have occurred, the school must respond. Notice requirements are more limited for postsecondary school employees. See Section V for more information on notice requirements.
- Live hearing: Only postsecondary schools are required to provide for a live hearing with the opportunity for cross-examination to be conducted by each party’s advisor of choice. For more information on live hearings and cross-examination, see Section XII.

**II. Definition of Sexual Harassment**

**Question 5: What is the definition of sexual harassment in the 2020 amendments?**

Answer 5: The 2020 amendments define sexual harassment to include certain types of unwelcome sexual conduct, sexual assault, dating violence, domestic violence, and stalking. Here is the full definition in the regulations:

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

- (1) An employee of the [school] conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct;
- (2) 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

(3) '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).

For additional information, please see [34 C.F.R. § 106.30](#).

When unwelcome conduct on the basis of sex meets one or more of these three categories, the conduct is considered to be sexual harassment under the 2020 amendments. Here is some additional information about each category:

- The first category is commonly referred to as “quid pro quo” sexual harassment, meaning that a school employee offers something to an individual in exchange for sexual conduct.
- The second category 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. The case is [Davis v. Monroe County Board of Education](#), 526 U.S. 629 (1999).
- The third category refers to definitions in the Clery Act and the Violence Against Women Act (VAWA). The Clery Act is a federal law that requires colleges and universities that participate in the federal student financial aid programs to provide current and prospective students and employees, the public, and the Department with crime statistics and information about campus crime prevention programs and policies. VAWA is a federal law administered by the U.S. Departments of Justice (DOJ) and Health and Human Services (HHS) that supports comprehensive responses to domestic violence, sexual assault, dating violence, and stalking.

**Definitions under the Clery Act:** The Clery Act defines sexual assault as a forcible or nonforcible offense under the uniform crime reporting system of the Federal Bureau of Investigation.<sup>5</sup> This system includes the National Incident-Based Reporting System (NIBRS), which defines forcible sex offenses to include any sexual act, including rape, sodomy, sexual assault with an object, or fondling “directed against another person, without the consent of the victim including instances where the victim is incapable of giving consent.” Please see Question 6 explaining that the 2020 amendments do not require schools to use a particular definition of consent. NIBRS also includes incest and statutory rape as “nonforcible” sex offenses.<sup>6</sup> Conduct that fits within any of these definitions under NIBRS is considered a type of sexual harassment in the 2020 amendments.

**Definitions under VAWA:** The 2020 amendments refer to the following definitions of dating violence, domestic violence, and stalking in VAWA:

- Dating violence includes violence committed by a person who has been in a social relationship of a romantic or intimate nature with the complainant; the existence

of such a relationship shall be determined based on consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.<sup>7</sup>

- Domestic violence includes felony or misdemeanor crimes of violence committed by: a current or former spouse or intimate partner of the complainant, a person with whom the complainant shares a child, a person who is cohabitating with or has cohabitated with the complainant as a spouse or intimate partner, a person similarly situated to a spouse of the complainant under the jurisdiction’s domestic or family violence laws, or any other person against a complainant who is protected under the domestic or family violence laws of the jurisdiction.<sup>8</sup>
- Stalking is defined as engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for their own safety or the safety of others or to suffer substantial emotional distress.<sup>9</sup> The 2020 amendments cover instances of stalking based on sex—including stalking that occurs online or through messaging platforms, commonly known as cyber-stalking—when it occurs in the school’s education program or activity.<sup>10</sup>

**Question 6: Do schools need to adopt a particular definition of consent for determining whether conduct is “unwelcome” under the definition of sexual harassment in the 2020 amendments?**

Answer 6: No. The preamble states that the Department will not require a school to adopt a particular definition of consent.<sup>11</sup> The preamble explains that a school has the flexibility to choose a definition of consent that “best serves the unique needs, values, and environment of the [school’s] own educational community.”<sup>12</sup>

**Question 7: May a school respond to alleged sexual misconduct that does not meet the definition of sexual harassment in the 2020 amendments?**

Answer 7: Yes. The preamble makes clear that “Title IX is not the exclusive remedy for sexual misconduct or traumatic events that affect students.”<sup>13</sup> A school has discretion to respond appropriately to reports of sexual misconduct that do not fit within the scope of conduct covered by the Title IX grievance process.<sup>14</sup> This may include, for example, reported sexual misconduct that a) occurs outside of a school’s education program or activity; b) occurs outside of the United States; or c) causes harm in the school environment that does not fit within the definition set out above in Question 5.<sup>15</sup>

The preamble also says that “nothing in the final regulations precludes [a school] from vigorously addressing misconduct (sexual or otherwise) that occurs outside the scope of Title IX or from offering supportive measures to students and individuals impacted by misconduct or trauma.”<sup>16</sup>



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. OCR encourages schools to develop and enforce their codes as an additional tool for ensuring safe and supportive educational environments for all students. OCR does not enforce school codes of conduct but may investigate complaints that a school's code of conduct treated students differently based on sex, including sexual orientation or gender identity.<sup>17</sup>

For examples of school codes that address sexual misconduct not covered by Title IX, please see Q&A Appendix Section XVI.

**Question 8: How can a school determine whether sexual harassment “effectively denies a person’s right to equal access to its education program or activity” under the “unwelcome conduct” category in the definition of sexual harassment in the 2020 amendments? (See the definition in Question 5.)**

Answer 8: The preamble explains that to determine whether a person has been effectively denied equal access to a school's education program or activity, a school must evaluate “whether a reasonable person in the complainant's position would be effectively denied *equal* access to education compared to a similarly situated person who is not suffering the alleged sexual harassment.”<sup>18</sup>

The preamble provides this additional guidance to schools:

- An effective denial of equal access to educational opportunities may include skipping class to avoid a harasser, a decline in a student's grade point average, or having difficulty concentrating in class.<sup>19</sup>
- Examples of specific situations that likely constitute effective denial of equal access to educational opportunities also include “a third grader who starts bed-wetting or crying at night due to sexual harassment, or a high school wrestler who quits the team but carries on with other school activities following sexual harassment.”<sup>20</sup>
- A complainant does not need to have “already suffered loss of education before being able to report sexual harassment.”<sup>21</sup>
- Effective denial of equal access to education does not require “that a person's total or entire educational access has been denied.”<sup>22</sup>
- While these examples help illustrate an effective denial of access, “[n]o concrete injury is required” to prove an effective denial of equal access.<sup>23</sup>

- Complainants do not need to have “dropped out of school, failed a class, had a panic attack, or otherwise reached a ‘breaking point’” or exhibited specific trauma symptoms to be effectively denied equal access.<sup>24</sup>
- “School officials turning away a complainant by deciding the complainant was ‘not traumatized enough’ would be impermissible.”<sup>25</sup>

Schools may wish to include these and other examples in their internal policies, training, and communications to students and employees to help illustrate this concept.

### **III. Where Sexual Harassment Occurs**

#### **Question 9: Which settings are covered by the 2020 amendments?**

Answer 9: The 2020 amendments apply to reports of sexual harassment in education programs and activities in the United States, including in the following settings:

1. Buildings or other locations that are part of the school’s operations, including remote learning platforms;
2. Off-campus settings if the school exercised substantial control over the respondent and the context in which the alleged sexual harassment occurred (e.g., a school field trip to a museum); and
3. Off-campus buildings owned or controlled by a student organization officially recognized by a postsecondary school, such as a building owned by a recognized fraternity or sorority.<sup>26</sup>

For additional information, please see [34 C.F.R. § 106.44\(a\)](#). For more information on how a school can determine whether it has substantial control over the respondent and context in an off-campus setting, see Question 10.

The 2020 amendments require that schools provide training to their Title IX personnel to “accurately identify situations that require a response under Title IX.”<sup>27</sup> OCR also encourages schools to include examples of their programs and activities in each of the three areas described above in their policies, staff training, and student-oriented communications.

Please note that sexual harassment that takes place in settings outside of the United States is not covered under the 2020 amendments.<sup>28</sup>

Schools should also note that, under the 2020 amendments, a school may still offer “supportive measures to a complainant who reports sexual harassment that occurred outside the [school’s] education program or activity, and any sexual harassment that does occur in an education program or activity must be responded to even if it related to, or happens subsequent to, sexual harassment that occurred outside the education program or activity.”<sup>29</sup>

**Question 10: How should a school determine whether it has substantial control over the respondent and context in an off-campus setting?**

Answer 10: The school must make a fact-specific determination. The preamble says that it “may be helpful or useful for a [school] to consider factors applied by Federal courts to determine the scope of a [school’s] education program or activity”—such as “whether the [school] funded, promoted, or sponsored the event or circumstance where the alleged harassment occurred”—but also that “no single factor is determinative” in concluding whether the school has substantial control over the respondent and the context in which the reported harassment occurred.<sup>30</sup>

In making this fact-specific determination, the preamble also says:

A school “must consider whether, for example, a sexual harassment incident between two students that occurs in an off-campus apartment” or house is a “situation over which the [school] exercised substantial control [and], if so, the [school] must respond [to notice] of sexual harassment or allegations of sexual harassment that occurred there.”<sup>31</sup>

If an incident of sexual harassment between two students in a private hotel room occurs in a context related to a school-sponsored activity, such as a school field trip or travel with a school athletics team, the school would need to consider whether it exercised substantial control over the context in which the sexual harassment occurred.<sup>32</sup>

The preamble adds that a school may have substantial control over an incident that occurred in a student’s home, such as where “a teacher employed by a school visits a student’s home ostensibly to give the student a book but in reality to instigate sexual activity with the student.”<sup>33</sup>

**Question 11: How do the 2020 amendments apply to alleged sexual harassment that takes place electronically or on an online platform used by the school?**

Answer 11: In discussing Title IX and online platforms used by a school, the preamble provides this guidance to schools:

- The operations of a school “may certainly include computer and internet networks, digital platforms, and computer hardware or software owned or operated by, or used in the operations of, the [school].”<sup>34</sup>
- “[T]he factual circumstances of online harassment must be analyzed to determine if it occurred in an education program or activity.”<sup>35</sup>

The preamble adds that the definition of “education program or activity” in the 2020 amendments “does not create a distinction between sexual harassment occurring in person versus online.”<sup>36</sup>

**Question 12: How do the 2020 amendments apply to alleged sexual harassment that is perpetrated by a student using a personal electronic device during class?**

Answer 12: The preamble explains that “a student using a personal device to perpetrate online sexual harassment during class time may constitute a circumstance over which the [school] exercises substantial control.”<sup>37</sup> As with in-person harassment, “the factual circumstances of online harassment must be analyzed to determine if it occurred” in circumstances “over which a school exercised substantial control over the respondent and the context.”<sup>38</sup>

**IV. When Harassment Occurred**

**Question 13: What is the appropriate standard for evaluating alleged sexual harassment that occurred before the 2020 amendments took effect?**

Answer 13: The 2020 amendments took effect on August 14, 2020, and are not retroactive. This means that a school must follow the requirements of the Title IX statute and the regulations that were in place at the time of the alleged incident; the 2020 amendments do not apply to alleged sexual harassment occurring before August 14, 2020. This is true even if the school’s response was on or after this date. In other words, if the conduct at issue in the complaint took place prior to August 14, 2020, the 2020 amendments do not apply even if the complaint was filed with a school on or after August 14, 2020.

Before August 2020, the Title IX regulations did not have specific requirements for schools related to sexual harassment. Instead, OCR had several guidance documents in place to assist schools in understanding how OCR interpreted the Department’s Title IX regulations. Although the guidance documents issued in [2011](#) and [2014](#) were rescinded in 2017, and the [2001](#) and [2017](#) guidance documents were rescinded in 2020, these documents remain accessible on OCR’s website for historical purposes to the extent they are helpful to schools when responding to earlier allegations of sexual harassment.<sup>39</sup>

**V. Notice of Sexual Harassment**

**Question 14: Which school employees must be notified about allegations of sexual harassment for a school to be put on notice that it must respond?**

Answer 14: In elementary and secondary school settings, a school must respond whenever any school employee has notice of sexual harassment.<sup>40</sup> This includes notice to a teacher, teacher’s aide, bus driver, cafeteria worker, counselor, school resource officer, maintenance staff worker, coach, athletic trainer, or any other school employee.<sup>41</sup>

In postsecondary school settings, notice may be more limited in scope. 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.<sup>42</sup> The Department is unable to

provide examples of types of individuals who have this authority because the determination of whether a person is an official who has authority to institute corrective measures on behalf of the institution depends on facts specific to that institution. A school “may, at its discretion, expressly designate specific employees as officials with this authority for purposes of Title IX sexual harassment and may inform students of such designations.”<sup>43</sup>

The preamble explains that “the Department does not limit the manner in which [a school] may receive notice of sexual harassment.” This means that the employees described above “may receive notice through an oral report of sexual harassment by a complainant or anyone else, a written report, through personal observation, through a newspaper article, through an anonymous report, or through various other means.”<sup>44</sup>

The 2020 amendments refer to this notice of sexual harassment as “actual knowledge.”

For additional information, please see [34 C.F.R. § 106.30](#).

**Question 15: If a school trains or requires non-employees who interact with the school’s students to report sexual harassment incidents, are those individuals (for example, volunteers, alumni, independent contractors) automatically considered “officials with authority to institute corrective measures” on the school’s behalf?**

Answer 15: No. The 2020 amendments state that at any school level—elementary, secondary, or postsecondary—“[t]he mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual [such as a volunteer parent, or alumnus] as one who has authority to institute corrective measures on behalf of the [school].”<sup>45</sup>

The preamble explains that “the Department does not wish to discourage [schools] from training individuals who interact with the [school’s] students about how to report sexual harassment.”<sup>46</sup> It also says that “the Department will not assume that a person is an official with authority solely based on the fact that the person has received training on how to report sexual harassment.”<sup>47</sup> Similarly, the preamble says that “the Department will not conclude that volunteers and independent contractors are officials with authority, unless the [school] has granted the volunteers or independent contractors authority to institute corrective measures on behalf of the [school].”<sup>48</sup>

For additional information, please see [34 C.F.R. § 106.30](#).

