

## TITLE IX COORDINATOR CERTIFICATION (K-12) FOUR SESSION SERIES

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### SUPPLEMENTAL MATERIALS

#### I. FERPA and Disclosure of Evidence to Parties under Title IX.

- A. The new regulations require the investigator to, prior to completion of the investigation report, send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy.
- B. The preamble to the new regulations provides this information related to non-disclosure / redaction of evidence or information:

“Recipients may require parties and advisors to refrain from disseminating the evidence (**for instance, by requiring parties and advisors to sign a non-disclosure agreement that permits review and use of the evidence only for purposes of the Title IX grievance process**), thus providing recipients with discretion as to how to provide evidence to the parties that directly relates to the allegations raised in the formal complaint.

With regard to the sharing of confidential information, a recipient may permit or require the investigator to redact information that is not directly related to the allegations (or that is otherwise barred from use under § 106.45, such as information protected by a legally recognized privilege, or a party's treatment records if the party has not given written consent) contained within documents or other evidence that are directly related to the allegations, before sending the evidence to the parties for inspection and review.

Further, as noted above, recipients may impose on the parties and party advisors restrictions or require a non-disclosure agreement not to disseminate any of the evidence subject to inspection and review or use such evidence for any purpose unrelated to the Title IX grievance process, as long as doing so does not violate these final regulations or other applicable laws.

We reiterate that redacting ‘confidential’ information is not the same as redacting information that is not ‘directly related to the allegations’ because information that is confidential, sensitive, or private may still be ‘directly related to the allegations’ and thus subject to review by both parties. Similarly, a recipient may permit or require the investigator to redact from the investigative report information that is not relevant, which is contained in documents or evidence that is relevant.”

*See Federal Register*, Vol. 85, No. 97 (May 19, 2020), page 30304.

## II. Recent Developments Related to Title IX.

- A. On January 15, 2021, the Office for Civil Rights issued a document entitled Part 1: Questions and Answers Regarding the Department's Final Title IX regulations. <https://www2.ed.gov/about/offices/list/ocr/docs/qa-titleix-part1-20210115.pdf>
- B. On January 15, 2021, the Office for Civil Rights issued a document entitled Part 2: Questions and Answers Regarding the Department's Final Title IX regulations. <https://www2.ed.gov/about/offices/list/ocr/docs/qa-titleix-part2-20210115.pdf>
- C. On July 20, 2021 (and **updated on June 28, 2022**), the U.S. Department of Education issued a *Questions and Answers on Title IX Regulations on Sexual Harassment*. The Q & A addresses 67 questions covering a variety of topics. The Guidance confirms that, until any new regulations go into effect, the 2020 amendments remain in place. The Guidance reflects OCR's interpretation of those regulations and largely relies on language in the preamble to the 2020 amendments. Neither the preamble nor the Guidance are binding law, but may be helpful for institutions to follow in implementing the law. <https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf>
- D. On August 24, 2021, the U.S. Department of Education issued a *Letter to Students, Educators and Stakeholders regarding Victim Rights Law Center v. Cardona*. The U.S. Department of Education's Office for Civil Rights issued a letter to students, educators, and other stakeholders explaining that, pursuant to a court order, postsecondary institutions are no longer subject to the part of 34 C.F.R. § 106.45(b)(6)(i) that prohibits decision-makers in Title IX proceedings from considering any statement from a person who did not submit to cross-examination. <https://www2.ed.gov/about/offices/list/ocr/docs/202108-titleix-VRLC.pdf>
- E. On June 23, 2022, the Department of Education released proposed changes to the Title IX regulations. <https://www.ed.gov/news/press-releases/us-department-education-releases-proposed-changes-title-ix-regulations-invites-public-comment>
- F. In February 2023, the Department of Education released several publications on Title IX and Athletic Opportunities (see Publications tab). <https://www2.ed.gov/about/offices/list/ocr/frontpage/pro-students/issues/sex-issue04.html>
- G. In April 2023, the Department of Education issued an amendment to the Title IX regulations on eligibility for athletic teams for students. <https://www.ed.gov/news/press-releases/fact-sheet-us-department-educations-proposed-change-its-title-ix-regulations-students-eligibility-athletic-teams>

### III. Pregnancy and Accommodations.

The EEOC issued guidance clarifying the terms of pregnancy discrimination under the law. <https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues>

### IV. Link to Title IX Regulations.

OCR has included a link to the current regulations under 34 C.F.R. part 106 under its discussion of the overview of the law related to sex discrimination. <https://www2.ed.gov/policy/rights/guid/ocr/sexoverview.html>

### V. Title IX and Off-Campus Conduct

Title IX requires recipients to address all sex discrimination in their education programs or activities.

Under the proposed regulations, conduct that occurs in a recipient's education program or activity includes: conduct that occurs off-campus when the respondent is a representative of the recipient or otherwise engaged in conduct under the recipient's disciplinary authority. Proposed § 106.11

Under the proposed regulations, a recipient would be required to address a sex-based hostile environment in its education program or activity, including when sex-based harassment contributing to the hostile environment occurred outside the recipient's education program or activity or outside the United States.

### VI. Standards of Evidence and Title IX

The preponderance of the evidence requires a determination that it is **more likely than not** that the respondent engaged in the alleged sexual harassment.

The clear and convincing standard requires a determination that sufficient evidence has been presented to make it **highly probable to be true** that the respondent engaged in the alleged sexual harassment.

### VII. Anonymous Complaints and Title IX

Such complaints are addressed under Question 11 of the January 15, 2021, Question and Answer guidance. <https://www2.ed.gov/about/offices/list/ocr/docs/qa-titleix-part1-20210115.pdf>