



Mid-Ohio ESC Title IX Legal Update
August 2, 2021



Bricker & Eckler
ATTORNEYS AT LAW

Your Presenter



Kate Davis

Experienced general counsel, independent investigator, and hearing officer

Agenda



- TIX Refresher
- A Reminder About Guidance
- Overall Themes
- Key Provisions
- Sample Policy Language
- Informal Resolution

Posting Permission



- Yes, you may post these materials on your website if you are using them to train your Title IX team
- See 34 CFR 106.45(b)(10)(i)(D).

TIX Refresher



- TIX Regs apply to allegations of Sexual Harassment
- Actual Knowledge triggers Duty to Respond
 - Supportive Measures
- Formal Complaint triggers Grievance Process
 - Major departure from your ordinary student disciplinary process
 - Notices to Parties before investigation/interviews
 - Investigation; Decision; Appeal
 - Respondent presumed not responsible – no disciplinary actions or sanctions until determination at conclusion of process



A Reminder About Guidance

New Guidance Released



- July 20, 2021
- 37 pages of Q&A
- Another 18 pages of sample policy language
- <https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf>

Guidance Is Not Binding*



- “This Q&A resource does not have the force and effect of law and is not meant to bind the public or regulated entities in any way. This document is intended only to provide clarity to the public regarding OCR’s interpretation of existing legally binding statutory and regulatory requirements. As always, OCR’s enforcement of Title IX stems from Title IX and its implementing regulations, not this or other guidance documents.” (p.2)



Key Provisions

Q.8 – “Equal Access”



- Answer draws from the preamble to emphasize examples of denying “equal access”
- Skipping class to avoid a harasser
- Declining GPA
- Having difficulty concentrating in class
- Crying at night due to sexual harassment
- Quitting a team due to harassment

Q.8 Not Required to Suffer Loss



- “A complainant does not need to have ‘already suffered loss of education before being able to report sexual harassment.’”
- “School officials turning away a complainant by deciding the complainant was ‘not traumatized enough’ would be impermissible.”
- OCR suggests using Q.8 examples to train your community.

Q.11 Application to Sexual Harassment that Takes Place Electronically



- “The operations of a school ‘may certainly include computer and internet networks, digital platforms and computer hardware or software owned or operated by, or used in the operation of, the [school].”
- “The factual circumstances of online harassment must be analyzed to determine if it occurred in an education program or activity.”

Q.13



- “What is the appropriate standard for evaluating alleged sexual harassment that occurred before the 2020 amendments took effect?”

Q.13 Background



August 5, 2020 Blog Post – “The Rule does not apply to schools’ responses to sexual harassment that allegedly occurred prior to August 14, 2020. The Department will only enforce the Rule as to sexual harassment that allegedly occurred on or after August 14, 2020. With respect to sexual harassment that allegedly occurred prior to August 14, 2020, OCR will judge the school’s Title IX compliance against the Title IX statute and the Title IX regulations in place at the time that the alleged sexual harassment occurred.”

Q.13



- “[A] school must follow the requirements of the Title IX statute and the regulations that were in place at the time of the alleged incident.”
- 2020 amendments do not apply to SH occurring before August 14, 2020, even where the complaint is filed after that date
- Our question: is this meant to include *procedures* as well as *substance*?

Q.14 Employees/Actual Notice



- K-12: Notice of allegations of sexual harassment to ANY EMPLOYEE of an elementary and secondary school.

34 CFR 106.30(a)

- Contrast with Post-Secondary: employee with “authority to institute corrective measures on the institution’s behalf.”

Q.22 Formal Complaints



- What is a formal complaint? Regs tell us.
- OCR states, “an email from a student to the Title IX Coordinator that ends with the student signing their name would suffice.”

Q.23 Complainant Participation



- What counts as “attempting to participate”? Preamble reminders:
 - Withdrawn but wants to re-enroll if SH is addressed;
 - Graduated but intends to apply to a new program or participate in alumni programs
 - Leave of absence but intends to re-apply
 - Has applied for admission (enrollment)

Q.24 Coordinator-Filed Complaints



- “Put simply, 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 is because the school has a Title IX obligation to provide all students, not just the complainant, with an educational environment that does not discriminate based on sex.”

Q.27 Respondent Withdraws?



- Discretionary dismissal
- “Proceeding with the grievance process could potentially allow a school to determine the scope of the harassment, whether school employees knew about it but failed to respond, whether there is a pattern of harassment in particular programs or activities, whether multiple complainants experienced harassment by the same respondent, and what appropriate remedial actions are necessary.”

Q.65 Sex Discrimination Process



- “OCR has historically looked to whether and how schools have communicated information about their [sex discrimination grievance] procedures, including where to file complaints, to students ... and employees.”
- “OCR also has historically explained that a grievance procedure cannot be prompt or equitable unless students know it exists, how it works, and how to file a complaint.”