**Question 16: May a school accept reports of sexual harassment from individuals who are not associated with the school in any way?**

Answer 16: Yes. A school may receive actual knowledge of sexual harassment from any person.<sup>49</sup> There is no requirement that the person be participating in or attempting to participate in a school program or activity to report sexual harassment.<sup>50</sup>

**Question 17: Is a school required to respond to allegations of sexual harassment if the only employee or school official who has notice of the harassment is the alleged harasser?**

Answer 17: Not under the 2020 amendments. At any school level—elementary, secondary, or postsecondary—the school does not have notice for purposes of Title IX if the only official or employee of the school with actual knowledge is the respondent.<sup>51</sup> The preamble explains the reason for this is that the school “will not have [an] opportunity to appropriately respond if the only official or employee who knows [of the alleged misconduct] is the respondent.”<sup>52</sup>

For additional information, please see [34 C.F.R. § 106.30](#).

**Question 18: Is a school required to respond if it has notice of alleged misconduct that could meet the definition of sexual harassment but is not certain whether the harassment has occurred?**

Answer 18: Yes. At any school level—elementary, secondary, or postsecondary—actual knowledge refers to notice of conduct that *could* constitute sexual harassment.<sup>53</sup> A complainant is “an individual who is alleged to be the victim of conduct that could constitute sexual harassment” and the definition of actual knowledge refers to “allegations of sexual harassment.”<sup>54</sup> Thus, the preamble explains that a school must respond promptly and appropriately when it receives notice of alleged facts that, if true, could be considered sexual harassment under the 2020 amendments.<sup>55</sup>

For additional information, please see [34 C.F.R. § 106.30](#).

**Question 19: Does a postsecondary school have discretion to require additional employees to report allegations of sexual harassment to the school?**

Answer 19: Yes. The preamble says that a postsecondary school may empower as many officials as it wishes to institute corrective measures on its behalf, including coaches and athletic trainers.<sup>56</sup> If any of these officials receives notice of sexual harassment allegations, the school must respond as the 2020 amendments require (see Question 20).<sup>57</sup> The preamble also provides this guidance:

- A postsecondary school has discretion to determine which of their employees should be mandatory reporters, and which employees may keep a student’s disclosure about sexual

harassment confidential (e.g., counselors, therapists, other mental health providers, victim advocates).<sup>58</sup>

- Nothing in the 2020 amendments prevents a postsecondary school “from instituting [its] own polic[y] to require professors, instructors, or all employees to report to the Title IX Coordinator every incident and report of sexual harassment.”<sup>59</sup> However, the Department will not hold a postsecondary school responsible for responding to such sexual harassment unless an employee “actually did give notice to the [school’s] Title IX Coordinator” or other official with authority to institute corrective measures.<sup>60</sup>
- A postsecondary school may also “empower as many officials as it wishes with the requisite authority to institute corrective measures on the [school’s] behalf, and notice to these officials with authority constitutes the [school’s] actual knowledge.”<sup>61</sup> A postsecondary school “may also publicize [a] list[] of officials with this authority,” and OCR encourages postsecondary schools to do so, as this will assist students and others to understand which reports will require the school to respond.<sup>62</sup>

## **VI. Response to Sexual Harassment**

### **Question 20: How must a school respond to allegations of sexual harassment?**

Answer 20: When a school has actual knowledge of sexual harassment in any of its programs or activities that take place in the United States, it must “respond promptly in a manner that is not deliberately indifferent.”<sup>63</sup> This includes schools that serve any age, grade, or level of students, from pre-K through postsecondary.

The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures, regardless of whether a formal complaint is filed, and to explain the process for filing a formal complaint.<sup>64</sup> For more on supportive measures, see Questions 32-34.

In addition, if a formal complaint is filed, either by the complainant or the Title IX Coordinator, a school must:

- offer supportive measures to the respondent, and
- follow the Title IX grievance process specified by the 2020 amendments.<sup>65</sup> For more on this process, including the requirement to offer supportive measures to the respondent, see Question 26 and Section IX.

In addition to setting out these requirements, the regulations provide that a school is deliberately indifferent “only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.”<sup>66</sup>

For more information on the obligations described in this section, please see [34 C.F.R. § 106.44\(a\)](#).

**Question 21: Is a school required to impose particular remedies when a respondent is found responsible for sexual harassment?**

Answer 21: No. The 2020 amendments do not dictate that a school provide any particular remedies for the complainant or disciplinary sanctions for the respondent after a finding of responsibility.<sup>67</sup> Each school is free to make disciplinary and remedial decisions that it “believes are in the best interest of [its] educational environment.”<sup>68</sup>

When a school finds a respondent responsible for sexual harassment under its Title IX grievance process, the school must provide remedies to the complainant that are “designed to restore or preserve equal access to the [school’s] education program or activity.”<sup>69</sup> These remedies may include the same individualized services that the school provided to the complainant as supportive measures, additional services, or different services.<sup>70</sup> These remedies can be disciplinary or punitive and can burden the respondent.<sup>71</sup> Schools are required to “[d]escribe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies,”<sup>72</sup> however the preamble clarifies that this requirement “is not intended to unnecessarily restrict a [school’s] ability to tailor disciplinary sanctions to address specific situations.”<sup>73</sup>

For additional information, please see [34 C.F.R. § 106.45\(b\)\(1\)\(i\)](#), [34 C.F.R. § 106.45\(b\)\(1\)\(vi\)](#), and [34 C.F.R. § 106.45\(b\)\(7\)\(ii\)\(E\)](#).

**VII. Formal Complaints**

**Question 22: What is a “formal complaint” under the 2020 amendments?**

Answer 22: A “formal complaint” is a document filed by a complainant alleging sexual harassment against a respondent and requesting that the school investigate the allegation of sexual harassment.<sup>74</sup> It may be a hard copy document or an electronic document submitted via email or an online portal.<sup>75</sup> Whether it is a hard copy document or an electronic document, it must contain the complainant’s physical or digital signature or otherwise indicate that the complainant is the person filing the formal complaint.<sup>76</sup> For example, an email from a student to the Title IX Coordinator that ends with the student signing their name would suffice.

A formal complaint may be filed with the school’s Title IX Coordinator in person, by mail, or by email using the contact information provided by the school. A formal complaint may also be filed by any additional method designated by the school.<sup>77</sup> A parent or guardian who has a legal right to act on behalf of an individual may also file a formal complaint on that individual’s behalf.<sup>78</sup> In addition, a Title IX Coordinator may initiate a formal complaint as described in Question 24.<sup>79</sup>

For additional information, please see [34 C.F.R. § 106.30](#).



**Question 23: Is a school required to accept a formal complaint of sexual harassment from a complainant who is not currently enrolled in or attending the school?**

Answer 23: Yes, but only if the complainant is attempting to participate in the school's education program or activity at the time they file the formal complaint.<sup>80</sup> Individuals who are currently participating in the school's education program or activity may also file formal complaints.<sup>81</sup> When a formal complaint is filed, the school must respond as described in Question 20.

The preamble gives several examples of situations of a complainant "attempting to participate" in a school's education program, including when a complainant:

- (1) has withdrawn from the school due to alleged sexual harassment and expresses a desire to re-enroll if the school responds appropriately to the allegations,
- (2) has graduated but intends to apply to a new program or intends to participate in alumni programs and activities,
- (3) is on a leave of absence and is still enrolled as a student or intends to re-apply after the leave of absence, or
- (4) has applied for admission.<sup>82</sup>

It is important to keep in mind that this requirement concerns a complainant's status at the time a formal complaint is filed and is not affected by a complainant's later decision to remain or leave the school.<sup>83</sup>

**Question 24: If a complainant has not filed a formal complaint and is not participating in or attempting to participate in the school's education program or activity, may the school's Title IX Coordinator file a formal complaint?**

Answer 24: Yes. A Title IX Coordinator may file a formal complaint even if the complainant is not associated with the school in any way.<sup>84</sup>

In some cases, a school may be in violation of Title IX if the Title IX Coordinator does not do so.<sup>85</sup> For example, the preamble explains that if a school "has actual knowledge of a pattern of alleged sexual harassment by a perpetrator in a position of authority," OCR may find the school to be deliberately indifferent (i.e., to have acted in a clearly unreasonable way) if the school's Title IX Coordinator does not sign a formal complaint, "even if the complainant . . . does not wish to file a formal complaint or participate in a grievance process."<sup>86</sup> Put simply, there are circumstances when a Title IX Coordinator may need to sign a formal complaint that obligates the school to initiate an investigation regardless of the complainant's relationship with the school or interest in participating in the Title IX grievance process. This is because 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.

**Question 25: If a complainant is not participating in or attempting to participate in the school’s education program or activity, may a school respond to reports of sexual harassment under its own code of conduct?**

Answer 25: Yes. As discussed in Question 7, a school has discretion to use its own student-conduct process to address alleged misconduct not covered by the 2020 amendments. This includes situations where a complainant is not participating in or attempting to participate in the school’s education program or activity.<sup>87</sup> There are also circumstances when a Title IX Coordinator may need to file a formal complaint that obligates the school to initiate an investigation regardless of the complainant’s relationship with the school or interest in participating in the Title IX grievance process. See Question 24.

**Question 26: Is a school required to take action even if the respondent has left the school prior to the filing of a formal complaint with no plans to return?**

Answer 26: Yes. As explained in the preamble, a school must always respond promptly to a complainant’s report of sexual harassment when it has actual knowledge.<sup>88</sup> (For more on actual knowledge, see Question 14.) The Title IX Coordinator must inform the complainant about the availability of supportive measures, with or without the filing of a formal complaint, and consider the complainant’s wishes regarding supportive measures.<sup>89</sup>

**Question 27: Is a school required to dismiss a formal complaint if a respondent leaves the school?**

Answer 27: No. Although a school may dismiss a formal complaint if, at any time during the grievance process, the respondent is “no longer enrolled or employed” by the school, dismissal is not required.<sup>90</sup> The preamble explains that a school has discretion to assess the facts and circumstances of a case before deciding whether to dismiss the complaint because the respondent has left the school.<sup>91</sup>

A school may consider, for example, “whether a respondent poses an ongoing risk to the [school’s] community,” or “whether a determination regarding responsibility provides a benefit to the complainant even where the [school] lacks control over the respondent and would be unable to issue disciplinary sanctions, or other reasons.”<sup>92</sup>

Proceeding with the grievance process could potentially allow a school to determine the scope of the harassment, whether school employees knew about it but failed to respond, whether there is a pattern of harassment in particular programs or activities, whether multiple complainants experienced harassment by the same respondent, and what appropriate remedial actions are necessary.

**Question 28: May a school use trauma-informed approaches when responding to a formal complaint?**

Answer 28: Yes. A school may use trauma-informed approaches to respond to a formal complaint of sexual harassment. The preamble clarifies that the 2020 amendments do not preclude a school “from applying trauma-informed techniques, practices, or approaches,” but notes that the use of such approaches must be consistent with the requirements of [34 C.F.R. § 106.45](#), particularly [34 C.F.R. § 106.45\(b\)\(1\)\(iii\)](#).<sup>93</sup>

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

**Question 29: May a school stop offering its Title IX grievance process due to the COVID-19 pandemic?**

Answer 29: No. A school must follow its policies for receiving and responding to reports of sexual harassment and may not adopt a policy of putting investigations or proceedings on hold due to COVID-19.<sup>94</sup>

For additional discussion of schools’ ongoing Title IX obligations during the COVID-19 pandemic, please see OCR’s [Questions and Answers on Civil Rights and School Reopening in the COVID-19 Environment](#).

**Question 30: How should a school proceed in the Title IX sexual harassment grievance process when a party or a witness is temporarily unable to participate due to a disability?**

Answer 30: A 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.”<sup>95</sup> However, when deciding whether to grant a delay or extension, a school must balance the interests of promptness, fairness to the parties, and accuracy of adjudications. The school also must promptly notify all parties of the reason for the delay and the estimated length of the delay, in addition to important updates about the investigation.<sup>96</sup>

Additionally, a school must not delay investigations or hearings solely because in-person interviews or hearings are not feasible. Instead, a school must use technology, as appropriate, to conduct activities remotely, in a timely and equitable manner, and consistent with the applicable law.

For additional information, please see [34 C.F.R. § 106.45\(b\)\(1\)\(v\)](#).

**Question 31: May a school use technology to permit participants to appear virtually in its Title IX grievance process?**

Answer 31: Yes. The 2020 amendments grant a school discretion to allow participants, including witnesses, to appear at a live hearing virtually; however, technology must enable all participants to see and hear other participants,<sup>97</sup> with appropriate accommodations for individuals with disabilities.

For additional information, please see [34 C.F.R. § 106.45\(b\)\(6\)\(i\)](#).

**IX. Supportive Measures and Temporary Removal of Respondents from Campus**

**Question 32: Does a school have to offer supportive measures to a complainant who has not filed a formal complaint of sexual harassment?**

Answer 32: Yes. The 2020 amendments specify that the school must contact the complainant to discuss the availability of, and to offer, supportive measures, regardless of whether a formal complaint is filed.<sup>98</sup> A school must also consider the complainant's wishes with respect to supportive measures.<sup>99</sup>

For additional information, please see [34 C.F.R. § 106.30](#) and [34 C.F.R. § 106.44\(a\)](#).

