



TO: Melissa Flores, Interim General Counsel

FROM: Jason Sweat, Associate General Counsel for Title IX, ADA/504 Compliance

DATE: August 20, 2021

RE: Title IX Developments— Department of Education Title IX Question and Answer Document and Recent Court Case Victim Rights Law Center, et al. v. Miguel Cardona and Suzanne Goldberg (D. Mass., July 28, 2021).

This memorandum is a summary of the key takeaways from the recently published Department of Education Title IX Question and Answer Document and the recent court case decision in Victim Rights Law Center, et al. v. Miguel Cardona and Suzanne Goldberg (D. Mass, July 28, 2021

The recently published DOE Title IX Question and Answer Document (Q&A) provided elaboration on many points of the 2020 Title IX amendments. In addition of several pages of information provided in a question and answer format, the Q&A also included several pages of policy samples. The Department of Education (DOE) articulated that the policy samples provided were for reference only, to “illustrate choices that different schools have made about communicating their procedures to students and their communities.” Q&A pg. 38. The DOE further stated that the 2020 amendments “do not necessarily require the approaches in the examples here ... [and that 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. *Id.* While the entire document was analyzed to determine the necessity of updating MCCCDC policies, significantly more weight was given to the question and answer portion of the Q&A than the policy examples in light of these statements.

This Q&A “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.” (Q&A pg. 1). The Q&A largely reasserts and expounds upon the preamble to the 2020 Title IX amendments (2020 amendments) and also the Final Rule. Each of the questions presented in the Q&A receive satisfactory treatment under the current MCCCDCD policy. Although the Q&A did not deviate significantly from the prior interpretation of the 2020 amendments, it did provide more expansive guidance on some complicated or controversial portions of the amendments. Included below are the areas that offer novel interpretation points or significant explanation.

*School ability to maintain processes more prescriptive than those in the 2020 amendments and undertake prevention efforts*

Question 2 of the Q&A states clearly that a school may maintain a process/policy that goes beyond the requirements set forth in the 2020 amendments (such as adopting best practices for supporting sexual harassment survivors), and Question 3 reiterates the prior DOE statement that schools should also try to prevent sexual harassment from occurring. Question 6 reiterates the school ability to adopt its own definition of consent. Question 27 reiterates that a school may use trauma-informed approaches when responding to formal complaint. Question 58 reiterates a school’s discretion to offer informal resolution processes and the form of such processes, within the bounds set forth in the rules.

The inclusion of these questions and answers at the beginning and throughout the document serve as a bridge between the Title IX framework prior to the 2020 amendments and the current Title IX regulation. With the emphasis on response to alleged harassment given in the 2020 amendments, the current DOE states that the 2020 amendments acknowledged the importance of school specific policies and procedures and also that schools are not just allowed, but “should endeavor to *prevent* sexual harassment in the first place.” Q&A pg. 4. With many educators, commenters, experts, and others expressing concern that the 2020 amendments eroded victim rights, these questions and answers set the interpretational tone of the current OCR: that the 2020 amendments allow for preventative training and adopting best practices for supporting survivors of sexual harassment.

<sup>1</sup> Question 10: How should a school determine whether it has substantial control over the respondent and context in an off-campus setting? Q&A pg. 9.

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? Q&A pg. 9.

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? Q&A pg. 30.

The reiteration of a school's ability to set its definition of consent is notable because many institutions define consent in a way that places significant responsibility on potential respondents to determine consent. Note, these statements are not a divergence from the preamble and the Final Rule of the 2020 amendments. However, the fact that these were among the first questions addressed is notable for understanding where the current OCR will draw interpretation direction.

*2020 amendment application to harassment taking place off-campus, electronically, and Covid-19 specific guidance<sup>1</sup>*

Questions 10 and 11 address how schools should analyze alleged harassment taking place off-campus/ online, and Question 61 addresses school ability to discipline a complainant, respondent, or witness for violation of a school's COVID-19 policy during a reported incident. It is likely that the DOE addressed these matters specifically in contemplation of the 2020-2021 operational reality of most schools conducting class online only. The 2020 amendments were drafted prior to the unique education challenges presented by COVID-19, and while these questions and answers do not deviate from the amendments, the DOE clarifies interpretation in the following ways:

- In all cases the school should undertake a fact-specific determination regarding substantial control, and that some situations may result that the school has 'substantial control' over an incident even when the conduct occurs off-campus (e.g. "a teacher employed by the school visits a student's home ostensibly to give the student a book but in reality to instigate sexual activity with the student.") Q&A pg. 9.
- Online systems are not excluded from school operations or control and the 2020 amendments draw no distinctions between in person versus online harassments. Q&A pg. 9.
- A school's ability to punish an individual for violations of other school policies depends on whether it adopts a consistent 'zero-tolerance policy' for that type of conduct violation, otherwise it is considered retaliation. Q&A pg. 31.

