



WHITE & STORY<sup>LLC</sup>

ATTORNEYS AT LAW

## TITLE IX: NEW RULES

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## WHAT IS TITLE IX?

- Title IX is a Federal Law that prohibits discrimination on the basis of sex.
  - Sex
  - Sexual Orientation
  - Gender Identity
- Title IX Funding – Public Schools
  - Athletics
  - Education

## NEW RULES: WHY NOW? WHAT ARE THE REASONS?

- First Amendment
  - OCR can never require a school to violate the First Amendment.
  - When OCR investigates a school for possible Title IX violations, OCR will never view a school's attempt to suppress free speech as an appropriate response to sexual harassment.
- Due Process
  - New grievance process and investigation ensures full due process for complainant and respondent
- Equal Access to Education
  - MAIN focus of this portion of Title IX – not restrict anyone's right to an education
  - Treat both parties equally, regardless of their status as male or female

# ROADMAP

- Notice to the School: Actual Knowledge
- Definition of Sexual Harassment
- Sexual Harassment Occurring in a School's "Education Program or Activity" and "In the USA"
- Accessible Reporting to Title IX Coordinator
- Adoption and Publication of Title IX Procedures
- School's Mandatory Response Obligations
  - Definitions
  - "Supportive Measures"
- Grievance Process: General Requirements
- Investigations
  - Title IX Coordinators
  - Investigators
  - Decision-Makers
- Hearings
- Rape Shield
- Standard of Evidence
- Written Determination
- Appeals
- Informal Resolutions
- Retaliation Prohibited

## NOTICE TO THE SCHOOL: ACTUAL KNOWLEDGE

- K-12 schools **MUST** respond whenever **ANY** employee has notice of sexual harassment, including allegations of sexual harassment
- K-12 employees are still mandatory reporters of child abuse
- Notice to the Title IX Coordinator **OR** to an official with authority to institute corrective measures on the recipient's behalf, charges a school with ***actual knowledge*** and triggers response obligations
- In elementary and secondary schools, telling any school employee **always** puts the school on notice

## NOTICE TO THE SCHOOL: ACTUAL KNOWLEDGE

- ***Actual Knowledge:***
  - Any person, whether the alleged victim or a parent, friend, or bystander, has the right to report sexual harassment to put the school on notice
  - School personnel may sometimes personally witness sexual harassment

## DEFINITION OF SEXUAL HARASSMENT

- The rule defines sexual harassment broadly to include any of three types of misconduct on the basis of sex, all of which jeopardize the equal access to education that Title IX is designed to protect:
  - *Quid pro quo* definition
  - *Davis* definition
  - Clery Act and VAWA definition

## QUID PRO QUO

- *Quid Pro Quo*: Offering a benefit in exchange for unwelcome sexual conduct
  - ONLY a school employee can commit
- *Quid Pro Quo* harassment is not evaluated for severity, pervasiveness, offensiveness, or denial of equal educational access, because such misconduct is sufficiently serious to deprive a person of equal access.

## DAVIS DEFINITION

- *Davis* definition:
  - Unwelcome conduct (determined by a reasonable person to be) so severe *and* pervasive *and* objectively offensive conduct that effectively denies a person equal access to a school's education program or activity
- Where unwelcome sex-based conduct consists of speech or expressive conduct, schools must balance Title IX enforcement with respect for free speech and academic freedom under the First Amendment

## CLERY ACT AND VIOLENCE AGAINST WOMAN ACT (VAWA)

- Clery Act
  - Any instance of sexual assault
- VAWA
  - Dating violence, domestic violence, or stalking
- Clery Act/VAWA offenses are not evaluated for severity, pervasiveness, offensiveness, or denial of equal educational access, because such misconduct is sufficiently serious to deprive a person of equal access.

## SEXUAL HARASSMENT “OCCURRING IN A SCHOOL’S EDUCATION PROGRAM OR ACTIVITY” AND “IN THE USA”

- Schools must respond when sexual harassment occurs in the school’s education program or activity, **AGAINST** a person in the United States
- Education program or activity includes:
  - Locations, events, or circumstances over which the school exercises substantial control over both the respondent and the context in which the sexual harassment occurs
  - All education program or activities, whether on-campus or off-campus

## ACCESSIBLE REPORTING TO TITLE IX COORDINATOR

- Each school must designate and authorize at least one employee to coordinate its efforts to comply with its Title IX responsibilities:
  - “Title IX Coordinator”
- School must notify applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions, of the employee or employees designated as the Title IX Coordinator:
  - Name or title
  - Office address
  - E-mail address
  - Telephone number

