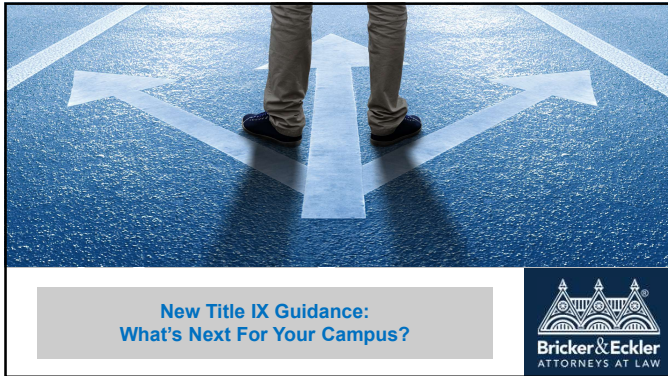




Disclaimer



- We are not giving you legal advice. Consult with your legal counsel regarding how best to address a specific situation.
- Use chat function to ask general questions and hypotheticals.
- We have a variety of stakeholders here, so please keep that in mind.
- There are still no magic answers. (Sorry in advance.)
- Watch for your "Thanks for Attending" email, which will include a link to the slides and to the recording of this webinar.

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Your Presenters



Erin Butcher



Jessica Galanos



Melissa Carleton

Experienced general counsel, independent investigators, and hearing officers

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Agenda



- We've Been Waiting
- A Reminder About Guidance
- Overall Themes
- Key Provisions
- Sample Policy Language

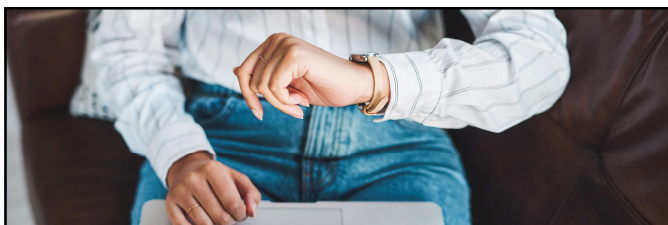
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Posting Permission



- Yes, you may post these materials on your website if you are using them to train your Title IX team.
- See 34 CFR 106.45(b)(10)(i)(D).

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We've Been Waiting
(A Quick Recap of the How We Got Here)

The Regs Are Here!



- After a long wait, the new regulations were released on May 6, 2021 – effective 100 days later (August 14, 2020)
- Implementation guidance was provided by blog
- Q&A released September 4, 2020

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Waning Days of the Trump Administration



- August 31, 2020 – Letters regarding *Bostock* implementation
- January 8, 2021 – Memo on *Bostock* implementation
- January 14, 2021 – Single-Sex Scholarships/Clubs
- January 15, 2021 – New Resources to Help Education Institutions Implement the Title IX Final Regulations (Parts 1 and 2)

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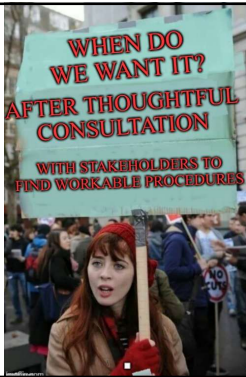
Biden Administration – Key Dates



- January 20, 2021 – Executive Order aligns Title IX with *Bostock*
- February 23, 2021 – OCR enforcement of *Bostock*
- June 2021 – Public Hearings on Regulations

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New Guidance Released



- July 20, 2021
- 37 pages of Q&A
- Another 18 pages of sample policy language

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Guidance Is Not Binding*



- "This 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 interpretation of existing legally binding statutory and regulatory requirements. As always, OCR's enforcement of Title IX stems from Title IX and its implementing regulations, not this or other guidance documents." (p.2)

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What Could Have Been



- Revise implementation guidance that was not specifically required by the regulations
- Define terms that are undefined in ways that could bring clarity and perhaps smooth over some rough parts of the mandated procedures
- Does not appear that OCR took either of those tactics here.

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SECRET Part 100
 [Docket ID ED-2018-OCR-0064]
 RIN 1870-AA14

Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

AGENCY: Office for Civil Rights, Department of Education.
ACTION: Final rule.

SUMMARY: The Secretary of Education amends the regulations implementing Title IX of the Education Amendments of 1972 (Title IX). The final regulations specify how recipients of Federal financial assistance covered by Title IX.

Supplemental Information:
 If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free at 1-800-877-8339.

