



Q & A

OCR's July 20, 2021, Title IX Q&A: What K-12 districts should know

July 30, 2021

As promised by the U.S. Department of Education, the Office of Civil Rights (OCR) issued a new 67-page [Q&A document](#)^[1] regarding Title IX on July 20, 2021. The document describes OCR's interpretation of the responsibilities educational institutions (both K-12 and higher ed) have under Title IX, and the Department's current implementing regulations related to sexual harassment. The Department makes clear that the current regulations remain in effect until any new regulations are implemented. Thus, the guidance is a useful tool for K-12 Title IX teams to review prior to the school year.

What to do when the misconduct is not Title IX sexual harassment

First, OCR devotes a significant portion of the Q&A to the topic of a school district's obligations when Title IX does not apply. The guidance reiterates that the new Title IX regulations do not cover employment claims under Title VII. "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)." Thus, when districts are analyzing harassment complaints and making determinations as to which policies apply (i.e., Title IX, general harassment, discrimination, bullying), schools must remember their obligations under these other laws and policies and consider whether multiple policies/laws apply to a given situation.

Relatedly, OCR emphasizes that schools should use their codes of conduct to ensure a safe and supportive educational environment for all students to address misconduct that falls outside the scope of Title IX. "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.” Q&A p. 7.

The guidance also discusses what constitutes a “prompt and equitable grievance procedure” under Title IX for complaints of sex discrimination that do not include Title IX harassment, stating, “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.” Q&A p. 31.

The guidance contains an appendix with sample policy language

Second, the Q&A contains a useful appendix with excerpts from policies used by actual school districts. If you are reviewing your district’s Title IX policy for the upcoming school year, this would be a great place to get ideas or to use as a resource to double-check against your current policies. For instance, related to the issue of non-Title IX misconduct, example language included in the appendix states, “[t]his 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.”

Also of note among the many other policy examples is language regarding emergency removal and students with disabilities (Q&A p. 51.²):

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.

Difficult interpretation questions are left unresolved

Third, difficult interpretation questions remain. Schools have wrestled with applying the definition of Title IX “sexual harassment” to various fact patterns. For instance, is the conduct in question “severe, pervasive, and objectively offensive?” The guidance document merely lists the regulatory definitions of sexual harassment, but goes no further in providing clarity to schools in how to apply the definitions.

Schools have also struggled with the anti-retaliation language in the regulations which prohibits “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].” The guidance document reiterates this prohibition, stating, “the preamble explains that if a school punishes an individual for violation 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.” Q&A p. 30. The guidance provides no further clarity on disciplining respondents for misconduct in this context, particularly if there is no staff member or student willing to sign the formal complaint. Thus, discipline in these circumstances will still be an issue to consider in

the coming school year, which Title IX coordinators will need to carefully analyze in order to avoid a claim of retaliation.

Also noteworthy is the rule on the retroactive application of the new regulations. The Q&A emphasizes schools “must follow the requirements of the Title IX statute and the regulations that were in place at the time of the alleged incident.” Q&A p. 10. However, there is caselaw that is inconsistent with this interpretation, and what is still unclear is whether OCR interprets this to include the procedures used as well as the substantive policy definitions that were in place prior to August 14, 2020. Thus, schools should work closely with their legal counsel when such questions arise.

Finally, while the guidance document does not contain a great deal of additional interpretation regarding the Title IX regulations issued last year, it is a useful document to share with school administrators as a refresher regarding what is required under the new regulatory scheme. Consider the Q&A to be a summarized version of the Title IX trainings your Title IX team may have attended last year. And, for those who have not been trained, it is a great overview to read prior to attending a training this coming school year—which is still recommended given the regulations are not changing this year. The [Unified Agenda](#) for the U.S. Department of Education indicates that they expect to issue their Notice of Proposed Rulemaking (NPRM) for new Title IX regulations in May 2022. Therefore, the current regulations will remain in effect for the coming 2021–2022 school year, and perhaps longer.

¹ The Q&A states, “[t]his Q&A resource does not have the force and effect of law and is not meant to bind the public or regulated entities in any way. This document is intended only to provide clarity to the public regarding OCR’s interpretations of existing legally binding statutory and regulatory requirements. As always, OCR’s enforcement of Title IX stems from Title IX and its complementing regulations not this or other guidance documents.” Q&A p. 2. However, readers should keep in mind if the guidance quotes the regulations or other laws, that part of the guidance containing legal authority would be binding. The guidance could also become binding if adopted by a court in a particular school’s jurisdiction.

² Other example policies include, but are not limited to intake procedures, supportive measures, investigations and decorum.

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