**Question 33: What are the supportive measures a school must offer to complainants?**

Answer 33: A school must offer supportive measures that "are designed to restore or preserve equal access to the [school's] education program or activity."<sup>100</sup> The 2020 amendments add that these include "measures designed to protect the safety of all parties or the [school's] educational environment, or deter sexual harassment."<sup>101</sup> A school also must consider the complainant's wishes in determining which supportive measures to provide and may not provide supportive measures that "unreasonably burden[] the other party."<sup>102</sup>

A school has discretion and flexibility to determine which supportive measures are appropriate. The preamble states that a school must consider "each set of unique circumstances" to determine what individualized services would be appropriate based on the "facts and circumstances of that situation."<sup>103</sup>

Examples of supportive measures include "counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures."<sup>104</sup>

For additional information, please see [34 C.F.R. § 106.30](#) and [34 C.F.R. § 106.44\(a\)](#).

**Question 34: Is a school still required to provide supportive measures during the COVID-19 pandemic?**

Answer 34: Yes. COVID-19-related disruptions do not relieve a school of its obligation to comply with Title IX. A school must continue to offer academic adjustments and supports to complainants and respondents in Title IX sexual harassment complaints.

In light of the COVID-19 pandemic, “the facts and circumstances”<sup>105</sup> of a given situation may require a school to provide remote counseling, or similar teletherapy option, as a supportive measure to students who are unable to access on-campus counseling services. Similarly, in a remote learning environment, supportive measures may include ensuring that parties to a complaint do not share the same online classes.

For additional discussion of schools’ ongoing Title IX obligations during the COVID-19 pandemic, please see OCR’s [Questions and Answers on Civil Rights and School Reopening in the COVID-19 Environment](#).

**Question 35: May a school remove a respondent from campus while a Title IX grievance process is pending if the school determines that the respondent is a threat to others?**

Answer 35: Yes. The 2020 amendments specify that a school may remove a respondent from its education program or activity on an emergency basis.<sup>106</sup> The school must “undertake[] an individualized safety and risk analysis, determine[] that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provide[] the respondent with notice and an opportunity to challenge the decision immediately following the removal.”<sup>107</sup> A school must also meet its obligations to students under federal disability laws.<sup>108</sup>

A school may also place non-student employee respondents on administrative leave while a Title IX grievance process is pending.<sup>109</sup> Again, the school must comply with federal disability laws, as applicable.<sup>110</sup>

For additional information, please see [34 C.F.R. §§ 106.44\(c\)-\(d\)](#).

**X. Presumption of No Responsibility**

**Question 36: The 2020 amendments require schools to presume that the respondent is not responsible for the alleged misconduct. Does this mean the school also must assume the complainant is lying or that the alleged harassment did not occur?**

Answer 36: No. A school should never assume a complainant of sexual harassment is lying or that the alleged harassment did not occur.

The 2020 amendments require a school to include in its Title IX grievance process “a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.”<sup>111</sup> However, the preamble explains that “[t]he presumption does not imply that the alleged harassment did not occur,” or that the respondent is truthful or a complainant is untruthful.<sup>112</sup> Instead, the preamble says that the presumption is designed to ensure that investigators and decision-makers serve impartially and do not prejudge that the respondent is responsible for the alleged harassment.<sup>113</sup> 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.

For examples of language related to this issue, please see Q&A Appendix Section XI.

## **XI. Time Frames**

### **Question 37: What is the appropriate length of time for a school’s investigation into a complaint of sexual harassment?**

Answer 37: The 2020 amendments require that a school’s grievance process for formal complaints of sexual harassment include reasonably prompt time frames for concluding the process, including filing and resolving appeals and for any informal resolution processes the school offers.<sup>114</sup> The preamble states that because the 2020 amendments specify that “the time frames designated by the [school] must account for conclusion of the entire grievance process, including appeals and any informal resolution process,” no part of the process “is subject to an open-ended time frame.”<sup>115</sup>

The preamble also explains that “the reasonableness of the time frame is evaluated in the context of the [school’s] operation of an education program or activity.”<sup>116</sup> Additionally, the preamble says that “the conclusion of the grievance process must be reasonably prompt, because students (or employees) should not have to wait longer than necessary to know the resolution of a formal complaint of sexual harassment; any grievance process is difficult for both parties, and participating in such a process likely detracts from students’ ability to focus on participating in the [school’s] education program or activity.”<sup>117</sup> The preamble adds that because “victims of sexual harassment are entitled to remedies to restore or preserve equal access to education, . . . prompt resolution of a formal complaint of sexual harassment is necessary to further Title IX’s nondiscrimination mandate.”<sup>118</sup>

The preamble explains that each school “is in the best position to balance promptness with fairness and accuracy based on [its] own unique attributes and [its] experience with its own student disciplinary proceedings,” and thus, each school has discretion to determine its own reasonably prompt time frames.<sup>119</sup> A school must resolve each formal complaint of sexual harassment according to the time frames the school has committed to in its grievance process.<sup>120</sup>

The Department had previously identified, but not required, a 60-day time frame, prior to appeal, for resolving sexual harassment complaints. Although that guidance is no longer in place, nothing in the 2020 amendments prohibits a school from adopting the 60-day time frame.<sup>121</sup>

The 2020 amendments permit a temporary delay of the grievance process or the limited extension of time frames, with good cause.<sup>122</sup> The 2020 amendments provide illustrations of good cause, including considerations such as the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities.<sup>123</sup>

For additional information, please see [34 C.F.R. § 106.45\(b\)\(1\)\(v\)](#).

## **XII. Live Hearings and Cross-Examination**

**Question 38: Are all schools required to hold live hearings as part of their Title IX grievance processes?**

Answer 38: Postsecondary schools must have a live hearing under the 2020 amendments.<sup>124</sup> A live hearing may occur virtually “with technology enabling the decision-maker[] and parties to simultaneously see and hear the party or the witness answering questions.”<sup>125</sup> Elementary and secondary schools are not required to have a live hearing.<sup>126</sup>

For additional information, please see [34 C.F.R. § 106.45\(b\)\(6\)](#).

**Question 39: What is cross-examination?**

Answer 39: At a live hearing, “each party’s advisor [must be permitted to] to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.”<sup>127</sup> The 2020 amendments refer to this process of questioning as cross-examination.

The 2020 amendments explain that a party may not conduct cross-examination, but instead the party’s advisor must ask the questions on their behalf.<sup>128</sup> The amendments also require a postsecondary school to provide an advisor to conduct cross-examination for any party who does not have their own advisor.<sup>129</sup>

For additional information, please see [34 C.F.R. § 106.45\(b\)\(6\)](#).

**Question 40: Since elementary and secondary schools are not required to provide a live hearing, what kind of process are they required to provide?**

Answer 40: The 2020 amendments state that elementary and secondary 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.”<sup>130</sup> In addition, the decision-maker “must explain to the party proposing the questions any decision to exclude a question as not relevant.”<sup>131</sup>

The preamble also explains that a school may exclude as not relevant questions that are duplicative or repetitive.<sup>132</sup>

The 2020 amendments permit a parent or legally authorized guardian to act on behalf of the complainant or respondent.<sup>133</sup> Whether a parent or guardian has the legal right to act on behalf of a complainant or respondent “would be determined by State law, court orders, child custody arrangements, or other sources granting legal rights to parents or guardians.”<sup>134</sup> If a parent or guardian has a legal right to act on a complainant or respondent’s behalf, this authority applies throughout all aspects of the Title IX matter, including throughout the grievance process.<sup>135</sup>

For additional information, please see [34 C.F.R. § 106.45\(b\)\(6\)\(ii\)](#) and [34 C.F.R. § 106.30](#).

**Question 41: Is a postsecondary school required to provide complainants and respondents with an advisor for a live hearing?**

Answer 41: Yes. The 2020 amendments require a postsecondary school to provide an advisor to conduct cross-examination for any party who does not have their own advisor.<sup>136</sup> The amendments also require all schools to provide the parties with the same opportunities to be accompanied by an advisor of their choice in other parts of the grievance process, but do not require a school to provide an advisor for any part of the process other than the requirement that a postsecondary school provide one for cross-examination.<sup>137</sup>

The preamble explains that the parties are in the best position to decide which individuals should serve as their advisors and notes that advisors may be friends, family members, an attorney, or other individuals chosen by the party or provided by the school if the party does not choose one.<sup>138</sup>

For additional information, please see [34 C.F.R. § 106.45\(b\)\(5\)\(iv\)](#) and [34 C.F.R. § 106.45\(b\)\(6\)\(i\)](#).

**Question 42: Are parties and witnesses required to participate in the Title IX grievance process, including submitting to cross-examination during a live hearing at the postsecondary school level?**

Answer 42: No. Parties and witnesses are not required to submit to cross-examination or otherwise participate in the Title IX grievance process.<sup>139</sup> For information on the consequences of not submitting to cross-examination, see Question 51.

The 2020 amendments do require schools to offer complainants supportive measures regardless of whether they participate in a grievance process and to prohibit retaliation against individuals based on their decision to participate, or not participate, in a grievance process.<sup>140</sup>

**Question 43: May a school create its own rules for conducting a live hearing?**

Answer 43: Yes. The preamble states that a school may implement rules regarding how the live hearing is conducted as long as those rules are applied equally to both parties.<sup>141</sup> For



example, a school “may decide whether or how to place limits on evidence introduced at a hearing that was not gathered and presented prior to the hearing.”<sup>142</sup>

The preamble also explains that a school may adopt rules on “whether the parties may offer opening or closing statements, specify a process for making objections to the relevance of questions and evidence, [and] place reasonable time limitations on a hearing.”<sup>143</sup> The preamble adds that a school may adopt a rule stating that duplicative questions are irrelevant.<sup>144</sup>

In addition, the preamble says that an advisor’s cross-examination role “is satisfied where the advisor poses questions on a party’s behalf, which means that an assigned advisor could relay a party’s own questions to the other party or witness.”<sup>145</sup> Thus, for example, a postsecondary school could limit the role of advisors to relaying questions drafted by their party.

For examples of language related to this issue, please see Q&A Appendix Sections V-VII.

**Question 44: May a school put in place rules of decorum or other rules for advisors, parties, and witnesses to follow during a live hearing?**

Answer 44: Yes. The preamble says that a school may “adopt rules of decorum” and notes that a school is “in a better position than the Department to craft rules of decorum best suited to [its] educational environment.”<sup>146</sup>

For example, a school may prohibit advisors from questioning parties or witnesses in an abusive, intimidating, or disrespectful manner.<sup>147</sup>

A school also may require a party to use a different advisor if the party’s advisor refuses to comply with the school’s rules of decorum. For example, the preamble explains that if a party’s advisor of choice yells at others in violation of a school’s rules of decorum, the school may remove the advisor and require a replacement.<sup>148</sup> The school has this authority even when the advisor is asking a question that is relevant to the hearing. If the manner in which an advisor attempts to ask the question is harassing, intimidating, or abusive (e.g., advisor yells, screams, or comes too close to a witness), the preamble explains that a school may enforce a rule requiring that relevant questions must be asked in a respectful, non-abusive manner.<sup>149</sup>

For examples of language related to this issue, please see Q&A Appendix Section VI.

**Question 45: Are all parties required to be physically present in the same location during the live hearing?**

Answer 45: No. The 2020 amendments state that, “at the [school’s] discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other.”<sup>150</sup> Additionally, the preamble states that even if a school does not regularly hold virtual hearings, any party may request that the entire hearing, including cross-examination, be held virtually, and the school

must grant that request.<sup>151</sup> The party does not need to provide a reason for making this request.<sup>152</sup>

In addition, nothing in the 2020 amendments prohibits schools from holding virtual hearings or from having the parties participate in separate locations even if no party makes such a request, particularly in light of the operational challenges posed by the COVID-19 pandemic.<sup>153</sup>

For additional information, please see [34 C.F.R. § 106.45\(b\)\(6\)\(i\)](#).

For examples of language related to this issue, please see Q&A Appendix Section V.

**Question 46: Is a school permitted to limit the questions that may be asked by each party of the other party or witnesses?**

Answer 46: Yes, and in fact the 2020 amendments require certain limitations, whether in a hearing or as part of an exchange of written questions at the elementary and secondary school level. Note that the 2020 amendments do not require a hearing at the elementary and secondary school level.<sup>154</sup>

Questions must be relevant. More specifically, the 2020 amendments state that questions about the complainant’s prior sexual behavior are not relevant, subject to certain limitations.<sup>155</sup> The preamble states that any school may exclude as not relevant questions that are duplicative or repetitive.<sup>156</sup> For more information regarding other limitations on questioning, see Question 48.

Further, the 2020 amendments state that during cross-examination at the postsecondary school level, “only relevant cross-examination questions and other questions may be asked of a party or witness” and the decision-maker must determine the relevance of a question before a party or a witness answers.<sup>157</sup>

For additional information, please see [34 C.F.R. § 106.45\(b\)\(6\)](#).

For examples of language related to this issue, please see Q&A Appendix Sections VIII and IX.

**Question 47: Are questions and evidence about the complainant’s sexual history relevant?**

Answer 47: The 2020 amendments state that “questions and evidence about the complainant’s sexual predisposition or 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” or the “questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent.”<sup>158</sup>

The preamble explains that the term “prior sexual behavior” refers to “sexual behavior that is unrelated” to the alleged conduct.<sup>159</sup> The preamble also addresses questions and evidence about sexual behavior after an alleged incident, saying that the regulations do not imply that these kinds of questions are relevant.<sup>160</sup> Whether sexual behavior between the complainant and

respondent might be relevant to prove consent regarding the particular allegations at issue “depends in part on a [school’s] definition of consent.”<sup>161</sup> Some schools’ definitions of consent “require a verbal expression of consent,” and other schools’ definitions of consent “inquire whether based on circumstances the respondent reasonably understood that consent was present (or absent).”<sup>162</sup>

For additional information, please see [34 C.F.R. § 106.45\(b\)\(6\)](#).

For examples of language related to this issue, please see Q&A Appendix Section IX.