SUPPLEMENTARY INFORMATION:

Table of Contents

Effective Date
 Executive Summary
 Purpose of This Regulatory Action
 Summary of the Major Provisions of This Regulatory Action
 Timing, Comments, and Changes
 Adoption and Adaptation of the Supreme Court's Framework To Address Sexual Harassment
 Differences Between Standards in Department Guidance and These Final

No Formal Complaint Required To Report Sexual Harassment
 Burden on Complainants To File a Formal Complaint
 Anonymous Reporting and Anonymous Filing of Formal Complaints
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 Complexity of a Document Labeled "Formal Complaint"
 Parents' and Guardians' Rights To File a Formal Complaint
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 Miscellaneous Concerns About the Formal Complaint Definition
 Postsecondary Institution Respondent
 Sexual Harassment
 Overall Support and Opposition for the E.O. 161 on Sexual Harassment Definition

Overall Themes

Themes



- The Preamble is central to the analysis and should be read in conjunction with the regulations for implementation guidance (but note there are a lot of "musts")
- Reluctance to deviate from prior administration's commentary in many situations
- Some attempts at clarity beyond prior administration may create more confusion

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Key Provisions

Q.8 – “Equal Access”

- Answer draws from the preamble to emphasis examples of denying “equal access”
 - Skipping class to avoid a harasser
 - Declining GPA
 - Having difficulty concentrating in class
 - Crying at night due to sexual harassment
 - Quitting a team due to harassment

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Q.8 Not Required to Suffer Loss

- “A complainant does not need to have ‘already suffered loss of education before being able to report sexual harassment.’”
- “School officials turning away a complainant by deciding the complainant was ‘not traumatized enough’ would be impermissible.”
- OCR suggests using Q.8 examples to train your community.

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Q.13

- “What is the appropriate standard for evaluating alleged sexual harassment that occurred before the 2020 amendments took effect?”

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Q.13 Background

- August 5, 2020 Blog Post – “The Rule does not apply to schools’ responses to sexual harassment that allegedly occurred prior to August 14, 2020. The Department will only enforce the Rule as to sexual harassment that allegedly occurred on or after August 14, 2020. With respect to sexual harassment that allegedly occurred prior to August 14, 2020, OCR will judge the school’s Title IX compliance against the Title IX statute and the Title IX regulations in place at the time that the alleged sexual harassment occurred.”

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Doe v. Rensselaer Polytechnic

- 2020 WL 6118492 (Oct. 16, 2020)
- Not retroactive enforcement to require regs to be used for hearings occurring after August 14, 2020
- Blog post is not an “authoritative statement” entitled to deference
- Court not willing to let disciplinary proceedings continue unless parties agree to use new procedure

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Back to Q.13

- “[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.”
- 2020 amendments do not apply to SH occurring before August 14, 2020, even where the complaint is filed after that date
- Our question: is this meant to include *procedures* as well as *substance*?

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Q.14 Employees/Actual Notice

- OCR declined to provide examples of the types of individuals who have "authority to institute corrective measures on the institution's behalf."
 - Case-by-case analysis based on your institution
- Reminder: you may designate these officials in your policy.

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Q.22 Formal Complaints

- What is a formal complaint? Regs tell us.
- OCR states, "an email from a student to the Title IX Coordinator that ends with the student signing their name would suffice."

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Q.23 Complainant Participation

- What counts as "attempting to participate"? Preamble reminders:
 - Withdrawn but wants to re-enroll if SH is addressed;
 - Graduated but intends to apply to a new program *or participate in alumni programs*
 - Leave of absence but intends to re-apply
 - Has applied for admission

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Q.24 Coordinator-Filed Complaints

- “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.”

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Q.27 Respondent Withdraws?

- Discretionary dismissal
- “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.”

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Q.36 Presumption of No Responsibility

- “Q: 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?”
- “A: No. A school should never assume a complainant of sexual harassment is lying or that the alleged harassment did not occur.... 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.”

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Q.43 Create Your Own Hearing Rules?



- Yes! Several citations to preamble. Examples given in Q&A:
 - Limits on evidence introduced at a hearing that was not gathered and presented prior to the hearing
 - Opening/closing statements
 - Objections to relevance
 - Reasonable time limits (!!)
 - Duplicative questions are irrelevant
 - "Could limit the role of advisors to relaying questions drafted by their party."

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Q.44 Decorum Rules?



- Yes!
- OCR indicates that you may address decorum "even when the advisor is asking a question that is relevant to the hearing"

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Q.47 Prior Sexual Behavior



- Draws from preamble
- "Prior sexual behavior" refers to "sexual behavior that is unrelated to the alleged conduct"
- Regulations do not imply that questions and evidence about sexual behavior after an alleged incident are relevant

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Q.49 The Pause for Relevancy

- Preamble requires a pause in the cross-examination process each time a party or witness is asked a cross-examination question to allow decision-maker to determine relevancy
- Q&A continues to emphasize this practice so that “the pace of the cross-examination does not place undue pressure on a party or a witness to answer immediately.”

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Q.53 Non-Statements

- Q&A continues to allow the decision-maker to “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.”
- “In these types of situations, the decision-maker is evaluating whether the statement was made or sent.”

