

PA DISTANCE LEARNING CHARTER SCHOOL

Title IX – Staff Training

SEPTEMBER 27, 2023

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Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 et seq.

- ▶ Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 et seq., protects students from discrimination based on sex in educational programs or activities that receive Federal financial assistance.
- ▶ On May 6, 2020, the U.S. Department of Education issued the Final Rule on Title IX of the Education Amendments of 1972 (“Title IX”) regulations. The Final Rule goes into effect on Friday, August 14, 2020.

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Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 et seq.

- ▶ Title IX states that:
 - ▶ No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient, which receives Federal financial assistance.



Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 et seq.

- ▶ Title IX requires the School to have a Board Policy to comply.
- ▶ This policy covers student on student as well as employee on student sexual harassment.



Title IX Updates - 2020

- ▶ In 2020, the Supreme Court of the United States held in *Bostock v. Clayton Cty.*, that discrimination based on sex under **Title VII of the Civil Rights Act** includes discrimination based on sexual orientation and gender identity. (140 S. Ct. 1731 (2020)).

Title IX Updates - 2021

- ▶ As interpretations of Title IX often follow interpretations of Title VII, in March of 2021, the **United States Department of Education** (the “Department”) began a comprehensive review of the Title IX regulations as directed by **Executive Order 14021**, entitled “*Guaranteeing an Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity.*”



Title IX Updates - 2022

- ▶ In June 2022, the Department released proposed changes to the **Title IX Regulations** for public comment.
- ▶ The June 2022 proposed changes included protections for LGBTQI+ students from discrimination based on sexual orientation, gender identity, and sex characteristics.

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Title IX Updates - 2022

- ▶ The June 2022 proposed changes to the Title IX Regulations did not address discrimination in athletic programs, specifically with respect to transgender and/or gender non-conforming students.
- ▶ The public comment period closed in September of 2022 and we anticipate the revised Regulations will be formally adopted in the near future.



Title IX Updates - 2023

- ▶ Subsequently, in April of 2023, the Department released a notice of proposed rulemaking on athletic eligibility under **Title IX**.
- ▶ This proposed rule specifically addresses the issue of participation in sports teams.

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Newest Proposed Rule

- ▶ If a recipient adopts or applies sex-related criteria that would limit or deny a student's eligibility to participate on a male or female team consistent with their gender identity, such criteria must, for each sport, level of competition, and grade or education level: **(i) be substantially related to the achievement of an important educational objective, and (ii) minimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied.**



Newest Proposed Rule

- ▶ The proposed regulation would be in the Title IX regulations at section 106.41 (b) (2).
- ▶ The comment period for the newest proposed rule ended on May 15, 2023.

Key Provisions of the DOE's Title IX Regulations

- ▶ 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 Title IX Regulations

- ▶ Requires K-12 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 Title IX Regulations

- ▶ 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.



When Does Title IX Apply?

- ▶ Title IX covers sexual harassment that happens in a school's "education program or activity."
- ▶ This includes locations, events, and circumstances where a school exercises substantial control over the context of the alleged harassment and the person accused of committing the sexual harassment.



Defining Sexual Harassment

- ▶ Title IX protects students' rights to educational opportunities free from sex discrimination. While courts have previously interpreted Title IX to include sexual harassment as a form of sex discrimination, the newly published regulations establish in law that sexual harassment, including sexual assault, is unlawful sex discrimination.



Sexual Harassment

- ▶ Title IX prohibits the following conduct on the basis of sex that satisfies one or more of the following:
 - ▶ 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 school's education program or activity.



Sexual Harassment

- ▶ Title IX prohibits the following conduct on the basis of sex that satisfies one or more of the following:
 - ▶ School employee conditioning educational benefits on participation in unwelcomed sexual conduct, otherwise known as “Quid pro Quo” harassment.



Sexual Harassment

- ▶ “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)



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.

