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Understanding Title IX Requirements

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THE CHARTER LAW FIRM

1

Overview of Training

- Title IX
 - Scope of Title IX
 - Responsibilities of the Title IX Coordinator
 - Responses and Grievance Procedures
 - Policy and Notice Requirements
 - Training and Recordkeeping

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2

Scope of Title IX

- What is Title IX?
 - "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance." (20 USC § 1681; 34 CFR Part 106)
- Sex-based discrimination includes sexual harassment and sexual assault.
- OCR stated it will enforce Title IX's prohibition on sex-based discrimination to include discrimination based on sexual orientation or gender identity. (OCR Notice of Interpretation)

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3

Scope of Title IX



- Applies only to sex-based discrimination occurring in the U.S.
- Applies to recipients of Federal financial assistance operating education programs or activities
- Applies to students and employees and may also apply to third-party complaints



4

Scope of Title IX



- “Education program or activity”
 - Includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution (34 CFR Part 106.44(a))
 - Includes all of the academic, educational, extra-curricular, athletic, and other programs of the school, whether they take place in the facilities of the school, on a school bus, at a class or training program sponsored by the school at another location, or elsewhere (2001 DOE Guidance cited by Title IX Final Rule)
 - Not necessarily dictated by the geographic location of the incident; requires a fact-specific inquiry (Title IX Final Rule)



5

Scope of Title IX




- “Education program or activity” (cont.)
 - May be affected by whether sexual harassment was perpetrated by a teacher against a student
 - May include school networks, platforms, and computer hardware or software owned or operated by the school, or used in school operations
 - Student’s use of a personal device to sexually harass another student online during class time may constitute a circumstance over which the school exercises substantial control (Title IX Final Rule)




6

Scope of Title IX



- Sexual Harassment
 - Under 34 CFR § 106.30, “sexual harassment” means conduct on the basis of sex that satisfies one or more of the following:
 - 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;
 - 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).


7



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Title IX Coordinator



- The School must designate and authorize at least one employee to serve as the “Title IX Coordinator.” The Title IX Coordinator:
 - Coordinates the School’s efforts to comply with the requirements of Title IX and the regulations
 - Receives reports of sex discrimination, including sexual harassment and formal sexual harassment complaints
 - May investigate complaints or reports but cannot serve as a decision-maker for formal complaints of sexual harassment
 - Must not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent


8



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Title IX Coordinator



- The Title IX Coordinator also coordinates the effective implementation of remedies and supportive measures
 - Promptly contact the complainant to discuss the availability of supportive measures
 - Consider the complainant’s wishes regarding supportive measures
 - Inform the complainant of the availability of supportive measures with or without the filing of a formal complaint
 - Explain to the complainant the process for filing a formal complaint


9



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General Response to Sexual Harassment




- If the School has actual knowledge of sexual harassment in an education program or activity of the School against a person in the U.S., the School must respond promptly in a manner that is not deliberately indifferent.
 - Any person may report sex discrimination, including sexual harassment, whether or not the reporter is alleged to be the victim of sex discrimination or sexual harassment.
 - Reports may be made at any time by 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.
- A School is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.
- Must treat complainants and respondents equitably by offering supportive measures to a complainant, and by following the grievance process for "formal complaints of sexual harassment" before the imposition of any disciplinary sanctions or other actions that are not supportive measures against a respondent.

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10

General Response to Sexual Harassment




- "Actual knowledge"
 - Means notice of sexual harassment or allegations of sexual harassment to the School's Title IX Coordinator or any School official who has authority to institute corrective measures on behalf of the School, or to any employee of an elementary and secondary school (other than the respondent).
- "Complainant"
 - Means an individual who is alleged to be the victim of conduct that could constitute sexual harassment.
- "Respondent"
 - Means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

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11

Supportive Measures



- "Supportive Measures"
 - Non-disciplinary, non-punitive, free individualized services offered to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint is filed.
 - Designed to restore or preserve equal access to the education program or activity without unreasonably burdening the other party.
 - May include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures.
 - Must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the School's ability to provide the supportive measures.

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12

Grievance Procedures

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- The School must adopt and publish:
 - Grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by Title IX and the regulations; and
 - A grievance process for formal complaints of sexual harassment that complies with 34 CFR § 106.45.



13
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13

Formal Sexual Harassment Complaints



- “Formal complaint”
 - Means 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, the complainant must be participating in or attempting to participate in the education program or activity.
 - Must contain the complainant's physical or digital signature, or otherwise indicate that the complainant is the person filing the formal complaint and may be submitted electronically.