**Question 48: Can cross-examination include questions about an individual’s medical or mental-health records?**

Answer 48: Questions that seek information about any party’s medical, psychological, and similar records are not permitted unless the party has given written consent.<sup>163</sup> Questions about other records protected by a legally recognized privilege are also not permitted unless waived by the party.<sup>164</sup> The preamble also explains that “[schools] (and, as applicable, parties) must follow relevant State and Federal health care privacy laws throughout the grievance process.”<sup>165</sup>

These protections apply throughout the investigation as well as the hearing.

**Question 49: May a school put measures in place to protect the well-being of the parties during the cross-examination?**

Answer 49: Yes. For example, the preamble notes that a school is permitted to grant breaks to the parties during a live hearing.<sup>166</sup> Also, as discussed in Question 46, the 2020 amendments require a pause in the cross-examination process each time before a party or witness answers a cross-examination question in order for the decision-maker to determine if the question is relevant.<sup>167</sup> The preamble explains that this is to help ensure that the cross-examination includes only relevant questions and that the pace of the cross-examination does not place undue pressure on a party or a witness to answer immediately.<sup>168</sup>

**Question 50: How do the 2020 amendments address the manner in which a decision-maker should evaluate answers to cross-examination questions?**

Answer 50: The 2020 amendments do not require that answers to cross-examination questions “be in linear or sequential formats” or that any party “must recall details with certain levels of specificity.”<sup>169</sup> The preamble adds that the 2020 amendments “protect against a party being unfairly judged due to inability to recount each specific detail of an incident in sequence” because “decision-makers must be trained to serve impartially without prejudging the facts.”<sup>170</sup>

For examples of language related to this issue, please see Q&A Appendix Section VIII.

**Question 51: What are the consequences if a party or witness does not participate in a live hearing or submit to cross-examination?**

Answer 51: Postsecondary schools, which are required to provide for cross-examination at a live hearing, should keep in mind that, under the 2020 amendments, if a party or a witness does not submit to cross-examination, that individual's statements cannot be relied on by the decision-maker in determining whether the respondent engaged in the alleged sexual harassment.<sup>171</sup>

The preamble explains that even 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.<sup>172</sup> As discussed in Question 37, a 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."<sup>173</sup>

The decision-maker also may not draw any inference from a decision of a party or witness not to participate at the hearing, including not to submit to cross-examination.<sup>174</sup> This means, for example, that the decision-maker may not make any decisions about a party's credibility based on their decision not to participate in a hearing or submit to cross-examination.

Note that "police reports, medical reports and other documents and records may not be relied on to the extent they contain the statements of a party or witness who has not submitted to cross-examination."<sup>175</sup>

For examples of language related to this issue, please see Q&A Appendix Section X.

For additional information, please see [34 C.F.R. § 106.45\(b\)\(6\)\(i\)](#).

**Question 52: May a decision-maker at a postsecondary school rely on non-statement evidence, such as photographs or video images, if a party or witness does not submit to cross-examination?**

Answer 52: Yes. Although a decision-maker may not rely on any statement of a party or witness who does not submit to cross-examination, other relevant evidence can still be considered to determine whether the respondent is responsible for the alleged sexual harassment.<sup>176</sup> The preamble explains that the term "statements" should be interpreted using its ordinary meaning, but does not include evidence, such as a videos of the incident itself, where the party or witness has no intent to make an assertion regarding whether or not the alleged harassment occurred or discuss factual details related to the alleged harassment, or where the evidence does not contain such factual assertions by the party or witness.<sup>177</sup> Thus, the decision-maker may rely on non-statement evidence related to the alleged prohibited conduct that is in the record, such as photographs or video images showing the underlying incident.<sup>178</sup>

For examples of language related to this issue, please see Q&A Appendix Section X.

**Question 53: May a decision-maker at a postsecondary school rely on statements of a party, such as texts or emails, even if the party does not submit to cross-examination?**

Answer 53: It depends. The decision-maker may consider certain types of statements by a party where the statement itself is the alleged harassment, even if the party does not submit to cross-examination. For example, the decision-maker may consider a text message, email, or audio or video recording created and sent by a respondent as a form of alleged sexual harassment even if the respondent does not submit to cross-examination.<sup>179</sup> Similarly, if a complainant alleges that the respondent said, “I’ll give you a higher grade in my class if you go on a date with me,” the decision-maker may rely on the complainant’s testimony that the respondent said those words even if the respondent does not submit to cross-examination.<sup>180</sup>

In these types of situations, the decision-maker is evaluating whether the statement was made or sent. In second example above, the complainant’s testimony was about the fact that the respondent made the offer, and not about what the respondent intended or whether the respondent took an additional action based on the statement, such as changing the student’s grade after a date.<sup>181</sup>

In contrast, evidence in which a party or witness comments on the interaction between the parties without engaging in harassment (e.g., email or text exchanges leading up to the alleged harassment or an admission, an apology, or other comment about the alleged harassment), would be considered statements that could not be considered unless the party or witness is cross-examined.<sup>182</sup>

For examples of language related to this issue, please see Q&A Appendix Section X.

**Question 54: May a decision-maker rely on a video, text message, or other piece of evidence that includes statements by multiple parties or witnesses if some of them do not submit to cross-examination?**

Answer 54: Yes. The preamble explains that in such cases, even if a party or witness in a text message, email, or video does not submit to cross-examination, the decision-maker may still rely on the statements by other people in that text message, email, or video who do submit to cross-examination.<sup>183</sup>

**Question 55: May a decision-maker rely on the statements of a party or witness who submits to cross-examination, but does not answer questions posed by the decision-maker?**

Answer 55: Yes. The preamble explains that cross-examination differs from questions posed by a neutral fact-finder and that if a party or witness submits to cross-examination by a party’s advisor, but does not answer a question posed by the decision-maker, the decision-maker may still rely on all of that person’s statements.<sup>184</sup> The preamble also explains that “the decision-maker still may not draw any inference about the party’s credibility in making the responsibility

determination based solely on a party’s refusal to answer questions posted by the decision-maker” because [34 C.F.R. § 106.45\(b\)\(6\)\(i\)](#) states that no inference may be drawn based on the refusal to answer cross-examination or other questions.<sup>185</sup>

### **XIII. Standard of Proof**

**Question 56: What standard of proof must a school use when deciding whether a respondent is responsible for committing sexual harassment?**

Answer 56: Under the 2020 amendments, a school’s grievance process must state whether the standard of evidence or proof to be used to determine responsibility is the preponderance-of-the-evidence standard or the clear-and-convincing-evidence standard.<sup>186</sup> The preamble explains that the preponderance-of-the-evidence standard means the decision-maker must determine whether alleged facts are more likely than not to be true.<sup>187</sup> It also explains that the clear-and-convincing-evidence standard means the decision-maker must determine whether it is “highly probable” that the alleged facts are true.<sup>188</sup>

For additional information, please see [34 C.F.R. § 106.45\(b\)\(1\)\(vii\)](#).

**Question 57: May a school use a different standard of proof for formal complaints of sexual harassment involving students and employees?**

Answer 57: No. Regardless of which standard of proof is used, a school must apply the same standard of proof to all formal complaints of sexual harassment made by a student, employee, or faculty member.<sup>189</sup> The preamble explains that if a school has a collective bargaining agreement in place that requires the school to use the clear-and-convincing standard for sexual harassment investigations involving employees, it is required under the 2020 amendments to use only the clear-and-convincing standard for sexual harassment investigations involving students as well.<sup>190</sup> In those cases, the preamble indicates that the school may work cooperatively with its employee unions to renegotiate the standard of proof used in employee sexual harassment investigations.<sup>191</sup>

For additional information, please see [34 C.F.R. § 106.45\(b\)\(1\)\(vii\)](#).

### **XIV. Informal Resolution**

**Question 58: May a school offer an informal resolution process, including restorative justice or mediation, as a way to resolve a sexual harassment complaint?**

Answer 58: Yes. The 2020 amendments state that a school is not required to offer an informal resolution process but may facilitate an informal resolution process at any time prior to reaching a determination regarding responsibility, subject to certain conditions.<sup>192</sup> A school is not permitted to offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.<sup>193</sup>

The 2020 amendments explain that they leave the term “informal process” undefined to allow a school the discretion to adopt whatever process best serves the needs of its community.<sup>194</sup> The amendments do not require that the parties interact directly with each other as part of an informal resolution process; mediations are often conducted with the parties in separate rooms and the mediator conversing with each party separately.<sup>195</sup> The parties’ participation in mediation or restorative justice, if offered, should remain a decision for each individual party to make in a particular case, and neither party should be pressured to participate in the process. Schools may exercise discretion to make fact-specific determinations about whether to offer informal resolution in response to a complaint. The Department will not require the parties to attempt mediation in its enforcement of Title IX.<sup>196</sup>

For additional information, please see [34 C.F.R. § 106.45\(b\)\(9\)](#).

For examples of language related to this issue, please see Q&A Appendix Section XV.

**Question 59: If a school chooses to offer an informal resolution process, are there any requirements under Title IX?**

Answer 59: Yes. If a school chooses to offer an informal process, the 2020 amendments require that the school obtains the complainant’s and the respondent’s voluntary, written consent before using any kind of “informal resolution” process, such as mediation or restorative justice.<sup>197</sup> With the parties’ consent, schools have the freedom to allow the parties to choose an informal resolution mechanism that best suits their needs.<sup>198</sup> If those needs change, however, the 2020 amendments also make clear that either party may withdraw from the informal resolution process and resume the formal grievance process at any time prior to agreeing to a resolution.<sup>199</sup>

A school’s discretion to offer an informal resolution process is also limited by the school’s obligation to ensure that all persons who facilitate informal resolutions are free from conflicts of interest and bias, and are trained to serve impartially without prejudging the facts at issue.<sup>200</sup> For example, schools that choose to offer restorative justice as a means of an informal resolution should ensure that the restorative justice facilitators are well-trained in effective processes.<sup>201</sup> A school may use trauma-informed techniques during the informal resolution process.

For additional information, please see [34 C.F.R. § 106.45\(b\)\(9\)](#).

**XV. Retaliation and Amnesty**

**Question 60: What is retaliation, and is it prohibited under the 2020 amendments?**

Answer 60: The 2020 amendments prohibit retaliation.<sup>202</sup> Retaliation is defined as “[i]ntimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report

or formal complaint of sexual harassment, for the purposes of interfering with any right or privilege secured by [the] Title IX [statute or regulations].”<sup>203</sup>

For additional information, please see [34 C.F.R. § 106.71](#).

**Question 61: May a school discipline a complainant, respondent, or witness for violating the school’s COVID-19 or other policy during a reported incident of sexual harassment?**

Answer 61: No, unless the school has a policy that always imposes the same punishment for violating the COVID-19 or other policy regardless of the circumstances. The 2020 amendments prohibit “charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or formal complaint of sexual harassment [i.e., collateral conduct], for the purpose of interfering with any right or privilege secured by Title IX or [its implementing regulations].”<sup>204</sup>

The preamble explains that if a school punishes an individual for violations of other school policies, it will be considered retaliation if the punishment is for the purpose of interfering with any right or privilege secured by Title IX.<sup>205</sup> The preamble adds that if a school has a zero-tolerance policy that always imposes the same punishment for such conduct regardless of the circumstances, imposing that punishment would not be for the purpose of interfering with any right or privilege secured by Title IX and thus, would not be considered retaliation.<sup>206</sup>

For additional information, please see [34 C.F.R. § 106.71](#).

**Question 62: Is a school permitted to have an amnesty policy as a way to encourage reporting of sexual harassment?**

Answer 62: Yes. The preamble notes that “[t]he Department is aware that some schools have adopted ‘amnesty’ policies designed to encourage students to report sexual harassment.”<sup>207</sup> Under these policies, “students who report sexual misconduct (whether as a victim or witness) will not face charges for school code of conduct violations relating to the sexual misconduct incident (e.g., underage drinking at the party where the sexual harassment occurred).”<sup>208</sup> “Nothing in the [2020 amendments] precludes a [school] from adopting such amnesty policies,” and schools retain broad discretion to adopt such amnesty policies or to otherwise define retaliation more broadly than in the regulations.<sup>209</sup>

More generally, schools should keep in mind that the 2020 amendments require that a school’s Title IX grievance process treat complainants and respondents equitably.<sup>210</sup>

**Question 63: May a school punish a complainant for filing a complaint if the decision-maker finds that the respondent did not engage in the alleged sexual harassment?**

Answer 63: Not without a finding of bad faith. The 2020 amendments state that “a determination regarding responsibility, alone, is not sufficient to conclude that any party made



a materially false statement in bad faith.”<sup>211</sup> To the contrary, it might be considered retaliation for a school to penalize a student for bringing a complaint, depending on the circumstances.<sup>212</sup> However, if a school believes a student made a materially false statement in bad faith in the course of a Title IX grievance proceeding, it would not constitute retaliation for a school to charge that individual with a code-of-conduct violation.<sup>213</sup>

For additional information, please see [34 C.F.R. § 106.71](#).

**XVI. Forms of Sex Discrimination Other Than Sexual Harassment as Defined by the 2020 Amendments**

**Question 64: How should a school respond to complaints alleging sex discrimination that do not include sexual harassment allegations?**

Answer 64: The 2020 amendments explain that the grievance process required for formal sexual harassment complaints does not apply to complaints alleging discrimination based on pregnancy, different treatment based on sex, or other forms of sex discrimination.<sup>214</sup>

Instead, the 2020 amendments state that schools must respond to these complaints using the “prompt and equitable” grievance procedures that schools have been required to adopt and publish since 1975, when the original Title IX regulations were issued.<sup>215</sup> The 1975 regulations, which are still in place today, require schools to have a Title IX Coordinator to receive complaints of sex discrimination and require schools to respond promptly and equitably to such complaints.<sup>216</sup>

For additional information, please see [34 C.F.R. § 106.8\(c\)](#).