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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

- ▶ Further, Charter School personnel who personally witness sexual harassment can mean that the Charter School has “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

- ▶ Supportive measures are free, individualized services designed to restore or preserve equal access to education, protect or preserve equal access to education, protect safety, or deter sexual harassment.
- ▶ A complainant does not need to file a formal complaint for him/her to receive supportive measures.



Supportive Measures

- ▶ Supportive measures are intended to support a student and are not punitive or disciplinary with respect to another student.
- ▶ These measures do not unreasonably burden any other person.
- ▶ Each student, the complainant and respondent, must have equal access to education prior to any determination of responsibility.



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.



Rape Shield

- ▶ *“Questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant’s prior sexual behavior are offered to prove that...*



Rape Shield

- ▶ *...someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent."*

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Title IX Coordinator

- ▶ Per Title IX federal funding mandates, the Charter School shall designate a Title IX Coordinator whose duties will include:
 - ▶ Receiving reports from victims and third parties of sexual discrimination or sexual harassment in person or by mail, telephone, email, or any other means that results in the Title IX Coordinator receiving the report at any time, including nonbusiness hours;



Title IX Coordinator (duties cont.)

- ▶ Oversee mandated **(7-year)** recordkeeping regarding:
 - ▶ Investigations
 - ▶ Appeals
 - ▶ Informal resolutions
 - ▶ Training for Coordinator, investigators and decision-makers on the definition of sexual harassment in the Final Rule
 - ▶ Application of the Title IX policy
 - ▶ How to make relevancy determinations (*including how to apply rape shield protections for complainants*)



Title IX Coordinator (duties cont.)

- ▶ Grievance process
- ▶ How to conduct investigations
- ▶ Hearings (*including technology for live hearings*)
- ▶ Appeals
- ▶ Informal resolution processes
- ▶ How to serve impartially (*including by avoiding pre-judgment of the facts at issue, conflicts of interest, and bias*)
- ▶ Maintaining current contact information in Charter School's nondiscrimination notices and website



Title IX Coordinator (duties cont.)

- ▶ Ensuring Charter School is compliant with Title IX, coordinating the investigation and disciplinary process and looking for patterns or systematic problems with compliance to ensure Charter School fulfills federal obligations;



Title IX Coordinator (duties cont.)

- ▶ Signing formal complaints alleging sexual harassment;
- ▶ Receiving notice of sexual harassment or allegations of sexual harassment (or authorized Charter School representative authorized to institute corrective measures), triggering actual knowledge designation;



Title IX Coordinator (duties cont.)

- ▶ Upon receipt of the complaint, the Title IX Coordinator must provide the parties with written notice including the names of the parties, the date and location of the alleged misconduct, and a description of the alleged misconduct. The notice must further:
 - ▶ Provide the allegations and facts that would constitute sexual harassment
 - ▶ State the presumption of innocence
 - ▶ A statement that the parties are entitled to an advisor of their choice
 - ▶ A statement that the parties can request to inspect and review certain evidence
 - ▶ Provide information regarding the Charter School's Code of Conduct and penalties for false statements.
 - ▶ If additional allegations come to light, notice must be supplemented.



Title IX Coordinator (duties cont.)

- ▶ The Title IX Coordinator shall meet with every complainant and respondent.
 - ▶ The complainant may have his or her Parent(s) present during any such meeting.
 - ▶ The respondent, if he or she is a student, shall also have the right to have his or her parent(s) present at any meetings with the Title IX Coordinator as well.
- ▶ The Title IX Coordinator shall provide written notice of the: *date, time, location, participants, and purpose of all interviews, or other meetings, with sufficient time for the party to prepare.*



Duties of Title IX Coordinator, cont'd

- ▶ From these meetings, the Title IX Coordinator will conduct an adequate, reliable, and impartial investigation of complaint(s), which includes:
 - ▶ interviewing and obtaining statements from any witnesses of both the complainant and alleged perpetrator, and
 - ▶ the review of all evidence presented.
- ▶ Parties will be provided updates until a determination is made in writing.