14
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Formal Sexual Harassment Complaints



- Basic requirements for grievance process for formal complaints of sexual harassment:
 - Treat complainants and respondents equitably by providing remedies to a complainant where sexual harassment found, and by following the formal complaint grievance process before imposing any disciplinary sanctions or other actions that are not supportive measures against a respondent.
 - Remedies must be designed to restore or preserve equal access to the School's education program or activity. Remedies may include “supportive measures” and discipline.
 - Require an objective evaluation of all relevant evidence - including both inculpatory and exculpatory evidence - and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness.




15
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Formal Sexual Harassment Complaints

• Basic requirements for grievance process for formal complaints of sexual harassment (cont.):

- Title IX Coordinator, investigator, decision-maker, or any person designated to facilitate an informal resolution process must not have a conflict of interest or bias for or against complainants or respondents.
- Respondent is presumed not responsible for the alleged conduct until a determination of responsibility is made at the conclusion of the process.
- Include reasonably prompt time frames for conclusion of the grievance process, appeal process and any informal resolution processes.
- Allow for temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the parties. Good cause may be based on the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation.



16

16

Formal Sexual Harassment Complaints

• Basic requirements for grievance process for formal complaints of sexual harassment (cont.)

- Include a list or describe the range of possible disciplinary sanctions, remedies, and supportive measures.
- State whether the standard of evidence will be the preponderance of the evidence standard or the clear and convincing evidence standard and apply the same standard to all formal complaints of sexual harassment.
- Include the procedures and permissible bases for appeal.
- Not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.



17

17

Formal Sexual Harassment Complaints

• Notice of allegations upon receipt of a formal complaint including notice of:

- The School's grievance process, including any informal resolution process.
- The allegations potentially constituting sexual harassment, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview.
- Presumption that the respondent is not responsible for the alleged conduct until the conclusion of the grievance process.
- Their right to have an advisor of their choice and inspect and review evidence.
- Any provision in the School's code of conduct that prohibits knowingly making false statements or submitting false information during the grievance process.
- If additional allegations will be investigated, the School must provide notice of the additional allegations to the parties whose identities are known.


18

18

Formal Sexual Harassment Complaints



- **Mandatory dismissal of a formal complaint**
 - The School must investigate the allegations in a formal complaint and dismiss a formal complaint if the conduct alleged:
 - Would not constitute sexual harassment even if proved
 - Did not occur in the School's education program or activity
 - Did not occur against a person in the U.S.



19
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Formal Sexual Harassment Complaints



- **Discretionary dismissal of a formal complaint**
 - Complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein
 - Respondent is no longer enrolled or employed by the School
 - Specific circumstances prevent the School from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein
- Upon a dismissal, the School must promptly send written notice of the dismissal and reason(s) therefor simultaneously to the parties.
- Dismissal does not preclude action under another provision of the School's code of conduct.



20
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20

Formal Sexual Harassment Complaints



- **Investigation of a formal complaint**
 - Burden of proof and of gathering evidence sufficient to reach a determination on responsibility rests on the School.
 - School must have valid written, voluntary consent to access, consider, disclose, or otherwise use records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in their capacity, or assisting in that capacity, and which are made and maintained for the provision of treatment to the party.
 - Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence.



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Formal Sexual Harassment Complaints



- Investigation of a formal complaint (cont.)
 - Do not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence.
 - Provide the parties with equal opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied by the advisor of their choice, and not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding. The School may establish restrictions that apply to both parties equally, regarding the extent to which the advisor may participate in the proceedings.
 - Provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate.



22

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Formal Sexual Harassment Complaints



- Investigation of a formal complaint (cont.)
 - Provide both parties an equal opportunity to inspect and review any evidence obtained in the investigation that is directly related to the allegations raised in the formal complaint, including evidence upon which the School does not intend to rely and inculpatory or exculpatory evidence, so that each party can meaningfully respond prior to conclusion of the investigation.
 - Prior to completion of the investigative report, the School must 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, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report.
 - Investigative report must fairly summarize relevant evidence and be provided in electronic or hard copy at least 10 days prior to any hearing or date of determination on responsibility to each party and the party's advisor, for review and response.



23

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Formal Sexual Harassment Complaints



- Determination regarding responsibility
 - Decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination and apply the standard of evidence specified. The written determination must:
 - Identify the allegations potentially constituting sexual harassment
 - Describe the procedural steps taken, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held
 - Findings of fact supporting the determination
 - Conclusions on the application of the School's code of conduct to the facts
 - State the result, rationale and determination of responsibility as to each allegation and any disciplinary sanctions imposed on the respondent
 - State whether remedies will be provided to the complainant
 - The School's procedures and permissible bases for appeal
 - Be provided to the parties simultaneously
 - Become final on the date that the School provides the parties with written result of any appeal, or the deadline for appeal.