# ADOPTION AND PUBLICATION OF TITLE IX PROCEDURES

- Any person may report sex discrimination, including sexual harassment – whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment:
  - In person,
  - By mail,
  - By e-mail, or
  - By telephone
- Using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person’s verbal or written report
  - This report can be made at any time (including non-school hours)
- Schools **MUST** prominently display on their websites the required contact information for the Title IX Coordinator

## SCHOOL'S MANDATORY RESPONSE OBLIGATIONS

- A school must respond ***promptly*** to Title IX sexual harassment in a manner that is not deliberately indifferent, which means in a way that is not clearly unreasonable in light of the known circumstances.
- Title IX Coordinator **must** provide the following information to the individual:
  - The availability of supportive measures;
  - The right to file a formal complaint; AND
  - How to file a formal complaint

## DEFINITIONS

- **“Complainant”**: individual *who is alleged to be the victim* of conduct that could constitute sexual harassment
  - The Final Rule expressly recognizes the legal rights of parents and guardians to act on behalf of parties (including by filing formal complaints) in Title IX matters.
- **“Respondent”**: individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment

## DEFINITIONS

- **“Formal Complaint”**: a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the school investigate the allegation of sexual harassment.
  - At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the school with which the formal complaint is filed.
  - A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator under the Final Rule, and by any additional method the school designates.
  - **“Document filed by a Complainant”** = a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the school) that contains the complainant’s physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint.

## SUPPORTIVE MEASURES

- Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, without fee or charge, to the complainant or respondent, before or after the filing of a formal complaint OR where no formal complaint has been filed.
- Such measures are designed to restore or preserve access to the recipient's education program or activity, without unreasonably burdening the other party; protect the safety of all parties and the recipient's educational environment; and deter sexual harassment.
- Supportive measures may include: counseling, course-related adjustments, modifications of work or class schedules, campus escort services, increased security and monitoring of certain areas of campus, and mutual restrictions on contact between the parties.

## GRIEVANCE PROCESS: GENERAL REQUIREMENTS

- **Treat parties equitably**
  - The school's grievance process must treat complainants and respondents equitably by providing remedies to a complainant if a respondent is found responsible, and by following the prescribed grievance process imposing discipline on a respondent.
  - The remedies for a complainant have to be designed to restore or preserve equal access to the school's education program or activity.
  - Unlike supportive measures in place with or without a grievance process pending, a complainant's remedies **CAN** be punitive or disciplinary against the respondent.

## GRIEVANCE PROCESS: GENERAL REQUIREMENTS

- Objective Evaluation of Evidence
  - The school's grievance process must ensure an objective evaluation of all relevant evidence – including inculpatory and exculpatory evidence.
  - Credibility determinations cannot be made on the basis of a person's status as a complainant, respondent, or witness.

## GRIEVANCE PROCESS: GENERAL REQUIREMENTS

- **Training; No Conflicts of Interest**
  - The individuals involved in the process – Title IX Coordinator, investigators, decision-makers, or facilitators of informal, voluntary resolution efforts – must not have any bias or conflict of interest.
  - These individuals must also be trained. The materials used to train Title IX personnel cannot rely on sex stereotypes, must promote impartial investigations and adjudications, and must be posted on each school's website (and if a school does not maintain a website, make them available for public inspection upon request).

## GRIEVANCE PROCESS: GENERAL REQUIREMENTS

- Presumption of Innocence
  - Under the school's grievance procedures, the respondent must be presumed not responsible, so that any finding of responsibility only comes at the conclusion of a grievance process.

## GRIEVANCE PROCESS: GENERAL REQUIREMENTS

- **Reasonably Prompt Time Frames**
  - The grievance process must include reasonably prompt time frames for resolving complaints of sexual harassment.
  - Temporary delays are permitted only for good cause.
    - Good cause can include law enforcement activities, the absence of a party or witness, the absence of a party's advisor of choice, or the need to provide language assistance or accommodation of disabilities.

## GRIEVANCE PROCESS: GENERAL REQUIREMENTS

- **Description of Range of Outcomes**
  - The grievance process must describe or list the range of possible remedies and disciplinary sanctions that could occur following a determination of responsibility.