Therefore, with the reality of much of the education environment occurring in a virtual format, these clarifications inform schools of how to consider harassment claims that occur in the context of the virtual classroom/ distance learning. Current MCCCDCD policy proactively addresses the online harassment issues under "XII-Online Harassment and Misconduct" A.R. 5.1.16 - Title IX Sexual Harassment Policy.

*Standard for evaluating alleged harassment that occurred before the 2020 amendments*

Question 13 of the Q&A states that the 2020 amendments are not retroactive. All alleged Title IX incidents that take place prior to the 2020 amendments must be addressed but the regulations in place at the time of the incident, even if the school's response takes place after the 2020 amendment implementation date. Notable is the specific mention that although rescinded, the OCR guidance documents from 2001, 2011, 2014, and 2017 remain accessible on the OCR website "to the extent that they are helpful to schools when responding to earlier allegations of sexual harassment." Q&A pg. 10. The OCR makes clear by this interpretation that for conduct alleged prior to the 2020 amendment implementation date, schools should utilize the prior documents and that the OCR will enforce the response according to these prior guidance documents. The current MCCCDCD policy likewise maintains an archived copy of the Title IX policy from prior to the updated policy implemented in compliance with the 2020 amendments, and so when addressing these allegations, it is important to train Title IX Coordinators and Investigators that the processes will vary depending on when the alleged Title IX incident transpired.

*How to address complainants not currently enrolled in, attending, or affiliated with the school*

Questions 23, 24, and 25 address complainants who are not enrolled in, attending, or even affiliated with the school. It is novel that in answer to Question 24<sup>2</sup>, the DOE sets the assets that even in some cases where a complainant may not be affiliated with the school in any way, "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 approach goes beyond the text of the Final Rule regarding a complainant needing to be participating in or attempting to participate in an educational program, but makes sense given the overall obligation of schools "to provide all students, not just the complainant, with an educational environment that does not discriminate based on sex." Q&A pg. 15. The answer to Question 25<sup>3</sup> further reiterates this obligation and refers to the answer in Question 24. MCCCDCD currently performs this analysis and trains coordinators along these lines, and so this DOE interpretation does not impact current MCCCDCD practices.

<sup>2</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? Q&A pg. 15.

<sup>3</sup> 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? Q&A pg. 16.

## *Live Hearings*

Of the 67 questions presented in the Q&A, 18 related to the live hearing requirement of the 2020 amendments, Questions 38-55. This is nearly 27% of all questions presented and answered, and easily represents the largest of the 17 sections that the DOE used to organize the questions/answers. Live hearings have been the most complex and controversial of the 2020 amendments and so it is unsurprising that so much attention was given to this topic in the Q&A document. Most of the information in these questions/answers reiterate information in the preamble and Final Rule. The general theme of these questions and answers are that schools have a fair bit of latitude to implement its own rules to operationalize the live hearing requirement. The policy examples in the appendices provide more illumination regarding how some institutions have implemented their own rules and processes surrounding live hearings.

Notable is Question 48 “Can cross-examination include questions about an individual’s medical or mental-health records?”, and the answer “Questions that seek information about any party’s medical, psychological, and similar records are not permitted unless the party has given written consent.” This answer seems to be novel in that the preamble and rule don’t seem to address this directly. In function, MCCC’s use of a privileged log of information and practices in gathering and use of evidence help prevent this issue. MCCC’s Decision Maker training materials<sup>4</sup> cover this subject but it might be helpful to expand on the information provided in the training.

