

Title IX in K-12 Schools

Training Title IX – New Guidance July 29, 2020



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Key Provisions of the DOE's New Title IX Regulation

- ▶ Defines sexual harassment to include sexual assault, dating violence, domestic violence and stalking, as unlawful discrimination on the basis of sex.
- ▶ Provides a consistent, legally sound framework on which survivors, the accused and schools can rely.
- ▶ Requires schools to offer clear, accessible options for any person to report sexual harassment.
- ▶ Requires the school to offer survivors supportive measures, such as class or dorm reassignments or no-contact orders.
- ▶ Protects K-12 students by requiring elementary and secondary schools to respond promptly when any school employee has notice of sexual harassment.



Key Provisions of the DOE's New Title IX Regulation

- ▶ Holds colleges and universities responsible for off-campus sexual harassment at houses owned or under the control of school-sanctioned fraternities and sororities.
- ▶ Requires colleges and universities to provide students the right to written notice of allegations, the right to an adviser and the right to submit, cross-examine and challenge evidence at a live hearing.
- ▶ Shields survivors from having to come face to face with the accused during a hearing and from answering questions posed personally by the accused.



Key Provisions of the DOE's New Title IX Regulation

- ▶ Requires schools to select one of two standards of evidence, the preponderance of the evidence standard or the clear and convincing evidence standard—and to apply the selected standard evenly to proceedings for all students and employees, including faculty.
- ▶ Provides “rape shield” protections and ensures survivors are not required to divulge any medical, psychological or similar privileged records.



Key Provisions of the DOE's New Title IX Regulation

- ▶ Requires schools to offer an equal right of appeal for both parties to a Title IX proceeding.
- ▶ Gives schools flexibility to use technology to conduct Title IX investigations and hearings remotely.
- ▶ Protects students and faculty by prohibiting schools from using Title IX in a manner that deprives students and faculty of rights guaranteed by the First Amendment.



Defining Sexual Harassment

- ▶ An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct (quid pro quo);
- ▶ 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 recipient's education program or activity; or
- ▶ "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).



Defining Sexual Harassment

- ▶ In these final regulations, the Department retains reference to sexual assault under the Clery Act, and additionally incorporates the definitions of dating violence, domestic violence and stalking in the Clery Act as amended by the Violence Against Women Act.
- ▶ The final rule also provides definitions for “complainant,” “respondent,” formal complaint” and “supportive measures.”



Charter School's Response to Allegations/Knowledge of Sexual Harassment

- ▶ Once the Charter School has actual knowledge of sexual harassment or allegations of sexual harassment, the Charter school must respond or take action.
- ▶ The Charter School has “actual knowledge” when it has been given notice that a person may have been victimized by sexual harassment.



Charter School's Response to Allegations/Knowledge of Sexual Harassment

- ▶ Any person, whether the alleged victim or a parent, friend, or bystander, has the right to report sexual harassment to put the Charter school on notice.
- ▶ A report to any school employee will result in the Charter School having “actual knowledge.”



Charter School's Response to Allegations/Knowledge of Sexual Harassment

- ▶ The Charter School cannot be “deliberately indifferent” in responding to a complaint of sexual harassment.
- ▶ That means that it cannot be “clearly unreasonable” in light of the known circumstances.



Charter School's Response to Allegations/Knowledge of Sexual Harassment

- ▶ Upon receipt of a complaint, the Title IX Coordinator must act promptly, and must provide the following information to the complainant:
 - ▶ The availability of supportive measures
 - ▶ The right to file a complaint
 - ▶ How to file a complaint



Supportive Measures

- ▶ Examples of supportive measures include:
 - ▶ Counseling
 - ▶ Extension of deadlines
 - ▶ Modification of work or class schedules
 - ▶ Escort services
 - ▶ Mutual restrictions on contact between individuals



Supportive Measures

- ▶ The Title IX Coordinator is responsible for implementing these supportive measures and must consider the alleged victim's wishes when it comes to requests for supportive measures.
- ▶ Generally, these measures must remain confidential between the parties and any School personnel who are responsible for implementing these measures.



Grievance Procedures

- ▶ The Charter School should follow a grievance process, that complies with the Final Rule, before the imposition of any disciplinary sanctions or other actions against a respondent that are not supportive measures.
- ▶ The Charter School should not restrict rights protected under the U.S. Constitution, including the First Amendment, Fifth Amendment, and Fourteenth Amendment, when complying with Title IX.



Grievance Procedures

- ▶ The Title IX Coordinator should be capable of conducting a thorough and complete investigation and should seek advice and assistance from the Board of Trustees if the Title IX Coordinator believes that he or she lacks the capacity to conduct a thorough and complete investigation of the alleged misconduct.



Grievance Procedures

- ▶ Once the Title IX Coordinator completes his/her investigatory report, the case should be turned over to a neutral decision maker for the hearing process.
- ▶ A neutral decision maker must be a person(s) who is free from all conflicts of interest or bias for or against complainants or respondents and must receive special training about how to be impartial and how to decide what evidence is relevant.



Grievance Procedures

- ▶ Both complainant and respondent have equal rights throughout the entire investigation and hearing process, including, but not limited to, the opportunity to present witnesses and evidence, including expert witnesses.
- ▶ K-12 schools do not need to hold a hearing, live or otherwise, but parties may submit written questions for the other parties and witnesses to answer;



Grievance Procedure, cont'd

- ▶ Apply a presumption that the respondent is not responsible during the grievance process (often called a “presumption of innocence”), so that the school bears the burden of proof and the standard of evidence is applied correctly;
- ▶ Use either the preponderance of the evidence standard or the clear and convincing evidence standard (and use the same standard for formal complaints against students as for formal complaints against employees);



Informal Resolution

- ▶ The regulations permit the school to offer and facilitate informal resolution options, such as mediation or restorative justice, if both parties give voluntary, informed, written consent after both parties have been given written notice of the allegations in the complaint. This consent may be withdrawn at any time in favor of a formal grievance procedure. The school may not provide the informal resolution process when the allegations involve employee sexual harassment of a student. The school cannot offer the informal resolution process as a condition of enrollment or employment or waiver of the right to a formal investigation. Additionally, the school can only provide an informal resolution process after receiving a formal complaint.



Retaliation

- ▶ Complaints alleging retaliation may be filed according to the Charter school's prompt and equitable grievance procedures.
- ▶ The exercise of rights protected under the First Amendment does not constitute retaliation.



Appeals

- ▶ Both the complainant and respondent are permitted to appeal a determination of responsibility.
- ▶ Appeals can be taken:
 - ▶ After a dismissal before the grievance process, whether mandatory or discretionary
 - ▶ At the end of the grievance process



Grounds for Appeal

- ▶ A procedural irregularity affected the outcome of the matter
- ▶ New evidence has been discovered that was not reasonably available at the time of the determination on responsibility or dismissal
- ▶ A conflict of interest on the part of a Title IX Coordinator, an investigator who compiled evidence, or a decision maker, and the conflict of interest affected the outcome



Scenario

A Board Member for Relaxed Charter School receives word that a teacher at the Charter School is involved in an inappropriate sexual relationship with a 16-year old student.

The Board Member does nothing about it for fear that the newspapers will get a hold of the information and it will make the school look bad.

- Appropriate Action?
- Consequence(s) of Action?
 - Alternative Action?