**Question 65: What constitutes a prompt and equitable grievance procedure under Title IX for responding to complaints of sex discrimination that do not include sexual-harassment allegations?**

Answer 65: OCR has historically looked to whether and how schools have communicated information about their procedures, including where to file complaints, to students, parents/caregivers (for elementary and secondary school students), and employees. In addition, OCR has considered whether the procedures have provided for adequate, reliable, and impartial investigation of complaints; designated and reasonably prompt time frames for the complaint and resolution process; and notice to the parties of the outcome of a complaint.<sup>217</sup>

OCR also has historically explained that a grievance procedure cannot be prompt or equitable unless students know it exists, how it works, and how to file a complaint. Thus, the procedures should be written in language appropriate to the age of the school’s students, easily understood, and widely disseminated.<sup>218</sup>

## **XVII. Religious Exemptions**

### **Question 66: Are all schools that receive federal financial assistance required to comply with Title IX?**

Answer 66: 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.<sup>219</sup> This religious exemption was in the text of Title IX when it was enacted in 1972. The religious exemption does not apply to public schools or to colleges or universities run by state or local governments.

A school may, at its discretion, seek an assurance of a Title IX religious exemption at any time by submitting a letter from the highest ranking official of the institution to the Assistant Secretary for Civil Rights in the Department of Education.<sup>220</sup> The letter must identify the provisions of the Title IX regulations that conflict with specific tenets of the religious organization.<sup>221</sup> A religious exemption is not a blanket exemption from Title IX, and a school's religious exemption extends only as far as the conflict between the Title IX regulations and the religious tenets of the controlling religious organization.<sup>222</sup> A school must comply with the Title IX regulations to the extent that compliance would not conflict with the tenets of the controlling religious organization.<sup>223</sup>

The 2020 amendments state that a school is not required to seek a written assurance of its religious exemption under Title IX before claiming the exemption, and the regulations state that a school can invoke a religious exemption after OCR has received a complaint regarding the school.<sup>224</sup> This is consistent with OCR's handling of religious exemption requests dating back more than two decades.

For additional information, please see [34 C.F.R. § 106.12](#).

Please visit OCR's [website](#) for additional information about religious exemptions.

### **Question 67: May a student file a complaint with OCR against a school that has obtained an assurance of a religious exemption from OCR?**

Answer 67: Yes. Students may always file a complaint with OCR if they believe their school has violated their rights under Title IX, even if OCR has previously provided assurance to the school of a religious exemption under Title IX. After receiving the complaint, OCR would first evaluate whether the allegation is appropriate for investigation. If yes, and if the school has previously asserted a religious exemption, then OCR would determine whether the exemption applies to the alleged discrimination. If the exemption applies, OCR would dismiss the complaint. If the alleged discrimination does not fall within the school's religious exemption from Title IX, then OCR would proceed with the investigation, following OCR's Case Processing Manual.<sup>225</sup>

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<sup>1</sup> You can read the 2020 amendments, entitled “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,” at 85 Fed. Reg. 30,026 (May 19, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf>. The amendments begin on page 30,572. The Federal Register notice also includes a preamble, at pages 30,026-30,570, that clarifies OCR’s interpretation of Title IX and the Title IX regulations. As discussed above, please note that the preamble itself does not have the force and effect of law.

<sup>2</sup> 85 Fed. Reg. at 30,063.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> 20 U.S.C. § 1092(f)(6)(A)(v).

<sup>6</sup> NIBRS User Manual at 40 (April 15, 2021), <https://www.fbi.gov/file-repository/ucr/ucr-2019-1-nibrs-user-manual-093020.pdf/view>.

<sup>7</sup> 34 U.S.C. § 12291(a)(10).

<sup>8</sup> *Id.* § 12291(a)(8).

<sup>9</sup> *Id.* § 12291(a)(30).

<sup>10</sup> 34 C.F.R. § 106.30 (definition of sexual harassment). *See also* 85 Fed. Reg. at 30,202.

<sup>11</sup> 85 Fed. Reg. at 30,174.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 30,199.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> 34 C.F.R. § 106.31.

<sup>18</sup> 85 Fed. Reg. at 30,170. *See also* 34 C.F.R. § 106.30(a) (definition of sexual harassment).

<sup>19</sup> 85 Fed. Reg. at 30,170.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 30,169.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 30,170.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> 34 C.F.R. § 106.44(a). *See also* 85 Fed. Reg. at 30,196-98.

<sup>27</sup> 85 Fed. Reg. at 30,093. *See also* 34 C.F.R. § 106.45(b)(1)(iii).

<sup>28</sup> 34 C.F.R. § 106.8(d).

<sup>29</sup> 85 Fed. Reg. at 30,201.

<sup>30</sup> *Id.* at 30,197.

<sup>31</sup> *Id.* at 30,199 n.875.

<sup>32</sup> *Id.* at 30,200 n.877.

<sup>33</sup> *Id.* at 30,200.

<sup>34</sup> *Id.* at 30,202.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 30,203.

<sup>37</sup> *Id.* at 30,202.

<sup>38</sup> *Id.*

<sup>39</sup> U.S. Department of Education, Office for Civil Rights, Letter from Acting Assistant Secretary for Civil Rights, Kimberly M. Richey, Withdrawing Certain OCR Documents (Aug. 26, 2020), <https://www2.ed.gov/policy/gen/guid/fr-200826-letter.pdf>. Guidance documents previously issued by the Department that have since been withdrawn are available at <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/respolicy.html>. Note that these

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guidance documents, even prior to their withdrawal, do not have the force and effect of law, and are not meant to bind the public or regulated entities in any way.

<sup>40</sup> 34 C.F.R. §§ 106.30(a) (definition of actual knowledge), 106.44(a).

<sup>41</sup> 85 Fed. Reg. at 30,109, 30,115.

<sup>42</sup> 34 C.F.R. § 106.30(a) (definition of actual knowledge).

<sup>43</sup> 85 Fed. Reg. at 30,115-16, 30,120.

<sup>44</sup> *Id.* at 30,115.

<sup>45</sup> 34 C.F.R. § 106.30(a) (definition of actual knowledge); 85 Fed. Reg. at 30,043.

<sup>46</sup> 85 Fed. Reg. at 30,043.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> 34 C.F.R. §§ 106.8(a), 106.30(a) (definition of actual knowledge).

<sup>50</sup> 85 Fed. Reg. at 30,093.

<sup>51</sup> 34 C.F.R. § 106.30(a)

<sup>52</sup> 85 Fed. Reg. at 30,116.

<sup>53</sup> *Id.* at 30,192.

<sup>54</sup> *Id.* See also 34 C.F.R. § 106.30(a) (definition of complainant).

<sup>55</sup> 85 Fed. Reg. at 30,192.

<sup>56</sup> *Id.* at 30,107, 30,115, 30,523.

<sup>57</sup> *Id.* at 30,107.

<sup>58</sup> *Id.* at 30,523.

<sup>59</sup> *Id.* at 30,107.

<sup>60</sup> *Id.* at 30,115, 30,523.

<sup>61</sup> *Id.* at 30,107.

<sup>62</sup> *Id.*

<sup>63</sup> 34 C.F.R. § 106.44(a).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> 34 C.F.R. § 106.45(b)(1)(i), (b)(7)(ii)(E); 85 Fed. Reg. at 30,274.

<sup>68</sup> 85 Fed. Reg. at 30,274.

<sup>69</sup> 34 C.F.R. § 106.45(b)(1)(i).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* § 106.45(b)(1)(vi).

<sup>73</sup> 85 Fed. Reg. at 30,275.

<sup>74</sup> 34 C.F.R. § 106.30(a) (definition of formal complaint).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* § 106.6(g); 85 Fed. Reg. at 30,453.

<sup>79</sup> *Id.* § 106.30(a) (definition of formal complaint).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> 85 Fed. Reg. at 30,138, 30,198 n.869, 30,219.

<sup>83</sup> 34 C.F.R. § 106.30(a) (definition of formal complaint).

<sup>84</sup> *Id.*

<sup>85</sup> 34 C.F.R. §§ 106.30(a) (definition of formal complaint), 106.44(a).

<sup>86</sup> 85 Fed. Reg. at 30,089.

<sup>87</sup> 34 C.F.R. § 106.45(b)(3)(i). See also 85 Fed. Reg. at 30,199.

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<sup>88</sup> 34 C.F.R. § 106.44(a).  
<sup>89</sup> *Id.*  
<sup>90</sup> *Id.* § 106.45(b)(3)(ii). *See also* 85 Fed. Reg. at 30,290.  
<sup>91</sup> 85 Fed. Reg. at 30,290.  
<sup>92</sup> *Id.*  
<sup>93</sup> *Id.* at 30,187.  
<sup>94</sup> *See* 34 C.F.R. § 106.45(b)(1)(v).  
<sup>95</sup> 85 Fed. Reg. at 30,348. *See also* 34 C.F.R. § 106.45(b)(1)(v).  
<sup>96</sup> 34 C.F.R. § 106.45(b)(1)(v).  
<sup>97</sup> 34 C.F.R. § 106.45(b)(6)(i). *See also* 85 Fed. Reg. at 30,348.  
<sup>98</sup> 34 C.F.R. § 106.44(a).  
<sup>99</sup> *Id.*  
<sup>100</sup> *Id.* § 106.30(a) (definition of supportive measures). *See also* 34 C.F.R. § 106.44(a).  
<sup>101</sup> 34 C.F.R. § 106.30(a) (definition of supportive measures).  
<sup>102</sup> *Id.*  
<sup>103</sup> 85 Fed. Reg. at 30,182.  
<sup>104</sup> *Id.* at 30,401.  
<sup>105</sup> *Id.* at 30,182.  
<sup>106</sup> 34 C.F.R. § 106.44(c).  
<sup>107</sup> *Id.*  
<sup>108</sup> *Id.* (referencing the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, and the Americans with Disabilities Act).  
<sup>109</sup> *Id.* § 106.44(d).  
<sup>110</sup> *Id.* (referencing Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act).  
<sup>111</sup> *Id.* § 106.45(b)(1)(iv).  
<sup>112</sup> 85 Fed. Reg. at 30,259.  
<sup>113</sup> *Id.*  
<sup>114</sup> 34 C.F.R. § 106.45(b)(1)(v).  
<sup>115</sup> 85 Fed. Reg. at 30,269.  
<sup>116</sup> *Id.*  
<sup>117</sup> *Id.*  
<sup>118</sup> *Id.*  
<sup>119</sup> *Id.*  
<sup>120</sup> *Id.*  
<sup>121</sup> *Id.*  
<sup>122</sup> 34 C.F.R. § 106.45(b)(1)(v).  
<sup>123</sup> *Id.*  
<sup>124</sup> *Id.* § 106.45(b)(6)(i).  
<sup>125</sup> *Id.*  
<sup>126</sup> *Id.* § 106.45(b)(6)(ii).  
<sup>127</sup> *Id.* § 106.45(b)(6)(i).  
<sup>128</sup> *Id.*  
<sup>129</sup> *Id.*  
<sup>130</sup> *Id.* § 106.45(b)(6)(ii).  
<sup>131</sup> *Id.*  
<sup>132</sup> 85 Fed. Reg. at 30,361.  
<sup>133</sup> 34 C.F.R. § 106.6(g).  
<sup>134</sup> 85 Fed. Reg. at 30,453.  
<sup>135</sup> *Id.* at 30,122.  
<sup>136</sup> 34 C.F.R. § 106.45(b)(6)(1).

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<sup>137</sup> *Id.* § 106.45(b)(5)(iv).  
<sup>138</sup> 85 Fed. Reg. at 30,297.  
<sup>139</sup> 34 C.F.R. § 106.45(b)(6)(i).  
<sup>140</sup> *Id.* §§ 106.44(a), 106.71. *See also* 85 Fed. Reg. at 30,324.  
<sup>141</sup> 85 Fed. Reg. at 30,360. These rules would be in addition to any rules required under 34 C.F.R. § 106.45.  
<sup>142</sup> *Id.* at 30,360.  
<sup>143</sup> *Id.* at 30,361.  
<sup>144</sup> *Id.* at 30,331.  
<sup>145</sup> *Id.* at 30,340.  
<sup>146</sup> *Id.* at 30,319. *See also* 34 C.F.R. § 106.45(b)(5)(iv).  
<sup>147</sup> 85 Fed. Reg. at 30,319, 30,324, 30,331, 30,361.  
<sup>148</sup> *Id.* at 30,320, 30,324, 30,342.  
<sup>149</sup> *Id.*  
<sup>150</sup> 34 C.F.R. § 106.45(b)(6)(i).  
<sup>151</sup> *Id.* *See also* 85 Fed. Reg. at 30,324, 30,355-56.  
<sup>152</sup> 34 C.F.R. § 106.45(b)(6)(i).  
<sup>153</sup> 85 Fed. Reg. at 30,362.  
<sup>154</sup> 34 C.F.R. § 106.45(b)(6)(ii).  
<sup>155</sup> *Id.*  
<sup>156</sup> 85 Fed. Reg. at 30,361.  
<sup>157</sup> 34 C.F.R. § 106.45(b)(6)(i).  
<sup>158</sup> *Id.*  
<sup>159</sup> 85 Fed. Reg. at 30,354 n.1355.  
<sup>160</sup> *Id.*  
<sup>161</sup> *Id.* at 30,353.  
<sup>162</sup> *Id.*  
<sup>163</sup> 34 C.F.R. § 106.45(b)(5)(i). *See also* 85 Fed. Reg. at 30,361, 30,294.  
<sup>164</sup> 34 C.F.R. § 106.45(b)(1)(x).  
<sup>165</sup> 85 Fed. Reg. at 30,286.  
<sup>166</sup> *Id.* at 30,323.  
<sup>167</sup> *Id.* at 30,323-24.  
<sup>168</sup> *Id.*  
<sup>169</sup> *Id.* at 30,323.  
<sup>170</sup> *Id.*  
<sup>171</sup> 34 C.F.R. § 106.45(b)(6)(i).  
<sup>172</sup> 85 Fed. Reg. at 30,348.  
<sup>173</sup> *Id.*  
<sup>174</sup> 34 C.F.R. § 106.45(b)(6)(i).  
<sup>175</sup> 85 Fed. Reg. at 30,349.  
<sup>176</sup> 34 C.F.R. § 106.45(b)(6)(i). *See also* 85 Fed. Reg. at 30,328, 30,345, 30,349, 30,361.  
<sup>177</sup> 85 Fed. Reg. at 30,328, 30,345, 30,349, 30,361.  
<sup>178</sup> *Id.* at 30,328, 30,345, 30,349, 30,361.  
<sup>179</sup> *Id.* at 30,349.  
<sup>180</sup> *Id.*  
<sup>181</sup> *See, e.g., id.* at 30,142 n.625 (acknowledging that speech, when not protected under the U.S. Constitution, may constitute actionable harassment under 34 C.F.R. § 106.30 even when speech is part of the misconduct at issue). *See also id.* at 30,349.  
<sup>182</sup> 85 Fed. Reg. at 30,349.  
<sup>183</sup> *Id.*  
<sup>184</sup> *Id.*

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<sup>185</sup> 34 C.F.R. § 106.45(b)(6)(i). *See also* 85 Fed. Reg. at 30,349 n.1341.