One interesting expansion to the 2020 amendments is found in the answer to Question 43<sup>5</sup>. In addition to reaffirming that an advisor’s cross examination role is satisfied where the advisor poses questions on a party’s behalf, the DOE here states. “[t]hus, for example, a postsecondary school could limit the role of advisors to relaying questions drafted by their party.” Limiting an advisor to relaying drafted questions indicates a degree of school management that did not seem allowed by the 2020 amendments. This interpretation further emphasizes that a school has the ability to set their own rules for live hearings.

Also notable is that the DOE does not deviate from the controversial rule that states that if a party or witness does not participate in a live hearing or submit to cross-examination then the Decision maker cannot rely on any statement made by that party or witness in making a determination. This is addressed in Question 51. It was supposed that this might be a point of divergence in interpretation under the current DOE, but in this document, there is no change in interpretation or enforcement. Note that there was a recent course case that may impact this very point, which is addressed below.

From the appendices, there are no interpretation deviation from prior guidance and the DOE is clear that these are provided as examples to demonstrate how some schools have decided to implement the 2020 amendments.

### **Recent Court Case**

Victim Rights Law Center, et al. v. Miguel Cardona and Suzanne Goldberg (D. Mass, July 28, 2021). (Cardona case). This recent case involved four victim advocates rights groups and three individuals as plaintiffs, who brought this action to challenge the Department of Education's May 19, 2020, Final Rule on Title IX and Sexual Harassment. Essentially, the Plaintiffs alleged many provisions of the final rule 1) undermined the purpose of Title IX, 2) amounted to ultra vires rulemaking, or 3) came about as a result of arbitrary and capricious decision making in violation of the Administrative Procedures Act.

The court upheld most of the final rule, but determined that §106.45(b)(6)(i) was arbitrary and capricious. This is the section of the rule which prohibits a Decision Maker from considering statements not subject to cross-examination due to lack of participation in live hearing.

While the court declared the provision unlawful, it did not go so far as to implement a nationwide stay or injunction on the DOE's enforcement of that provision. However, in the August 10, 2021 order of the court implementing its decision, it vacated §106.45(b)(6)(i). This has a broader effect than the original ruling as it applies nationwide. The DOE is unlikely to enforce this provision, given that it is one of the most onerous elements of the 2020 amendments. The fact that this action is a vacatur presents an interesting implementation consideration, as there is no automatic or prescribed effect on school policies and procedures, and yet school administrators may elect to make a change. Ultimately, a school may utilize their portions of policies relating to the vacated section, but they also may elect to remove such portions of policies as these portions. With the analysis that this section of the rule is unlawful, it behooves schools to remove implementing language related to this specific section.

<sup>4</sup> Title IX Sexual Harassment Training: Informal Resolution and the Hearing Process, Slide # 28.  
<https://district.maricopa.edu/sites/default/files/documents/Title%20IX%20Informal%20Resolution%20and%20Live%20Hearing%20Presentation%20for%20ADVISORS.2020.pdf>

<sup>5</sup> Question 43: May a school create its own rules for conducting a live hearing? Q&A pg. 22.s

Therefore, while there are signals that there may be more formal changes to this portion of the 2020 amendments, at MCCCDC we should proceed in compliance with current rules, with the one exception being §106.45(b)(6)(i). Portions of policy, procedure, and training relating to this section may be removed with a high degree of confidence that the DOE will not directly violate the vacatur to attempt to enforce this section which the current administration likely has no desire to enforce.

**Conclusion:** There is nothing in the Q&A document nor the Cardona case that would require an MCCCDC policy update. Rather, the only update would be to remove portions related to the suppression section.

Generally, the Q&A reassured institutions that certain pre-amendment practices were not forbidden (e.g.-establishing a 60-day timeline for resolving a complaint), but rather that the institutions have discretion to determine what works best for each institution “based on [its] own unique attributes.” Q&A pg. 20. The information provided in the Q&A will serve as useful aides in successfully executing live hearings and addressing specific questions such as how to comply in consideration of the COVID-19 impacted educational environment. This additional guidance should be included in training documents and in updated checklists/aides for processes. This is also true of the Cardona Case. The result of this case, in conjunction with the current DOE process of adjusting Title IX, signals that it will be necessary to update the MCCCDC Title IX policy at some point in the future. However, the current MCCCDC policy remains compliant and only minor adjustments to policy in the form of removal of language are necessary in light of the Q&A or the recent Cardona case.