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Q.61 COVID Discipline

- “Q: May a school discipline a [party] or witness for violating the school’s COVID-19 or other policy during a reported incident of sexual harassment?”
- “A: 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 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.”
- Consider: zero tolerance policies.

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Q.65 Sex Discrimination Process

- “OCR has historically looked to whether and how schools have communicated information about their [sex discrimination grievance] procedures, including where to file complaints, to students ... and employees.”
- “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.”

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Q.67 Religion/OCR Complaints

- If an institution has a religious exemption, OCR can still take complaints
- OCR will:
 - Evaluate whether complaint is appropriate for investigation
 - Evaluate whether religious exemption applies to alleged discrimination
 - If exemption applies, OCR dismisses the complaint

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**Sample Policy Language**

Quick Overview of Samples that Apply to Postsecondary Schools

- | | |
|---|---|
| <ul style="list-style-type: none"> I. Receiving and Responding to Reports of Sexual Harassment (aka handling intake) II. Supportive Measures (complete with examples) III. Investigations IV. Role of the Advisor V. Live Hearing Process VI. Behavior During the Live Hearing/Rules of Decorum VII. Protecting the Well-Being of the Parties During the Live Hearing/Investigation VIII. The Cross Examination Process IX. Restrictions on Considering a Complaint's or Respondent's Sexual History | <ul style="list-style-type: none"> X. Situations in Which a Party or Witness Does not Participate in a Live Hearing or in Cross-Examination XI. Presumptions about Complainants, Respondents, and Witnesses XII. Determination Regarding Responsibility XIII. Sanctions and Remedies XIV. Appeals XV. Informal Resolution 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 |
|---|---|

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I. Receiving and Responding to Reports of Sexual Harassment

Consider incorporating both examples

Example Policy 1: Walks through steps of intake for Regs and notes when TIXC may want to sign formal complaint: "in light of a health or safety concern for the community."

Example Policy 2: Underscores for complainants their choices to file a formal complaint, that the decisions to file do not need to be made immediately, and supportive measures available regardless.

II. Supportive Measures (1 of 4)

What each example offers (aim to capture all)

Example Policy 1: definition and examples

Example Policy 2: when available, to whom, role of TIXC, definition

Example Policy 3: when available, examples, limits

Example Policy 4: when available, to whom, why offered, and definition

II. Supportive Measures (2 of 4)

Definition

"Supportive Measures are short-term measures that are designed to restore or preserve access to the school's education program or activity." (Example Policy 1)

"Supportive Measures are temporary and flexible, based on the needs of the individual..." (Example Policy 4)

II. Supportive Measures (3 of 4)

Examples (you probably know these, but it's helpful to have a list)

Examples:

- Counseling
- Extensions of deadlines
- Course-related adjustments
- Modifications to work or class schedules
- Campus escort services
- Mutual restrictions on contact between the parties
- Changes in work or housing locations
- Leaves of absences (consider pay if employee)
- Increased security and monitoring of certain areas on campus
- Assistance in arranging rescheduling of exams and assignments
- Academic support services
- Assistance in 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

II. Supportive Measures (4 of 4)

TIXC role and Reasonableness

TIXC role: "will maintain consistent contact with the parties to ensure that safety and emotional and physical well-being are being addressed...will work with appropriate school resources to provide continued assistance to the parties." (Example Policy 2)

Reasonableness: can provide "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 3)

III. Investigations (1 of 2)

Not much beyond Regulations

Example Policy 1:

- Assignment of investigator
- Notice of allegations
- Investigator unbiased, objective, and free of conflict of interest
- Time and notice for interviews

Example Policy 2:

- Assignment of investigator
- What the investigation may include

III. Investigations (2 of 2)

What the investigation may include

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 Policy 2)

IV. The Role of the Advisor

Three brief examples – the takeaways

- Narrow in scope
- May not actively participate
- May not serve as a proxy for party
- May not intervene in meetings
- May talk quietly with student or pass notes
- All written submissions must be authored by the student (Example Policy 2)

V. The Live Hearing Process (1 of 5)

Before the Hearing, Confidentiality, and Decision-Maker Questioning

- May require a pre-hearing conference (V.A)
- Cannot prohibit the complainant from disclosing the final outcome of a formal complaint process (after any appeals are concluded) (V.D., Example Policy 2)
- Parties and witnesses may refuse to respond to questions by the decision-maker (V.E)

V. The Live Hearing Process (2 of 5)

Hearing Format

Example Policy 1: [Scope](#), typical hearing format

Example Policy 2: Role of decision-maker in questioning

Example Policy 3: Panel, [notes for reference](#), advisor and live video conference

Example Policy 4: Assisted through technology

Example Policy 5: Parties must be allowed to observe all, witnesses only included when questioned