Duties of Title IX Coordinator, cont'd

- ▶ After gathering evidence, the Title IX Coordinator must prepare an investigative report on the allegations of the formal complaint.
- ▶ The report, along with physical evidence (*including written witness statements*), must be provided to the parties.
- ▶ The Title IX Coordinator will give each party **ten (10) days** to respond to the evidence in writing.



Title IX Coordinator (duties cont.)

- ▶ Dismissing a Complaint:
 - ▶ When Complainant provides **written notice** to the Title IX Coordinator to do so
 - ▶ When allegations **do not** constitute sexual harassment
 - ▶ If the allegations **did not occur** in the Charter School's educational program or activity
 - ▶ If the allegations **did not occur** in the United States
 - ▶ If respondent is **no longer** enrolled or employed by the Charter School, or
 - ▶ When specific circumstances prevent the gathering of evidence sufficient to reach a determination.



Title IX Coordinator (duties cont.)

- ▶ Respecting a complainant's wishes regarding whether the Charter School investigates, unless the Title IX Coordinator determines that signing a formal complaint to initiate an investigation over the wishes of the complainant is not clearly unreasonable in light of the known circumstances;



Title IX Coordinator Duties DO NOT Include:

- ▶ The ability to be named the decision-maker tasked with issuing a written determination regarding responsibility with:
 - ▶ Findings of fact
 - ▶ Conclusion about whether the alleged conduct occurred
 - ▶ Rationale for the result as to each allegation
 - ▶ Any disciplinary sanctions imposed on the respondent
 - ▶ Whether remedies should be provided to the Complainant
 - ▶ Title IX Coordinator or the investigator cannot be named decision-maker



Title IX Coordinator Duties Do NOT Include:

- ▶ The ability to be named as the decision-maker on any appeal (cannot be the same person as the initial decision-maker on the formal complaint, the investigator, or the Title IX Coordinator);



Title IX Coordinator Duties Do NOT Include:

- ▶ Any other job responsibility that creates a conflict of interest with responsibilities under Title IX;
- ▶ Becoming a complainant or a party during the grievance process upon the signing of a formal complaint; and



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.



Title IX: 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.



Title IX: Informal Resolution

- ▶ 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.



Investigator

- Assigned by the Title IX Coordinator
 - ▶ Title IX Coordinator can serve as the Investigator
- Must be impartial, unbiased and free from conflicts
- If the investigator is not the Title IX Coordinator, the investigator will assume the investigatory role from the Title IX Coordinator discussed above.



Decision Maker

- ▶ Oversees the hearing, administrative determination proceeding, or reviews appeals
 - Must be impartial, unbiased and free from conflicts – cannot be the same person to oversee the hearing and appeal
 - Must receive training on any technology to be used at a live hearing, and on issues of relevance of questions and evidence, including when questions and evidence about a complainant's sexual predisposition or prior sexual behavior are not relevant
 - Title IX Coordinator and Investigators cannot serve as the Decision Maker



Informal Resolution Facilitator

- ▶ Who can serve as a mediator?
- ▶ The mediator oversees the informal resolution process seeking a resolution to a formal complaint that both parties agree, in writing, to resolve using restorative justice or mediation practices
- ▶ Must also be impartial, unbiased and free from conflict



Title IX: Grievance Procedures

- ▶ Once the Title IX Coordinator completes the 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.



Title IX: Grievance Procedures

- ▶ Disciplinary Measures: A school can remove a respondent from the Charter School's educational programs or activities on an emergency basis if the respondent poses an immediate threat to anyone's physical health or safety.
- ▶ If the respondent is an employee, the Charter School may place the employee on administrative leave pending the investigation.



Title IX: 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;



Title IX: Grievance Procedures

- ▶ The Charter School should further comply with all disability laws to ensure that all participants are appropriately accommodated.
- ▶ No one should be forced, threatened, coerced, or discriminated against for choosing not to be a part of this grievance process.