<sup>186</sup> 34 C.F.R. § 106.45(b)(1)(vii).

<sup>187</sup> 85 Fed. Reg. at 30,386 n.1472, 30,388 n.1480.

<sup>188</sup> *Id.* at 30,386 n.1473.

<sup>189</sup> 34 C.F.R. § 106.45(b)(1)(vii). *See also* 85 Fed. Reg. at 30,378.

<sup>190</sup> 85 Fed. Reg. at 30,378.

<sup>191</sup> *Id.*

<sup>192</sup> 34 C.F.R. § 106.45(b)(9).

<sup>193</sup> *Id.* § 106.45(b)(9)(iii).

<sup>194</sup> 85 Fed. Reg. at 30,401.

<sup>195</sup> *Id.* at 30,403.

<sup>196</sup> *Id.* at 30,361.

<sup>197</sup> 34 C.F.R. § 106.45(b)(9).

<sup>198</sup> 85 Fed. Reg. at 30,406.

<sup>199</sup> 34 C.F.R. § 106.45(b)(9).

<sup>200</sup> 34 C.F.R. § 106.45(b)(1)(iii).

<sup>201</sup> 85 Fed. Reg. at 30,401, 30,403.

<sup>202</sup> 34 C.F.R. § 106.71(a).

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> 85 Fed. Reg. at 30,536.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> 34 C.F.R. § 106.45(b)(1)(i).

<sup>211</sup> *Id.* § 106.71(b)(2). *See also* 85 Fed. Reg. at 30,537.

<sup>212</sup> 34 C.F.R. § 106.71(b)(2).

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* §§ 106.8(c), 106.45. *See also* 85 Fed. Reg. at 30,095, 30,129, 30,471, 30,473.

<sup>215</sup> 34 C.F.R. §§ 106.8(c), 106.45. *See also* 85 Fed. Reg. at 30,095, 30,129, 30,461, 30,473.

<sup>216</sup> 34 C.F.R. §§ 106.8(a)-(c).

<sup>217</sup> U.S. Department of Education, Office for Civil Rights, *Revised Sexual Harassment Guidance: Sexual Harassment of Students by School Employees, Other Students, or Third Parties* at 19-20 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>. This guidance was rescinded in 2020 but remains accessible on the Department’s website for historical reference.

<sup>218</sup> *Id.* at 20.

<sup>219</sup> 20 U.S.C. § 1681(a)(3); 34 C.F.R. § 106.12.

<sup>220</sup> 34 C.F.R. § 106.12(b).

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* § 106.12(a).

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* § 106.12(b).

<sup>225</sup> U.S. Department of Education, Office for Civil Rights Case Processing Manual (Aug. 26, 2020), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

**Appendix to**  
**Questions and Answers on the Title IX Regulations on Sexual Harassment (July 2021)**

This Appendix accompanies Questions and Answers on the Title IX Regulations on Sexual Harassment (July 2021) from the U.S. Department of Education’s Office for Civil Rights. This Appendix responds to schools’ requests for examples of Title IX procedures that may be adaptable to their own circumstances and helpful in implementing the 2020 amendments to the Department’s Title IX regulations.<sup>1</sup> Schools that receive federal funds are obligated to implement these regulations, with some limited exceptions described in the statute and regulations.

The Appendix includes examples for elementary and secondary schools and postsecondary schools. It is not comprehensive but addresses many areas in which questions arise.

*Important notes:*

- Schools may use the example policy language in this Appendix to guide the creation of their own policies but are not required to do so. The Department does not endorse these provisions in particular, nor does it prefer or support these examples as compared with others that schools may use.
- Other than any statutory and regulatory requirements included below, the contents of this Appendix do not have the force and effect of law and are not meant to bind the public. This Appendix is intended only to provide clarity to the public regarding how OCR interprets existing requirements under the law or agency policies.
- Adoption of one or more of the examples from this Appendix alone does not demonstrate compliance with Title IX. If OCR investigates a discrimination complaint, OCR will make a fact-specific determination regarding whether a school’s Title IX policies and procedures, and their implementation, complies with the law.
- The example policy language does not address policies or procedures that may be required to comply with Title VII of the Civil Rights Act of 1964, which prohibits sex discrimination in employment. As the 2020 amendments state: “Nothing in [these regulations] may be read in derogation of any individual’s rights under title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* or any regulations promulgated thereunder.” 34 C.F.R. § 106.6(f).

Please also note that this Appendix focuses on procedures for addressing reports and complaints of sexual harassment, including sexual violence, because the regulations themselves focus on procedures.

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<sup>1</sup>The Department issued the regulations to implement Title IX of the Education Amendments Act of 1972. The Department’s current Title IX regulations are in 34 C.F.R. Part 106, which is available at <https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=f12a46d66326f0c23de5edac094d253d&mc=true&n=pt34.1.106&r=PART&ty=HTML>.



The examples are excerpted from the policies at a variety of schools across the United States, and OCR has edited them for readability and consistency.

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*Many of the sections below include multiple examples to illustrate choices that different schools have made about communicating their procedures to students and their communities. The 2020 amendments do not necessarily require the approaches in the examples here and, again, the Department does not endorse these provisions in particular, nor does it prefer or support these examples as compared with others that schools may use.*

*The 2020 amendments impose some different requirements for elementary and secondary schools, as compared to postsecondary schools. In light of this, we have noted where examples track requirements for elementary and secondary schools, postsecondary schools, or both. For more information on these differences, please see the Title IX Q&A.*

## **I. Receiving and Responding to Reports of Sexual Harassment**

### *Example Policies Used by Elementary and Secondary Schools and Postsecondary Schools*

- Example Policy 1: When a complaint or report of sexual harassment is made under this school's policy, the Title IX Coordinator (or designee) will: (1) confidentially contact the complainant to offer supportive measures, consider the complainant's wishes with respect to supportive measures, and inform them of the availability of supportive measures with or without filing a formal complaint; (2) explain the process for how to file a formal complaint; (3) inform the complainant that any report made in good faith will not result in discipline; and (4) respect the complainant's wishes with respect to whether to investigate unless the Title IX Coordinator determines it is necessary to pursue the complaint in light of a health or safety concern for the community.
- Example Policy 2: Choosing to make a report, file a formal complaint, and/or meet with the Title IX Coordinator after a report or formal complaint has been made, and deciding how to proceed, can be a process that unfolds over time. You do not have to decide whether to pursue a formal complaint or to name the other party/ies at the time of the report. Reporting does not mean you wish to pursue a formal complaint—it may mean you would like help accessing resources and supportive measures. You do not have to pursue a formal complaint to take advantage of the supportive measures available to you.

### *Example Policy Used by Elementary and Secondary Schools*

- Example Policy 1: The district must respond whenever any District employee has been put on actual notice of any sexual harassment or allegations of sexual harassment as

defined in this district's policy. This mandatory obligation is in addition to the child abuse mandatory reporting obligation under state law.

## **II. Supportive Measures**

### *Example Policies Used by Elementary and Secondary Schools and Postsecondary Schools*

- Example Policy 1: Supportive measures are short-term measures that are designed to restore or preserve access to the school's education program or activity. Examples of supportive measures include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures.
- Example Policy 2: Supportive measures are available regardless of whether the complainant chooses to pursue any action under this school's policy, including before and after the filing of a formal complaint or where no formal complaint has been filed. Supportive measures are available to the complainant, respondent, and as appropriate, witnesses or other impacted individuals. The Title IX Coordinator will maintain consistent contact with the parties to ensure that safety and emotional and physical well-being are being addressed. Generally, supportive measures are meant to be short-term in nature and will be re-evaluated on a periodic basis. To the extent there is a continuing need for supportive measures after the conclusion of the resolution process, the Title IX Coordinator will work with appropriate school resources to provide continued assistance to the parties.
- Example Policy 3: Supportive measures are provided based on an individualized assessment of the needs of the individual. They may include, but are not limited to: facilitating access to medical and counseling services, assistance in arranging the rescheduling of exams and assignments, academic support services, assistance in requesting long-term academic accommodations if the individual qualifies as an individual with a disability, allowing either a complainant or respondent to drop a class in which both parties are enrolled, a mutual "no contact order," and any other reasonably supportive measure that does not unreasonably burden the other party's access to education and that serves the goals of this policy.
- Example Policy 4: The school will make available supportive measures with or without the filing of a formal complaint. These supports will be available to both parties, free of charge. These supports are non-disciplinary and non-punitive individualized services designed to offer support without being unreasonably burdensome. They are meant to restore access to education, protect student and employee safety, and/or deter future acts of sexual harassment. Supportive measures are temporary and flexible, based on

the needs of the individual and may include counseling, extensions of deadlines or course-related adjustments, restrictions on contact between parties (must be applied equally to both parties), leaves of absence, and increased security and monitoring of certain areas of the school.

### **III. Investigations**

#### *Example Policies Used by Elementary and Secondary Schools and Postsecondary Schools*

- Example Policy 1: Once a formal Title IX complaint is filed, an investigator will be assigned and the parties will be treated equitably, including in the provision of supportive measures and remedies. They will receive notice of the specifics of the allegations as known, and as any arise during the investigation. The investigator will be unbiased and free from conflicts of interest and will objectively review the complaint, any evidence, and any information from witnesses, expert witnesses, and the parties. If the investigator conducts interviews, the parties will be provided time to prepare and will receive notice of the time/date/location/participants/purpose for the interviews.
- Example Policy 2: Upon receipt of a formal Title IX complaint, the Title IX Coordinator will appoint an Investigator to investigate the allegations subject to the formal grievance process. The investigation may include, among other things, interviewing the complainant, the respondent, and any witnesses; reviewing law enforcement investigation documents if applicable; reviewing relevant student or employment files (preserving confidentiality wherever necessary); and gathering and examining other relevant documents, social media, and evidence.

#### *Example Policies Used by Elementary and Secondary Schools*

- Example Policy 1: The Investigator will attempt to collect all relevant information and evidence. While the Investigator will have the burden of gathering evidence, it is crucial that the parties present evidence and identify witnesses to the Investigator so that they may be considered during the investigation. While all evidence gathered during the investigative process and obtained through the exchange of written questions will be considered, the decision-maker may in their discretion grant lesser weight to last-minute information or evidence introduced through the exchange of written questions that was not previously presented for investigation by the Investigator.
- Example Policy 2: The decision-maker will facilitate a written question and answer period between the parties. Each party may submit their written questions for the other party and witnesses to the decision-maker for review. The questions must be relevant to the case. The decision-maker will determine if the questions submitted are relevant and will then forward the relevant questions to the other party or witnesses for a response. The decision-maker can then review all the responses, determine what is relevant or not

relevant, and issue a decision as to whether the Respondent is responsible for the alleged sexual harassment.

#### **IV. The Role of the Advisor**

##### *Example Policies Used by Postsecondary Schools<sup>2</sup>*

- Example Policy 1: The role of the advisor is narrow in scope: the advisor may attend any interview or meeting connected with the grievance process that the party whom they are advising is invited to attend, but the advisor may not actively participate in interviews and may not serve as a proxy for the party. The advisor may attend the hearing and may conduct cross-examination of the other party and any witnesses at the hearing; otherwise, the advisor may not actively participate in the hearing.
- Example Policy 2: During meetings and hearings, the advisor may talk quietly with the student or pass notes in a non-disruptive manner. The advisor may not intervene in meetings with the school. In addition, while advisors may provide guidance and assistance throughout the process, all written submissions must be authored by the student.
- Example Policy 3: The advisor may provide advice and consultation to the parties or parties' witnesses outside of the conduct of the live hearing to assist parties in handling the formal resolution process.

#### **V. The Live Hearing Process**

##### *Example Policies Used by Postsecondary Schools<sup>3</sup>*

###### A. Before the hearing

- Example Policy 1: In order to promote a fair and expeditious hearing, the parties and their advisors will attend a pre-hearing conference with the decision-maker. The pre-hearing conference assures that the parties and their advisors understand the hearing process and allows for significant issues to be addressed in advance of the hearing.

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<sup>2</sup> While elementary and secondary schools may choose to permit parties to have an advisor, the 2020 amendments only require an advisor at the postsecondary school level due to the cross-examination requirement. See the Question 41 in the Q&A for more information.

<sup>3</sup> While elementary and secondary schools may choose to use a live hearing, the 2020 amendments only require a live hearing with cross-examination at the postsecondary school level. See Section XII in the Q&A for more information.