Example Policy 6: Comply with Section 504 of Rehab Act

V. The Live Hearing Process (3 of 5)

Hearing Format: scope and notes

- Hearing "is not intended to be a repeat of the investigation" (Example Policy 1)
- A party or witness appearing before the panel may bring notes for their reference and the decision may for a copy or to inspect the notes (Example Policy 3)

V. The Live Hearing Process (4 of 5)

Evidence – highlighted areas

- "In reaching a determination, the decision-maker will meet with the complainant, respondent, investigator, and any relevant witnesses, but the decision may not conduct their own investigation." (Example Policy 1)
- "Generally the parties may not introduce evidence, including witness testimony, at the hearing that they did not identify during the prehearing process." (Example Policy 2)
- "[P]arties are expected not to spend time on undisputed facts or evidence that would be duplicative." (Example Policy 2)

V. The Live Hearing Process (5 of 5)

Evidence – highlighted areas continued

- "Throughout the hearing, the decision-maker will: (1) Exclude evidence including witness testimony...that is "relevant only to issues not in dispute, or unduly repetitive.." (Example Policy 3)

VI. Behavior During the Live Hearing/Rules of Decorum and VII. Protecting the Well-Being of the Parties

These overlap...but are excellent tools for fair hearings

- Underscore the preamble portions on decision-maker's role maintaining a fair hearing through enforcing decorum
- Can call a break after repeated violations of appropriate decorum (VI. Example Policy 1) – there are preamble portions with removal
- Can include "a party's right to have their support person available to them at all times during the hearing (in addition to their advisor)" (VII. Example Policy 2)

VIII. The Cross-Examination Process

Follows Regs

- Contemplates two types of cross-examination through an advisor:
 - The advocate approach
 - The proxy approach (party prepares questions for other party and witnesses in a written document, provides to their advisor, and advisor asks only questions from the written document) (Example Policy 3)

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

Closely follows Regs

- Not much new here that isn't in the Regulations, but arguably a little more evenhanded towards Respondents by underscoring:
 - "The investigator will not, as a general rule, consider the sexual history of a complainant or respondent." (Example Policy 1)
 - "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)

X. Situations in Which a Party or Witness Does Not Participate in a Live Hearing or in Cross Examination

Follows Regs, with one highlight

- Not much new here-closely follow regulations
- "An investigator or decision-maker, in the investigation or the hearing respectively, will reach findings and conclusions based on the information available." (Example Policy 2)
- Doubles down: SANE reports, medical reports, etc., "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." (Example Policy 4)

XI. Presumptions about Complainants, Respondents, and Witnesses

Essentially, don't make presumptions

- Closely follows regulations and not much interesting here

XII. Determination Regarding Responsibility and XIII. Sanctions and Remedies

Follows Regs, with a few highlights

- Be sure to remember to describe whether remedies designed to restore or preserve equal access to the school's education program or activity will be provided to the complainant/restore and preserve equal access
- Follow your sanctioning guidelines or grids
- Be mindful of Section 504 of the Rehab Act

XIV. Appeals

Follows Regs, with a few optional new bases of appeal and underscoring flexibility of school to determine in time to appeal after 5-day minimum

- Two (optional) additional bases of appeal provided:
 - "the determination regarding the policy violation was unreasonable based on the evidence before the decision-maker"
 - "the sanctions were disproportionate to the hearing officer's findings"
 (Example Policy 3)
- Examples range from 5 days to 30 days for parties to appeal after a decision

XV. Informal Resolution

Underscores flexibility of schools and can impose discipline

- The examples underscore the discretion of the school to select the type of informal resolution
- Facilitated mediation example provided in Example Policy 2
- Clear that can impose discipline if parties agree as part of process
- But note: "Disciplinary action will only be imposed against a respondent where there is 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." (Example Policy 1)

XVI. Addressing Conduct That the School Deems to be Sexual harassment but Does not Meet the Definition of Sexual Harassment Under the Title

Lengthy heading nearly says it all...

- As we knew, yes, you can still address conduct that falls outside of Title IX.
- Provides some language to explain to students/employees why this may be happening (Example Policy 4)

Upcoming Events



- Title IX workshops (www.bricker.com/titleix)
 - August, November, and February (2022) Level 1/Level 2 Series
 - Level 3 series is coming soon – schedule should be out in the next week
 - In-person "skill building" sessions with mock interviews and mock hearings

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Free Higher Ed Webinars



- August 20, 12:00 ET: "What You Missed This Summer"
- September 17, 12:00 ET: "Hazing in Ohio"
- October 14, 12:00 ET: "Title VI in Higher Ed"
- November 17, 12:00 ET: "Title IX Litigation Update"
- December 7, 12:00 ET: "Deep Dive Into Governance"
- January 28, 2022, 12:00 ET: "Data Privacy and Security"
- Register at: www.bricker.com/events

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