## GRIEVANCE PROCESS: GENERAL REQUIREMENTS

- **Standard of Evidence**

- The grievance process must state which standard of evidence the school will use to reach a determination regarding responsibility, to be used for ALL sexual harassment proceedings.
- Schools can choose between the *preponderance of the evidence standard* and the clear and convincing evidence standard.
- Whichever standard the school chooses, it has to use that standard for ALL formal complaints of sexual harassment, whether the respondent is a student, or employee, including a faculty member.
- All sexual harassment proceedings must have the same standard of evidence.

## GRIEVANCE PROCESS: GENERAL REQUIREMENTS

- **Right to Appeal**
  - The grievance procedures have to contain the right to appeal the result of a grievance process, and information about how to invoke the right to appeal.
  - Schools must offer an appeal to every party on certain bases, and schools also have the option to expand the bases upon which an appeal may be taken, as long as they apply those bases equally to both parties.\*\*

## GRIEVANCE PROCESS: GENERAL REQUIREMENTS

- **Description of Range of Supportive Measures**
  - The school's grievance process must describe the range of supportive measures available to complainants and respondents.

## GRIEVANCE PROCESS: GENERAL REQUIREMENTS

- **Privileges**
  - The school's grievance process must explain that no information protected by a legal privilege, such as the attorney-client privilege or the doctor-patient privilege, can be used during an investigation unless the person holding that privilege has waived it.
  - Neither a party nor the school is allowed to seek, permit questions about, or allow the introduction of evidence that is protected by a recognized privilege.
  - Individuals can always opt to waive their own privileges, if they want, but they don't have to.

## GRIEVANCE PROCESS: GENERAL REQUIREMENTS

- **Emergency Removals**
  - A school can remove a respondent from the school's education programs or activities on an emergency basis if the respondent poses an immediate threat to anyone's physical health or safety.
    - There are additional requirements for emergency removal proceedings that schools should consider if they institute this process.
  - If the respondent is a school employee, the final regulations don't prevent a school from placing that employee on administrative leave during the investigation.

## GRIEVANCE PROCESS: GENERAL REQUIREMENTS

- A school's grievance process **cannot** itself discriminate against a complainant or a respondent on the basis of sex.
- Practices must apply equally to both complainants and respondent – either of which can be male or female – and cannot discriminate as between men and women, notably with respect to credibility determinations.

## GRIEVANCE PROCESS: GENERAL REQUIREMENTS

- Written Notice to the Parties
  - When the school begins an investigation, it has to provide the parties with written notice of certain information.
  - It has to give notice to the parties of the school's grievance process, which must comply with the terms (Treat Parties Equitably – Privileges).
  - It also has to include whether there is an opportunity to engage in informal resolution. Schools do not have to offer informal resolution processes, but if they choose to, it is important that they are mentioned in this initial notice.
    - \*\*Schools must not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student\*\*

# GRIEVANCE PROCESS: GENERAL REQUIREMENTS

- Details of Written Notice:
  1. The actual allegations and facts that would constitute sexual harassment.
    - Who, date and location, alleged misconduct that constitutes sexual harassment
  2. The presumption of innocence.
  3. A statement that the parties are entitled to adviser of their choice.
    - Can be attorney but doesn't have to be.
  4. A statement that the parties can request to inspect and review certain evidence.
  5. Information regarding the code of conduct and false statements (if this exists).
    - Satisfactory notice has to be provided to the parties before ANY initial interview with the respondent occurs AND has to give the parties sufficient time for a respondent to prepare before an initial interview.

## GRIEVANCE PROCESS: GENERAL REQUIREMENTS

- Mandatory Dismissals
  - A school **MUST** dismiss a complaint:
    - That does not describe conduct that meets the definition of sexual harassment;
    - That alleges sexual harassment that did not occur in the school's education program or activity;
    - That alleges sexual harassment that did not occur in the United States;
- Schools can still address these complaints under their code of conduct, even if the misconduct is not sexual harassment under Title IX.

## GRIEVANCE PROCESS: GENERAL REQUIREMENTS

- Discretionary Dismissals
  - A school MAY dismiss a complaint:
    - If the complainant notifies the Title IX Coordinator in writing that the complainant wishes to withdraw the formal complaint or some of its allegations;
    - If the respondent is no longer enrolled or employed by the school; or
    - If specific circumstances prevent the school from gathering evidence sufficient to reach a determination about the allegations.

## GRIEVANCE PROCESS: GENERAL REQUIREMENTS

- **Dismissal Procedures**
  - Whenever a school dismisses a formal complaint, or any allegations in it, the school has to promptly send written notice of the dismissal and the reasons to the parties.
  - Both parties have the right to appeal a school's dismissal decisions.