## B. Hearing Format

- Example Policy 1: While the hearing is not intended to be a repeat of the investigation, the parties will be provided with an equal opportunity for their advisors to conduct cross-examination of the other party and of relevant witnesses. A typical hearing may include: brief opening remarks by the decision-maker; questions posed by the decision-maker to one or both of the parties; cross-examination by either party's advisor of the other party and relevant witnesses; and questions posed by the decision-maker to any relevant witnesses.
- Example Policy 2: The parties and witnesses will address only the decision-maker, and not each other. Only the decision-maker and the parties' advisors may question witnesses and parties.
- Example Policy 3: When it is an individual's turn to appear before the decision-maker, that person will appear separately before the panel and may bring notes for their reference. The decision-maker may ask any individual for a copy of or to inspect their notes. The complainant and respondent may be accompanied by or may otherwise be in contact with their advisor at all times. If the hearing is conducted wholly or partially through video conference, an administrator will ensure that each party has the opportunity to appear before or speak directly to the hearing panel and to appropriately participate in the questioning process.
- Example Policy 4: At the request of either party, the decision-maker will allow the parties and/or witnesses to be visually separated during the hearing. This may include, but is not limited to, the use of videoconference and/or any other appropriate technology. To assess credibility, the decision-maker must have sufficient access to the complainant, respondent, and any witnesses presenting information; if the decision-maker is sighted, then the decision-maker must be able to see them.
- Example Policy 5: Parties will be able to see and hear (or, if deaf or hard of hearing, to access through auxiliary aids or services) all questioning and testimony at the hearing, if they choose to. Witnesses (other than the parties) will attend the hearing only for their own testimony.
- Example Policy 6: The school will ensure that students with disabilities have an equal opportunity to participate in, and benefit from the school's Title IX grievance process, consistent with the requirements of Section 504 of the Rehabilitation Act of 1973. The school will also ensure that English learner students can participate meaningfully and equally in the school's Title IX grievance process, as required by Title VI of the Civil Rights Act of 1964 and the Equal Educational Opportunities Act of 1974.

### C. Evidence

- Example Policy 1: The hearing is an opportunity for the parties to address the decision-maker. The parties may address any information in the investigative report, submit supplemental statements in response to the investigative report or, at the time of any sanction, provide verbal impact and mitigation statements. The school will make all evidence gathered available to the parties at the hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination. In reaching a determination, the decision-maker will meet with the complainant, respondent, investigator, and any relevant witnesses, but the decision-maker may not conduct their own investigation.
- Example Policy 2: The parties will have the opportunity to present the evidence they submitted, subject to any exclusions determined by the decision-maker. Generally, the parties may not introduce evidence, including witness testimony, at the hearing that they did not identify during the pre-hearing process. However, the decision-maker has discretion to accept or exclude additional evidence presented at the hearing. In addition, the parties are expected not to spend time on undisputed facts or evidence that would be duplicative.
- Example Policy 3: Courtroom rules of evidence and procedure will not apply. The decision-maker will generally consider, that is rely on, all evidence that they determine to be relevant and reliable. Throughout the hearing, the decision-maker will: (1) Exclude evidence including witness testimony that is, for example, irrelevant in light of the policy violation(s) charged, relevant only to issues not in dispute, or unduly repetitive, and will require rephrasing of questions that violate the rules of conduct; (2) Decide any procedural issues for the hearing; and/or (3) Make any other determinations necessary to promote an orderly, productive, and fair hearing that complies with the rules of conduct.

### D. Confidentiality

- Example Policy 1: All live hearings will be closed to the public and witnesses will be present only during their testimony. For live hearings that use technology, the decision-maker shall ensure that appropriate protections are in place to maintain confidentiality.
- Example Policy 2: The hearing is a closed proceeding and is not open to the public. All participants involved in a hearing are expected to respect the seriousness of the matter and the privacy of the individuals involved. The school's expectation of privacy during the hearing process should not be understood to limit any legal rights of the parties during or after the resolution. The school may not, by federal law, prohibit the

complainant from disclosing the final outcome of a formal complaint process (after any appeals are concluded). All other conditions for disclosure of hearing records and outcomes are governed by the school's obligations under the Family Educational Rights and Privacy Act (FERPA), any other applicable privacy laws, and professional ethical standards.

E. Decision-makers asking questions of the parties or witnesses

- Example Policy 1: The decision-maker may question the parties and witnesses, but they may refuse to respond.

## **VI. Behavior During the Live Hearing/Rules of Decorum**

### *Example Policies Used by Postsecondary Schools*

- Example Policy 1: The school will require all parties, advisors, and witnesses to maintain appropriate decorum throughout the live hearing. Participants at the live hearing are expected to abide by the decision-maker's directions and determinations, maintain civility, and avoid emotional outbursts and raised voices. Repeated violations of appropriate decorum will result in a break in the live hearing, the length of which will be determined by the decision-maker. The decision-maker reserves the right to appoint a different advisor to conduct cross-examination on behalf of a party after an advisor's repeated violations of appropriate decorum or other rules related to the conduct of the live hearing.
- Example Policy 2: The hearing will be conducted in a respectful manner that promotes fairness and accurate factfinding and that complies with the rules of conduct.
- Example Policy 3: The school (including any official acting on behalf of the school such as an investigator or a decision-maker) has the right at all times to determine what constitutes appropriate behavior on the part of an advisor and to take appropriate steps to ensure compliance with this policy.
- Example Policy 4: Parties and advisors may take no action at the hearing that a reasonable person would see as intended to intimidate that person (whether party, witness, or official) into not participating in the process or meaningfully modifying their participation in the process.

## **VII. Protecting the Well-Being of the Parties During the Live Hearing/Investigation**

### *Example Policies Used by Postsecondary Schools*

- Example Policy 1: Each participating individual will have access to a private room for the duration of the hearing if the hearing is in person and may choose to participate in the proceedings via video conference.
- Example Policy 2: The decision-maker will discuss measures available to protect the well-being of parties and witnesses at the hearing. These may include, for example, use of lived names and pronouns during the hearing, including names appearing on a screen; a party's right to have their support person available to them at all times during the hearing (in addition to their advisor); and a hearing participant's ability to request a break during the hearing, except when a question is pending.

### *Example Policy Used by Elementary and Secondary Schools*

- Example Policy 1: To the greatest extent possible, and subject to Title IX, the school will make reasonable accommodations in an investigation to avoid potential re-traumatization of a child and to avoid any potential interference with an investigation by the Department of Child and Family Services or a law enforcement agency.
- Example Policy 2: The school will ensure that students with disabilities have an equal opportunity to participate in, and benefit from the school's Title IX grievance process, consistent with the requirements of Section 504 of the Rehabilitation Act of 1973. The school will also ensure that English learner students can participate meaningfully and equally in the school's Title IX grievance process, as required by Title VI of the Civil Rights Act of 1964 and the Equal Educational Opportunities Act of 1974.

## **VIII. The Cross-Examination Process**

### *Example Policies Used by Postsecondary Schools*

#### A. Explaining Cross-Examination

- Example Policy 1: The parties' advisors will have the opportunity to cross examine the other party (and witnesses, if any). Such cross-examination must be conducted directly, orally, and in real time by the party's advisor and never by a party personally.
- Example Policy 2: Each party's advisor may pose relevant questions to the opposing party and witnesses (including the Investigative Team).
- Example Policy 3: Each party will prepare their questions, including any follow-up questions, for the other party and witnesses, and will provide them to their advisor. The advisor will ask the questions as the party has provided them, and may not ask questions that the advisor themselves have developed without their party.



- Example Policy 4: The role of the advisor at the live hearing is to conduct cross-examination on behalf of a party. The advisor is not to represent a party, but only to relay the party's cross-examination questions that the party wishes to have asked of the other party and witnesses. Advisors may not raise objections or make statements or arguments during the live hearing.

B. Relevant questions only/Decision-maker reviews all questions

- Example Policy 1: Only relevant questions may be asked of a party or witness. Before a complainant, respondent, or witness responds to a question, the decision-maker will first determine whether the question is relevant and explain any decision to exclude a question as not relevant.
- Example Policy 2: When a party's advisor is asking questions of the other party or a witness, the decision-maker will determine whether each question is relevant before the party or witness answers it, will exclude any that are not relevant or unduly repetitive, and will require rephrasing of any questions that violate the rules of conduct. If the decision-maker determines that a question should be excluded as not relevant, they will explain their reasoning.
- Example Policy 3: Only relevant cross-examination questions and follow-up questions, including those that challenge credibility, may be asked. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker first must determine whether the question is relevant or cumulative and must explain any decision to exclude a question that is not relevant or is cumulative.

**IX. Restrictions on Considering a Complainant's or Respondent's Sexual History**

*Example Policies Used by Elementary and Secondary Schools and Postsecondary Schools*

- Example Policy 1: The investigator will not, as a general rule, consider the sexual history of a complainant or respondent. However, in limited circumstances, sexual history may be directly relevant to the investigation. As to complainants: While the investigator will never assume that a past sexual relationship between the parties means the complainant consented to the specific conduct under investigation, evidence of how the parties communicated consent in past consensual encounters may help the investigator understand whether the respondent reasonably believed consent was given during the encounter under investigation. Further, evidence of specific past sexual encounters may be relevant to whether someone other than respondent was the source of relevant physical evidence. As to respondents: Sexual history of a respondent might be relevant to show a pattern of behavior by respondent or resolve another issue of importance in

the investigation. Sexual history evidence that is being proffered to show a party's reputation or character will never be considered relevant on its own.

- Example Policy 2: An individual's character or reputation with respect to other sexual activity is not relevant and will not be considered as evidence. Similarly, an individual's prior or subsequent sexual activity is typically not relevant and will only be considered as evidence under limited circumstances. For example, prior sexual history may be relevant to explain the presence of a physical injury or to help resolve other questions raised in the investigation. It may also be relevant to show that someone other than the respondent committed the conduct alleged by the complainant. The investigator will determine the relevance of this information, and both parties will be informed in writing if evidence of prior sexual history is deemed relevant.
- Example Policy 3: Where the parties have a prior sexual relationship and the existence of consent is at issue, the sexual history between the parties may be relevant to help understand the manner and nature of communications between the parties and the context of the relationship, which may have bearing on whether consent was sought and given during the incident in question. Even in the context of a relationship, however, consent to one sexual act does not, by itself, constitute consent to another sexual act; in addition, consent on one occasion does not, by itself, constitute consent on a subsequent occasion. The investigator will determine the relevance of this information and both parties will be informed if evidence of prior sexual history is deemed relevant.

**X. Situations in Which a Party or Witness Does Not Participate in a Live Hearing or in Cross-examination**

*Example Policies Used by Postsecondary Schools*

- Example Policy 1: If the complainant, the respondent, or a witness informs the school that they will not attend the hearing (or will attend but refuse to be cross-examined), the school's Title IX Coordinator may determine that the hearing may still proceed. The decision-maker may not, however: (a) rely on any statement or information provided by that non-participating individual in reaching a determination regarding responsibility; or (b) draw any adverse inference in reaching a determination regarding responsibility based solely on the individual's absence from the hearing (or their refusal to be cross-examined).
- Example Policy 2: Neither the complainant nor the respondent is required to participate in the resolution process outlined in these procedures. The school will not draw any adverse inferences from a complainant's or respondent's decision not to participate or

to remain silent during the process. An investigator or decision-maker, in the investigation or the hearing respectively, will reach findings and conclusions based on the information available.

- Example Policy 3: If a party does not submit to cross-examination, the decision-maker cannot rely on any prior statements made by that party in reaching a determination regarding responsibility, but may reach a determination regarding responsibility based on evidence that does not constitute a statement by that party. The decision-maker may also consider evidence created by the party where the evidence itself constituted the alleged prohibited conduct. Such evidence may include, by way of example but not limitation, text messages, e-mails, social media postings, audio or video recordings, or other documents or digital media created and sent by a party as a form of alleged sexual harassment, or as part of an alleged course of conduct that constitutes stalking. The decision-maker cannot draw an inference about the responsibility for a policy violation based solely on a party's absence from the hearing or refusal to answer cross-examination or other questions.
- Example Policy 4: A statement is a person's intent to make factual assertions, including evidence that contains a person's statement(s). Party or witness statements, police reports, Sexual Assault Nurse Examiner (SANE) reports, medical reports, and other records may not be relied upon in making a final determination after the completion of a live hearing to the extent that they contain statements of a party or witness who has not submitted to cross-examination. However, the decision-maker cannot draw any inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or their refusal to answer cross-examination questions.

#### **XI. Presumptions about Complainants, Respondents, and Witnesses**

##### *Example Policies Used by Elementary and Secondary Schools and Postsecondary Schools*

- Example Policy 1: The school presumes that reports of prohibited conduct are made in good faith. A finding that the alleged behavior does not constitute a violation of this school's policy or that there is insufficient evidence to establish that the alleged conduct occurred as reported does not mean that the report was made in bad faith.
- Example Policy 2: All formal sexual misconduct complaints are assumed to be made in good faith. However, if the evidence establishes that the formal complaint was intentionally falsely made, corrective/disciplinary action may be taken, up to and including suspension, expulsion, or termination. This does not include allegations

that are made in good faith but are ultimately shown to be erroneous or do not result in a policy violation determination.

- Example Policy 3: The respondent is presumed to be not responsible for the alleged conduct until a determination regarding responsibility is made by the decision-maker.
- Example Policy 4: An individual's status as a respondent will not be considered a negative factor during consideration of the grievance. Respondents are entitled to, and will receive the benefit of, a presumption that they are not responsible for the alleged conduct until the grievance process concludes and a determination regarding responsibility is issued. Similarly, credibility determinations will not be based on a person's status as a complainant, respondent, or witness.