Sample Policy Language

Quick Overview of Samples that Apply to Elementary and Secondary Schools

- I. Receiving and Responding to Reports of Sexual Harassment (aka handling intake)
- II. Supportive Measures (complete with examples)
- III. Investigations
- IX. Restrictions on Considering a Complainant's or Respondent's Sexual History
- XI. Presumptions about Complainants, Respondents, and Witnesses
- XII. Determination Regarding Responsibility
- XIII. Sanctions and Remedies
- XIV. Appeals
- XV. Informal Resolution
- XVI. Addressing Conduct That the School Deems to be Sexual Harassment but Does Not Meet the Definition of Sexual Harassment Under the Title IX Regulations
- XVII. Parent and Guardian Rights

I. Receiving and Responding to Reports of Sexual Harassment

Consider incorporating both examples

Example Policy 1: Walks through steps of intake for Regs and notes when TIXC may want to sign formal complaint: “in light of a health or safety concern for the community.”

Example Policy 2: Underscores for complainants their choices to file a formal complaint, that the decisions to file do not need to be made immediately, and supportive measures available regardless.

II. Supportive Measures (1 of 2)

Examples (you probably know these, but it's helpful to have a list)

Examples:

- Counseling
- Extensions of deadlines
- Course-related adjustments
- Modifications to work or class schedules
- Campus escort services
- Mutual restrictions on contact between the parties
- Changes in work or housing locations
- Leaves of absences (consider pay if employee)
- Increased security and monitoring of certain areas on campus
- Assistance in arranging rescheduling of exams and assignments
- Academic support services
- Assistance in long-term academic accommodations if the individual qualifies as an individual with a disability
- Allowing either a complainant or respondent to drop a class in which both parties are enrolled

II. Supportive Measures (2 of 2)

TIXC role and Reasonableness

TIXC role: “will maintain consistent contact with the parties to ensure that safety and emotional and physical well-being are being addressed...will work with appropriate school resources to provide continued assistance to the parties.” (Example Policy 2)

Reasonableness: can provide “any other reasonably supportive measure that does not unreasonably burden the other party’s access to education and that serves the goals of this policy.” (Example Policy 3)



Informal Resolution

Preamble Comments

34 C.F.R. 106.45(b)(9)

- A recipient may choose to offer the parties an informal process that resolves the formal complaint without completing the investigation and adjudication, but such a result depends on whether the recipient determines that informal resolution may be appropriate and whether both parties voluntarily agree to attempt informal resolution (P. 1367) (unofficial)
- You must provide a written notice disclosing any consequences resulting from participating in the informal resolution process, including the records that will be maintained could be shared (P. 1367)

Preamble Comments

34 C.F.R. 106.45(b)(9)

- The informal resolution officer must be trained in bias, conflict of interest the same as the investigators and decision makers (P. 1369)
- Informal resolution can take many forms—arbitration, mediation, restorative justice (P. 1370)
- Respondent may agree to discipline as part of informal resolution process (P. 1370)
- There must be a formal complaint prior to engaging in informal resolution (P. 1371)

Preamble Comments

34 C.F.R. 106.45(b)(9)

- Make sure parties understand confidential rules up front (P. 1379)
- You need a written agreement to document the resolution (P. 1384)
- You could do a safety and risk analysis to determine if informal process is appropriate for a given case, but don't have to (P. 1386)

XV. OCR's Q&A on Informal Resolution

Underscores flexibility of schools and can impose discipline

- The examples underscore the discretion of the school to select the type of informal resolution
- Facilitated mediation example provided in Example Policy 2
- Clear that can impose discipline if parties agree as part of process
- But note: “Disciplinary action will only be imposed against a respondent where there is sufficient factual foundation and both the complainant and the respondent have agreed to forego the additional procedures set forth in this school’s policy and accept an agreed upon sanction.” (Example Policy 1)

Upcoming Trainings

Register at: www.bricker.com/events



Level 1

- **General Title IX Training:** 8/2, 10/11, 1/10

Level 2

- **TIX Coordinator/Administrator Training:** 8/4, 10/13, 1/12
- **TIX Investigator Training:** 8/6, 10/15, 1/14
- **TIX Decision-Maker Training:** 8/9, 10/18, 1/18
- **TIX Report Writing for Investigators/Decision-Makers:** 8/11, 10/20, 1/19
- **TIX Informal Resolution Training:** 8/13, 10/22, 1/21

Upcoming Trainings

Register at: www.bricker.com/events



(NEW!) Level 3 Practicums (interactive virtual sessions)

- **TIX Coordinator/Administrator: 9/14, 11/1**
- **TIX Investigator: 9/16, 11/10**
- **TIX Report Writing for Investigators: 9/20, 11/12**
- **TIX Report Writing for Decision-Makers/Appeals Officers: 9/22, 11/16**
- **TIX Informal Resolution: 9/24, 11/18**