## GRIEVANCE PROCESS: GENERAL REQUIREMENTS

- Require objective evaluation of all relevant evidence, inculpatory and exculpatory, and avoid credibility determinations based on a person's status as a complainant, respondent, or witness.
- Require Title IX personnel (Title IX Coordinators, investigators, decision-makers, people who facilitate any informal resolution process) to be free from conflicts of interest or bias for or against complainants or respondents.

# INVESTIGATIONS

- **Gathering Evidence: Schools and Parties**
- The school must investigate the allegations in any formal complaint and send written notice to both parties (complainants and respondents) of the allegations ***upon receipt*** of a formal complaint.
- The Final Rule protects the privacy of a party's medical, psychological, and similar treatment records by stating that schools cannot access or use such records unless the school obtains the party's voluntary, written consent to do so.

# INVESTIGATIONS

- During the grievance process and when investigating:
  - The burden of gathering evidence and burden of proof must remain on schools, not on the parties.
  - Schools must provide equal opportunity for the parties to present fact and expert witnesses and other inculpatory and exculpatory evidence.
  - Schools must not restrict the ability of the parties to discuss the allegations or gather evidence (e.g., no “gag orders”).
  - Parties must have the same opportunity to select an advisor of the party’s choice who may be, but need not be, an attorney.
  - Schools must send *written notice* of any investigative interviews, meetings, or hearings.

# INVESTIGATIONS

- Schools must send the parties, and their advisors, *evidence directly related to the allegations*, in *electronic format or hard copy*, with **at least 10 days** for the parties to inspect, review, and respond to the evidence.
- Schools must send the parties, and their advisors, an *investigative report* that fairly summarizes relevant evidence, in *electronic format or hard copy*, with **at least 10 days** for the parties to respond.
- Schools must dismiss allegations of conduct that do not meet the Final Rule's definition of sexual harassment or did not occur in a school's education program or activity against a person in the U.S. *Such dismissal is only for Title IX purposes and does not preclude the school from addressing the conduct in any manner the school deems appropriate.\*\**

## INVESTIGATIONS

- Schools **may**, in their discretion, dismiss a formal complaint or allegations therein if the complainant informs the Title IX Coordinator in writing that the complainant desires to withdraw the formal complaint or allegations therein, if the respondent is no longer enrolled or employed by the school, or if specific circumstances prevent the school from gathering sufficient evidence to reach a determination.
- Schools **must** give the parties written notice of a dismissal (mandatory or discretionary) and the reasons for the dismissal.
- Schools **may**, in their discretion, consolidate formal complaints where the allegations arise out of the same facts.

## HEARINGS/INVESTIGATIONS CONT...

- Hearings are **OPTIONAL** for K-12 schools.
- With or without a hearing, after the school has sent the investigative report to the parties and before reaching a determination regarding responsibility, the decision-maker(s) must afford each party the opportunity to:
  - submit written, relevant questions that a party wants asked of any party or witness,
  - provide each party with the answers, and
  - allow for additional, limited follow-up questions from each party.
- The decision-maker(s) must explain to the party proposing the questions any decision to exclude questions as not relevant.

## RAPE SHIELD

- The Final Rule provides rape shield protections for complainants, deeming irrelevant questions and evidence about a complainant's prior sexual behavior unless offered to prove that someone other than the respondent committed the alleged misconduct or offered to prove consent.

## STANDARD OF EVIDENCE

- The Final Rule requires the school's grievance process to state whether the standard of evidence to determine responsibility is the ***preponderance of the evidence standard*** or the clear and convincing evidence standard.
- The Final Rule makes each school's grievance process consistent by requiring each school to apply the same standard of evidence for all formal complaints of sexual harassment whether the respondent is a student or an employee.

## DECISION-MAKING: OBJECTIVE AND UNBIASED

- The school's decision-maker needs to objectively evaluate the relevant evidence and reach conclusions about whether the respondent is responsible for the alleged sexual harassment.
- A school's decision-maker needs to use independent judgment, so the decision-maker **CANNOT** be the same person as the investigator OR Title IX Coordinator.

## DECISION-MAKING: OBJECTIVE AND UNBIASED

- Who are the decision-makers?
  - Decision-makers must be free from 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.
  - The decision-maker will weigh the relevant evidence and decide whether it meets the school's standard of evidence for sexual harassment allegations.