## **XII. Determination Regarding Responsibility**

### *Example Policies Used by Elementary and Secondary Schools and Postsecondary Schools*

- Example Policy 1: The school will review the evidence provided by all parties and will make a final determination of responsibility after the investigation. The decision-maker will not be the Title IX Coordinator, the investigator, or any other individual who may have a conflict of interest. The final determination will be provided to the parties at the same time, with appeal rights provided. It will explain if any policies were violated, the steps and methods taken to investigate, the findings of the investigation, conclusions about the findings, the ultimate determination and the reasons for it, any disciplinary sanctions that will be imposed on the respondent, and any remedies available to the complainant to restore or preserve equal access.
- Example Policy 2: The decision-maker will issue a written determination following the review of evidence. The written determination will include: (1) identification of allegations potentially constituting sexual harassment as defined in 34 C.F.R. § 106.30; (2) a description of the procedural steps taken from the receipt of the complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, and methods used to gather evidence; (3) findings of fact supporting the determination, conclusions regarding the application of this formal grievance process to the facts; (4) a statement of, and rationale for, the result as to each allegation, including any determination regarding responsibility, any disciplinary sanctions the decision-maker imposed on the respondent that directly relate to the complainant, and whether remedies designed to restore or preserve equal access to the school's education program or activity will be provided to the complainant; and (5) procedures and permissible bases for the parties to appeal the determination. The written determination will be provided to the parties simultaneously. Remedies and supportive measures that do not impact the respondent should not be disclosed in the

written determination; rather the determination should simply state that remedies will be provided to the complainant.

### **XIII. Sanctions and Remedies**

#### *Example Policies Used by Elementary and Secondary Schools and Postsecondary Schools*

- Example Policy 1: The school will take reasonable steps to address any violations of this policy and to restore or preserve equal access to the school's education programs or activities. Sanctions for a finding of responsibility depend upon the nature and gravity of the misconduct, any record of prior discipline for similar violations, or both. The range of potential sanctions and corrective actions that may be imposed on a student includes, but is not limited to the following: [list of possible sanctions decided on by the school].
- Example Policy 2: When a respondent is found responsible for the prohibited behavior as alleged, sanctions are based on the severity and circumstances of the behavior. Disciplinary actions or consequences can range from a conference with the respondent and a school official through suspension or expulsion. When a respondent is found responsible for the prohibited behavior as alleged, remedies must be provided to the complainant. Remedies are designed to maintain the complainant's equal access to education and may include supportive measures or remedies that are punitive or would pose a burden to the respondent.
- Example Policy 3: Whatever the outcome of the investigation, hearing, or appeal, the complainant and respondent may request ongoing or additional supportive measures. Ongoing supportive measures that do not unreasonably burden a party may be considered and provided even if the respondent is found not responsible.
- Example Policy 4: The role of the Title IX Coordinator following the receipt of the written determination from the decision-maker is to facilitate the imposition of sanctions, if any, the provision of remedies, if any, and to otherwise complete the formal resolution process. The appropriate school official, after consultation with the Title IX Coordinator, will determine the sanctions imposed and remedies provided, if any. The Title IX Coordinator must provide written notice to the parties simultaneously. The school must disclose to the complainant the sanctions imposed on the respondent that directly relate to the complainant when such disclosure is necessary to ensure equal access to the school's education program or activity.
- Example Policy 5: For students with disabilities: If a decision-maker has determined that the respondent has engaged in sexual harassment and prior to consideration of imposing a long-term suspension, reassignment, or recommendation for expulsion, the following shall occur, and timelines will be extended accordingly: (1) For any student with an Individualized Education Program (IEP), or that a school has knowledge may be a child with a disability, the decision-maker will make a referral to the school to conduct a

manifestation determination review (MDR). The MDR team meeting shall convene as soon as reasonably possible and make available to the decision-maker the MDR decision and written rationale in no later than ten school days; (2) For any student with a disability covered by Section 504, the decision-maker will make a referral to have a knowledgeable committee convene a Section 504 Causality Review. The causality review meeting shall convene as soon as reasonably possible and make available to the decision-maker the causality review decision and written rationale in no later than ten school days; (3) Before a student with a disability is suspended, reassigned, or recommended for expulsion, the principal of the school will consult with the student's case manager, review the student's IEP, and take into account any special circumstances regarding the student. The IEP team will consider the parents' views and any preference for the reassignment location along with any location proposed by school staff at the meeting. It is the duty of the IEP team at its meeting to discuss, propose, and decide upon the educational placement, consistent with the disciplinary decision. Accordingly, the IEP team will consider the views of all members, including the parents, at the meeting.

#### **XIV. Appeals**

##### *Example Policies Used by Elementary and Secondary Schools and Postsecondary Schools*

- Example Policy 1: Each party may appeal (1) the dismissal of a formal complaint or any included allegations and/or (2) a determination regarding responsibility. To appeal, a party must submit their written appeal within five business days of being notified of the decision, including the grounds for the appeal. The grounds for appeal are as follows: Procedural irregularity that affected the outcome of the matter (i.e., a failure to follow the institution's own procedures); New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against an individual party, or for or against complainants or respondents in general, that affected the outcome of the matter. The submission of an appeal stays any sanctions for the pendency of an appeal. Supportive measures and remote learning opportunities remain available during the pendency of the appeal. If a party appeals, the school will as soon as practicable notify the other party in writing of the appeal; however the time for appeal shall be offered equitably to all parties and shall not be extended for any party solely because the other party filed an appeal. Appeals will be decided by an individual, who will be free of conflict of interest and bias, and will not serve as investigator, Title IX Coordinator, or decision-maker in the same matter.
- Example Policy 2: Appeals are available after a complaint dismissal or after a final determination is made. Appeals can be made due to procedural irregularities in the

investigation affecting the outcome, new evidence becoming available, or due to bias or a conflict of interest by Title IX personnel that may have affected the outcome. Appeal requests must be made within 30 days of the school's final determination and include the rationale for the appeal. Parties will be given an opportunity to submit a written statement in support of or against the final determination. A new decision-maker will issue the final decision at the same time to each party.

- **Example Policy 3:** The complainant and respondent have an equal opportunity to appeal the policy violation determination and any sanctions. The school administers the appeal process, but is not a party and does not advocate for or against any appeal. A party may appeal only on the following grounds and the appeal should identify the reason(s) why the party is appealing: (1) there was a procedural error in the hearing process that materially affected the outcome; procedural error refers to alleged deviations from school policy, and not challenges to policies or procedures themselves; (2) there is new evidence that was not reasonably available at the time of the hearing and that could have affected the outcome; (3) the decision-maker had a conflict of interest or bias that affected the outcome; (4) the determination regarding the policy violation was unreasonable based on the evidence before the decision-maker; this ground is available only to a party who participated in the hearing; and (5) the sanctions were disproportionate to the hearing officer's findings. The appeal must be submitted within 10 business days following the issuance of the notice of determination. The appeal must identify the ground(s) for appeal and contain specific arguments supporting each ground for appeal. The school will notify the other party of the appeal, and that other party will have an opportunity to submit a written statement in response to the appeal, within three business days. The school will also inform the parties that they have an opportunity to meet with the appeal officer separately to discuss the proportionality of the sanction. The appeal officer, who will not be the same person as the Title IX Coordinator, investigator, or decision-maker, will decide the appeal considering the evidence presented at the hearing, the investigation file, and the appeal statements of both parties. In disproportionate sanction appeals, they may also consider any input the parties provided during the meeting. The appeal officer will summarize their decision in a written report that will be sent to the complainant and respondent within 10 business days of receiving the appeal.

#### **XV. Informal Resolution**

##### *Example Policies Used by Elementary and Secondary Schools and Postsecondary Schools*

- **Example Policy 1:** Informal resolution is available only after a formal complaint has been filed, prior to a determination of responsibility, and if the complainant and respondent voluntarily consent to the process in writing. Informal resolution is not available in cases in which an employee is alleged to have sexually harassed a student. Informal resolution

may involve agreement to pursue individual or community remedies, including targeted or broad-based educational programming or training; supported direct conversation or interaction with the respondent; mediation; indirect action by the Title IX Coordinator; and other forms of resolution that can be tailored to the needs of the parties. With the voluntary consent of the parties, informal resolution may be used to agree upon disciplinary sanctions. Disciplinary action will only be imposed against a respondent where there is a sufficient factual foundation and both the complainant and the respondent have agreed to forego the additional procedures set forth in this school's policy and accept an agreed upon sanction. Any person who facilitates an informal resolution will be trained and free from conflicts of interest or bias for or against either party.

- Example Policy 2: The informal resolution process is only available where the complainant has filed a formal sexual harassment complaint that involves parties of the same status (e.g., student-student or employee-employee) and the parties voluntarily request in writing to resolve the formal complaint through the informal resolution process. Within five workdays of receiving a written request to start the informal resolution process, the school will appoint an official to facilitate an effective and appropriate resolution. The Title IX Coordinator may serve as the facilitator. Within five workdays of such appointment, the parties may identify to the Title IX Coordinator in writing any potential conflict of interest or bias posed by such facilitator to the matter. The Title IX Coordinator will consider the information and appoint another facilitator if a material conflict of interest or bias exists. The facilitator will request a written statement from the parties to be submitted within 10 workdays. Each party may request that witnesses are interviewed, but the school shall not conduct a full investigation as part of the informal resolution process. The facilitator will hold a meeting(s) with the parties and coordinate the informal resolution measures. Each party may have one advisor of their choice during the meeting, but the advisor may not speak on the party's behalf. The informal resolution process should be completed within 30 workdays in most cases, unless good cause exists to extend the time. The parties will be notified in writing and given the reason for the delay and an estimated time of completion. Any resolution of a formal complaint through the informal resolution process must address the concerns of the complainant and the responsibility of the school to address alleged violations of its policy, while also respecting the due process rights of the respondent. Informal resolution process remedies include mandatory training, reflective writing assignment, counseling, written counseling memorandum by an employee's supervisor, suspension, termination, or expulsion, or other methods designed to restore or preserve equal access to the school's education programs or activities. At the conclusion of meetings, interviews, and the receipt of statements, the facilitator will write an informal resolution report and provide the parties with the informal resolution report simultaneously. At any time prior to resolving a formal complaint through the informal resolution process,



either party may withdraw in writing from the informal resolution process and resume or begin the formal resolution process.

- Example Policy 3: The Title IX Coordinator will determine whether it is appropriate to offer the parties informal resolution in lieu of a formal investigation of the complaint. In the event that the Title IX Coordinator determines that informal resolution is appropriate, the parties will be provided written notice disclosing: the allegations, the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared. Both parties must provide voluntary, written consent to the informal resolution process.

**XVI. Addressing Conduct That the School Deems to be Sexual Harassment but Does Not Meet the Definition of Sexual Harassment Under the Title IX Regulations**

*Example Policies Used by Elementary and Secondary Schools and Postsecondary Schools*

- Example Policy 1: It is important to note that conduct that does not meet the criteria under Title IX may violate other federal or state laws or school policies regarding student misconduct or may be inappropriate and require an immediate response in the form of supportive measures and remedies to prevent its recurrence and address its effects.
- Example Policy 2: This school adopts a “two-pronged” approach. All conduct not covered under the current definition of sexual harassment, including sexual misconduct, will be addressed by the principal under the student code of conduct. Title IX procedures will be reserved only for those alleged actions that fall under the Title IX definition of sexual harassment.
- Example Policy 3: The Title IX Coordinator shall investigate the allegations in all formal complaints. The Title IX Coordinator must dismiss the formal complaint if the conduct alleged in the formal complaint would not constitute sexual harassment as defined in this school’s policy even if proved, or is outside the jurisdiction of the school, i.e., the conduct did not involve an education program or activity of the school, or did not occur against a person in the United States. The Title IX Coordinator shall forward the formal complaint to an appropriate school official that will determine whether the conduct alleged in the formal complaint violates a separate policy or code of conduct.

- Example Policy 4: In May of 2020, the U.S. Department of Education issued new regulations for colleges and universities that address sexual assault and other sexual misconduct. These regulations cover certain specific forms of sexual misconduct. To comply with these regulations, this school has revised its existing policy for those types of misconduct. In addition, this school maintains its existing Sexual Misconduct Policy for other types of sexual misconduct that are not covered by the new regulations. Both policies are important to creating and supporting a school community that rejects all forms of sexual misconduct.
- Example Policy 5: The Title IX regulations direct the school’s response to some, but not all, of the forms of prohibited behavior in this school’s Title IX policy. Allegations in a Title IX formal complaint related to behavior that occurs outside of the education program or activity or outside the United States, or behavior that would not meet the definition of Title IX sexual harassment as defined in this school’s Title IX policy, must be dismissed. Both the complainant and respondent may appeal the dismissal of any allegations under Title IX. However, in keeping with the school’s educational mission and commitment to fostering a learning, living, and working environment free from discrimination, harassment, and retaliation, this school will still move forward with an investigation or formal resolution under the same resolution process for all forms of prohibited behavior under this school’s Title IX policy. In this instance, this school is using its Title IX policy as a code of conduct to address behavior that occurred outside of the education program or activity or outside of the United States, even though the behavior falls outside of Title IX jurisdiction under the Department of Education’s 2020 amendments.

**XVII. Parent and Guardian Rights**

*Example Policy Used by Elementary and Secondary Schools*

- Example Policy 1: Consistent with the applicable laws of the jurisdiction in which the school is located, a student’s parent or guardian must be permitted to exercise the rights granted to their child under this school’s policy, whether such rights involve requesting supportive measures, filing a formal complaint, or participating in a grievance process. A student’s parent or guardian must also be permitted to accompany the student to meetings, interviews, and hearings, if applicable, during a grievance process in order to exercise rights on behalf of the student. The student may have an advisor of choice who is a different person from the parent or guardian.

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