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Title IX: Grievance Procedure, cont'd

- ▶ Protect parties' privacy by requiring a party's written consent before using the party's medical, psychological, or similar treatment records during a grievance process;
- ▶ Protect all complainants from inappropriately being asked about prior sexual history ("rape shield" protections)



Title IX: Grievance Procedure, cont'd

The Determination

- ▶ Send both parties a written determination regarding responsibility explaining how and why the decisionmaker reached conclusions;
- ▶ Effectively implement remedies for a complainant if a respondent is found responsible for sexual harassment;
- ▶ Offer both parties an equal opportunity to appeal.



Other Reporting Requirements in Compliance with Local and State Laws:

- ▶ If the complaint involves sexual assault, rape or conduct of a criminal nature, the local Police Department shall be contacted and a report of the incident made by the Charter School, in accordance with its Memorandum of Understanding with local law enforcement.
- ▶ A report must also be made by the mandatory reporter to ChildLine and the Department of Public Welfare for students under 18 year old in accordance with the Charter School's Board approved Mandatory Reporter Policy.



Other Reporting Requirements in Compliance with Local and State Laws

Education Disciplinary Act

- ▶ Section 2070.9a of the Educator Discipline Act (Act), 24 P.S. § 2070.9a, imposes mandatory reporting responsibilities on all educators as well as specific reporting responsibilities on chief school administrators of all school entities or their designees.
- ▶ The portion of the Act which is triggered by a Title IX allegation is:
 - ▶ All educators must file a mandatory report with the Department of Education whenever they know of any action, inaction or conduct which constitutes sexual abuse or exploitation or sexual misconduct under this Act. The educator must also report such misconduct to his or her chief school administrator and immediate supervisor. The report shall be filed with the Department of Education within 15 days of the discovery of the sexual abuse or exploitation or sexual misconduct.



Other Reporting Requirements in Compliance with Local and State Laws:

- ▶ If there is any question of whether the conduct complained of constituted criminal activity, the Charter School's Board Solicitor should be contacted immediately.
- ▶ Knowledge of a law enforcement investigation does not relieve the Charter School of its independent obligation to investigate the misconduct.



Other Reporting Requirements in Compliance with Local and State Laws:

Substantiated Charges:

- ▶ Documents regarding substantiated charges of sexual harassment should be placed in the accused student's file.

Unsubstantiated Charges:

- ▶ Documents regarding unsubstantiated charges should not be placed in student files, but should be maintained by the Board of Trustees in a confidential file established expressly for retaining Title IX complaints against students.



Police

- ▶ When do you have to call police?
 - ▶ Memorandum of Understanding
 - ▶ Paragraph 4.1 offenses (will list those below)
 - ▶ May call for paragraph 4.2 offenses
 - ▶ Local MOU can move some from discretionary (4.2) to mandatory (4.1)



Retaliation

- ▶ The Charter School should 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.



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.



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.



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;



Additional Grounds

- ▶ Appeals will be referred to the Charter School Board of Trustees, unless the Board has or is scheduled to preside over a formal disciplinary hearing pursuant to 22 Pa.Code §12.6 and §12.8.
- ▶ In those cases, the Charter School Board of Trustees will appoint a neutral hearing officer to hear appeals of a determination of responsibility who is:
 - ▶ **not** an employee of the Charter school
 - ▶ **not** the investigator of the complaint, and
 - ▶ **not** the neutral decision-maker who made the initial determination.



Additional Grounds

- ▶ Both parties will have equal opportunities to submit a written statement supporting or challenging the outcome to the Board of Trustees or neutral hearing officer.
- ▶ After considering the parties' written statements, the Board of Trustees or neutral hearing officer must issue a written decision and send it to the parties simultaneously.
- ▶ This decision is **final**.



Questions?

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