24

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24

Formal Sexual Harassment Complaints

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- Appeals
 - Must offer both parties an appeal from a determination regarding responsibility, and from a dismissal of a formal complaint or any allegations therein, on the following bases:
 - Procedural irregularity that affected the outcome of the matter
 - New evidence that was not reasonably available at the time the was made, that could affect the outcome of the matter
 - The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents that affected the outcome of the matter
 - May offer an appeal equally to both parties on additional bases.
 - Notify the other party in writing and implement appeal procedures equally for both parties.
 - Decision-maker(s) cannot be the same as the initial decision-maker(s), the investigator(s), or the Title IX Coordinator and must comply with the required standards.
 - Give both parties a reasonable, equal opportunity to submit a written statement.
 - Written decision describing the result and the rationale provided simultaneously to both parties.

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25

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- Informal resolution
 - Voluntary and may not be offered unless a formal complaint is filed.
 - Must provide written notice to the parties of:
 - The allegations
 - The requirements of the informal resolution process and when it may preclude the parties from resuming a formal complaint on the same allegations
 - That 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
 - Consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared
 - Must obtain the parties' voluntary, written consent to the informal resolution process.
 - Must not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

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26

Relevance of Evidence

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- Investigations and determinations of responsibility must include an objective evaluation of all relevant evidence - inculpatory and exculpatory. Investigative report must fairly summarize relevant evidence.
- Evidence is relevant if it has any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.
- Investigator and decision-maker may give different weight to evidence or evaluate evidence differently.
- Factors that may affect weight given to relevant evidence:
 - First-hand v. hearsay
 - Direct evidence v. circumstantial evidence
 - Physical or documentary evidence
- Credibility factors: 1) corroboration; 2) consistency; 3) motivation/interest; 4) plausibility; 5) bias/hostility

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27

Relevance of Evidence



- Irrelevant evidence under Title IX includes:
 - Information protected under a legally recognized privilege
 - Evidence about the complainant's sexual predisposition
 - Evidence about the complainant's prior sexual behavior except when:
 - Used to prove that someone other than the respondent committed the conduct alleged; or
 - Relating to specific incidents of the complainant's prior sexual behavior with respect to the respondent and used to prove consent.
 - A party's treatment records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional/paraprofessional acting or assisting in the professional's/paraprofessional's capacity, unless the school obtains voluntary, written consent to use such records for the grievance process from the party (if the party is an "eligible student") or the party's parent/guardian (if the party is a minor)



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28

28

Policy and Notice Requirements



- The School must provide applicants for admission and employment, students, parents/guardians, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the School notice of the School's Title IX policy and grievance procedures and process, and the notice must state:
 - The name or title, office address, electronic mail address, and telephone number of the employee(s) designated as the Title IX Coordinator(s).
 - That the School does not discriminate on the basis of sex in its education program or activity and is required by Title IX and Part 106 not to discriminate in such a manner.
 - For certain institutions, that the requirement not to discriminate in the education program or activity extends to admission and employment.
 - That inquiries about the application of Title IX and Part 106 to the School may be referred to the Title IX Coordinator(s), to the Assistant Secretary, or both.
- Must prominently display the above-listed contact information for the Title IX Coordinator(s) and the School's Title IX policy on its website, if any, and in each handbook that it makes available to the stakeholders listed above.



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29

29

Training



- Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process must receive training on all the following:
 - The definition of sexual harassment in 34 CFR § 106.30
 - The scope of the School's education program or activity
 - How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable
 - How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
- Investigators must receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence.
- Training materials must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment.




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30

30

Recordkeeping




- The School must maintain the following records for a period of seven years–
 - Each sexual harassment investigation including any determination regarding responsibility and any audio or audiovisual recording or transcript required, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the education program or activity;
 - Any appeal and the result therefrom;
 - Any informal resolution and the result therefrom; and
 - All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. The training materials must be publicly available on the School's website.

31

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Recordkeeping



- For general responses to sexual harassment, the School must create and maintain the following for a period of seven years–
 - Records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment.
 - Documentation of the basis for concluding that the School's response was not deliberately indifferent.
 - Documentation that the School has taken measures designed to restore or preserve equal access to its education program or activity.
 - If the School does not provide a complainant with supportive measures, then the School must document the reasons why such a response was not clearly unreasonable in light of the known circumstances.
- Documentation of certain bases or measures does not limit the School in the future from providing additional explanations or detailing additional measures taken.

32

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QUESTIONS?

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33