# WRITTEN DETERMINATION

- After the evidence has been weighed, the determination must be written. It must include:
  - The portion of the school's policies that was violated.
  - A description of the procedural steps that were taken by the school on the way to getting to that point.
  - A finding of facts section.
  - A section that draws conclusions after applying the facts to the portion of the school's policy that applies.
  - A statement and rationale for the ultimate determination of responsibility.
  - Any disciplinary sanctions that the school will impose on the respondent, and state whether the school will provide remedies to the complainant.
  - A statement and rationale for any remedies for the complainant, addressing how those remedies will restore or preserve equal access.
  - A statement of the recipient's procedures, a statement that the parties have a right to appeal the initial determination regarding responsibility, and the permissible bases for appeal.

## WRITTEN DETERMINATION

- **Decision-Making: After the Decision:**
  - The written determination must be sent *simultaneously* to the parties along with information about how to file an appeal.
  - The school has discretion to set deadlines for when an appeal must be filed, bearing in mind the obligation to conclude the entire grievance process and bring resolution to the situation for both parties within a reasonably prompt time frame.
  - The Title IX Coordinator is responsible for carrying out the remedies contained in the written decision.

# APPEALS

- A school **must** offer **both** parties an appeal from a determination regarding responsibility, and from a school's dismissal of a formal complaint or any allegations therein, on the following bases:
  - A procedural irregularity affected the outcome of the matter,
  - Newly discovered evidence that was not available at the time of the determination that could affect the outcome of the matter, and/or
  - Title IX personnel (Title IX Coordinator, Investigator, or Decision-Maker) had a conflict of interest or bias, that affected the outcome of the matter.
- A school **may** offer an appeal equally to both parties on additional bases.

# APPEALS

- The recipient has to notify the parties in writing and implement appeal procedures equally.
- Both parties must have equal opportunity to submit a written statement supporting or challenging the outcome.
- The person who decides the appeal cannot be the same person who reached the determination regarding responsibility, or the same person as the investigator or Title IX Coordinator.
- After considering the parties' written statements, the decision-maker on appeal has to issue a written decision and send it to the parties ***simultaneously***.
- The school's determination about whether the respondent is responsible for the sexual harassment allegations becomes final after appeal.

## INFORMAL RESOLUTIONS

- The Final Rule allows a school, in its discretion, to choose to offer and facilitate informal resolution options,
  - Examples: mediation or restorative justice,
- so long as both parties give voluntary, informed, written consent to attempt informal resolution.
- Any person who facilitates an informal resolution must be well trained.
- The school still needs to provide complainants and respondents with notice of the allegations, notice of their rights, information about whether informal process is confidential, and about withdrawing from the process.

## INFORMAL RESOLUTIONS

- A school may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to a formal investigation and adjudication of formal complaints of sexual harassment.
- A school may not require the parties to participate in an informal resolution process and may not offer an informal resolution process *unless* a formal complaint is filed.
- At any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint.
- Schools **MUST NOT** offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

# RECORDKEEPING

- This duty extends for 7 years, and includes several categories of documents:
  - Records of a school's investigation;
  - Records of any appeal and the materials associated with an appeal;
  - Records of any informal resolution process;
  - All materials used to train Title IX Coordinators, Investigators, Decision-Makers, and any person who facilitates an informal resolution;
  - Records of supportive measures that they took in response to a report or complaint of sexual harassment.

## RETALIATION PROHIBITED

- The Final Rule expressly prohibits retaliation.
- For Example – Code of Conduct Issues:
  - If a school charges a person with a code of conduct violation for the purpose of discouraging the person from pursuing a sexual harassment report or formal complaint, or exercising any other Title IX rights, that is retaliation.
  - If a code of conduct charge is for a violation unrelated to sexual harassment yet arises from the same facts as a sexual harassment allegation, that may be prohibited retaliation.

## RETALIATION PROHIBITED

- The school must keep confidential the identity of complainants, respondents, and witnesses, except as may be permitted by FERPA, as required by law, or as necessary to carry out a Title IX proceeding.
- Complaints alleging retaliation may be filed according to a school's prompt and equitable grievance procedures.
- The exercise of rights protected under the First Amendment does not constitute retaliation.
- Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a Title IX grievance proceeding does not constitute retaliation; however, a determination regarding responsibility, alone, is not sufficient to conclude that any party made a bad faith materially false statement.

## FIRST AMENDMENT: FREE SPEECH

- OCR can never require a school to violate the First Amendment.
- When OCR investigates a school for possible Title IX violations, OCR will never view a school's attempt to suppress free speech as an appropriate response to sexual harassment.